

IN THE
Supreme Court of the United States

HAMED KIAN,

Petitioner,

v.

FLORIDA,

Respondent.

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

**AMICUS BRIEF OF THE FLORIDA ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AND THE
FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

The Florida Association of Criminal Defense Lawyers (FACDL) is a non-profit organization with a membership of over 1,000 attorneys and 29 chapters throughout Florida. FACDL's members are criminal defense practitioners committed to protecting the rights of individuals in the criminal justice system.

The Florida Public Defender Association (FPDA) is a nonprofit corporation whose members include 20 elected public defenders and nearly 2,000 employees of public defender offices throughout Florida. FPDA assists Florida's elected public defenders in fulfilling their constitutional duty to ensure equal justice for all.

The question presented in this case impacts jury selection in nearly all felony jury trials in Florida. The Court's resolution of this issue will therefore have significant and far-reaching consequences for criminal defendants and the administration of justice throughout Florida.¹

SUMMARY OF THE ARGUMENT

Florida's jury of six members was enacted as former Confederates regained power in southern states and their

1. No party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Public Defender Daniel Eisinger and Assistant Public Defenders Paul Petillo and Benjamin Eisenberg, all of the Office of the Public Defender, Fifteenth Judicial Circuit of Florida, are counsel for Petitioner and members of FPDA. Their agency pays annual dues to FPDA, but neither they nor their agency authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

legislatures set about excluding Black citizens from jury service. In addition to reducing the size of juries from 12 to six, Chapter 3010 voided every jury list compiled the month before, under the outgoing commissioners, and directed the incoming commissioners to select new potential jurors from persons of “approved integrity, fair character, sound judgment and intelligence.”²

In *Ramos v. Louisiana*, a majority of the Justices recognized that the Louisiana non-unanimity rule arose from efforts to silence Black voices and enforce white supremacy.³ Justice Kavanaugh, concurring in part, described non-unanimity as “one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”⁴ Florida’s jury of six, now codified in § 913.10 of the Florida Statutes, was built into the same program.

Restoring the jury of 12 asks little of Florida. The same statute that caps noncapital juries at six requires 12 jurors in capital cases, and Florida has imposed more new death sentences than any other State four years running; its noncapital jury boxes already seat more than six, because alternates sit through trial; and the state constitution sets six jurors as a floor, not a ceiling.

It is time to overrule *Williams v. Florida*, 399 U.S. 78 (1970). *Williams* rested on a functionalist inquiry this Court has since set aside, and it was wrong on that inquiry’s own terms.

2. Ch. 3010, § 1, 2, Fla. Stat. (1877)

3. 590 U.S. 83, 87-88 (2020).

4. *Id.* at 126-27.

ARGUMENT

I. FLORIDA'S SIX-PERSON JURY PROVISION AROSE AMID DELIBERATE EFFORTS TO SUPPRESS BLACK VOICES IN PUBLIC AFFAIRS

As Justice Gorsuch observed, “[d]uring the Jim Crow era, some States restricted the size of juries and abandoned the demand for a unanimous verdict as part of a deliberate and systematic effort to suppress minority voices in public affairs.”⁵ What follows is an account of how Florida’s jury of six arose amid those efforts.

In its Brief in Opposition to certiorari, the State argued that Petitioner made “no attempt to explain how a rule establishing the size of juries without regard to race could be a covert instrument of racism.”⁶ The State is right that a statute fixing the number of jurors says nothing about race. Neither did the registration act of 1877, the poll tax of 1889, the literacy requirements, the vagrancy laws, or some of the other “trappings of the Jim Crow era” that were exerted upon Black Floridians in the decades after the war.⁷ Some of these laws were drawn in race-neutral terms precisely to keep their intentions covert.⁸

5. *Khorrami v. Arizona*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari) (citations omitted).

6. Br. in Opp. 17.

7. See *Ramos*, 590 U.S. at 87 (“the avowed purpose of [the Louisiana constitutional convention of 1898] was to ‘establish the supremacy of the white race,’ and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements”).

8. *Id.* at 88.

Amicus has not located a letter, journal entry, or floor speech in which a Florida legislator said that reducing the jury size to six was done to preserve white supremacy. No such confession is necessary because the Legislature left its purposes on the record everywhere else.

a. 1865-1866: The Black Codes.

The Black Codes were laws passed by Florida and other Southern states in 1865 and 1866 after slavery was abolished. They were designed to force freed Black people back into a condition as close to slavery as the law would allow.⁹

Although the Confederacy surrendered in the Spring of 1865, by autumn the men who had governed Florida under it were writing the State's constitution again and by December they held the Legislature.¹⁰

In 1865, a constitutional convention assembled in Tallahassee, Florida under President Johnson's restoration program. The convention appointed a committee to recommend the laws that would govern the freed Black people. The committee chair was Charles H. DuPont, the chief justice of the Florida Supreme Court, who held 126 enslaved people.¹¹

9. Joe M. Richardson, *Florida Black Codes*, 47 Fla. Hist. Q. 365, 365 (1969).

10. Jerrell H. Shofner, *NOR IS IT OVER YET: FLORIDA IN THE ERA OF RECONSTRUCTION, 1863-1877*, at 42-44 (1974); Alexander J. Bowen, "Made and Executed by the White Race": *Florida's Constitution of 1865 and "Black Codes"*, 101 Fla. Hist. Q. No. 1 (2022); Richardson, *supra* note 9, at 373.

11. Bowen, *supra* note 10, at 15.

“After praising the institution of slavery,” the committee “recommended legislation which would ‘preserve as many as possible’ of the ‘better’ features of slavery.”¹² The committee proposed building county courts to try the minor offenses that a slave-master had previously punished.¹³ The assembly created the courts, and they did not punish alike: “[A]nyone who could not pay a fine would be sold at public auction . . . This of course was supposed to apply to Negroes.”¹⁴ Corporal punishment was available for both races, but “the report advised juries to continue charging white offenders with a fine or imprisonment while punishing Black offenders with the pillory or whipping for the same crime.”¹⁵

“To ensure Black Floridians labored for whites, landowners advocated for vagrancy laws to remove supposedly idle freedmen from the cities and relocate them to plantations.”¹⁶ Justice DuPont’s report proposed “an act to punish vagrants and vagabonds,” defined as able-bodied persons with “no visible means of living” or unemployed by “some labor to support himself or herself.”¹⁷ The Florida Legislature passed the vagrancy act unanimously in both houses.¹⁸

12. Richardson, *supra* note 9, at 373.

13. Shofner, *supra* note 10, at 54.

14. Richardson, *supra* note 9, at 374.

15. Bowen, *supra* note 10, at 16.

16. *Id.* at 9.

17. *Id.* at 16-17.

18. *Id.* at 18.

The Codes set punishment by race. Where a statute prescribed a fine and imprisonment for a white offender, it added 39 lashes or the pillory for a Black offender.¹⁹ A Black person unable to pay a fine was sold at auction. *Id.* Rape of a white woman was a capital offense, whereas no punishment existed “for the rape of a Negro woman.”²⁰

The convention adopted the ordinances abolishing slavery, and in the same sitting, “limited suffrage, political office, and jury duty to white men.”²¹

b. 1868: Reconstruction and Florida’s Jury Statute.

Florida’s Black Codes produced the opposite of what their authors intended. The 1865 constitution and the Codes that followed “brought the very situation white Floridians hoped to avoid: Reconstruction by a federal government that sought suffrage for Black Floridians and Republican control of state’s government.”²² Though President Johnson approved Florida’s new government, “it was rejected by Congress and other federal authorities.” *Id.*

The Freedmen’s Bureau, which Congress created in 1865 to assist the formerly enslaved, reported that Florida’s white juries were convicting and sentencing Black defendants unjustly. “[I]n cases where African

19. Richardson, *supra* note 9, at 373-75.

20. *Id.* at 374.

21. Shofner, *supra* note 10, at 42-43.

22. Bowen, *supra* note 10, at 21.

Americans received unjust sentences by white jurors, Assistant Commissioner Thomas W. Osborn applied directly to Gov. David S. Walker for executive clemency.”²³ Governor Walker provided no aid, so “the Bureau stepped in and administered fair punishments when possible.”²⁴

In Washington, D.C., “the egregiousness of the state’s ‘Black Codes’ and refusal to disenfranchise a greater portion of the ex-Confederate population met the ire of Congress.”²⁵ Congress passed the Reconstruction Acts of 1867, which “reestablished martial law until the ex-Confederate states could draft new constitutions that assured universal manhood suffrage and their governments ratified the Fourteenth Amendment.”²⁶

Florida’s Constitution of 1868 was drafted under that authority, “by a biracial delegation of Republicans,” and it “codified universal male suffrage for all men of twenty-one years and older.”²⁷ It recognized Black Floridians as political equals, admitted their testimony against white citizens, and struck the racial bar from jury service. And the jury it preserved was the common-law jury of 12. The Declaration of Rights provided “that the right of trial by jury shall remain inviolate forever.”²⁸ That guarantee, the Florida Supreme Court later explained, “refers to a jury,

23. Bowen, *supra* note 10, at 21.

24. *Id.*

25. *Id.* at 21.

26. *Id.*

27. *Id.* at 22.

28. Fla. Const. of 1868, Decl. of Rights, § 3.

according to the common law, to be composed of twelve persons.”²⁹

But the 1868 charter was not what its Radical framers had wanted. Leaders of the white “native” faction seized the assembly hall in the middle of the night and excluded the Radical Republican delegates from the proceedings.³⁰ The two white factions then combined to structure a constitution “designed to continue white dominance.”³¹ Harrison Reed, who led the prevailing faction and became the first Florida governor elected under the new charter, wrote to Senator Yulee: “Under our Constitution the Judiciary & State officers will be appointed & the apportionment will prevent a negro legislature.”³²

Florida’s 1868 constitution bore that out. It “strengthened the executive branch . . . and ensured white control of the Florida House of Representatives by capping voting districts at four representatives, thereby limiting the power of predominantly-Black districts.”³³ Its framers used “physical and economic pressure . . . to dissuade Negroes from engaging in political activity.”³⁴

29. *Gibson v. State*, 16 Fla. 291, 300 (1877).

30. Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868, A Case Study of Republican Factionalism in the Reconstruction South*, 51 Fla. Hist. Q. 1, 5-6 (1972); Shofner, *supra* note 10, at 266.

31. Hume, *supra* note 30, at 15.

32. *Id.* at 15-16.

33. Bowen, *supra* note 10, at 22.

34. Shofner, *supra* note 10, at 343.

On August 1, 1868, Florida enacted its general jury statute, Chapter 1628, which governed how jurors were selected, drawn, and summoned. Section 3 directed the county commissioners to compile a list of 300 persons from the registered voters of the county, and to choose from the list “such persons only as they know, or have good reasons to believe, are of approved integrity, fair character, sound judgment and intelligence.”³⁵ Section 5 required the clerk to draw a 36-person venire to serve in the petit jury.³⁶

Legislative power to set the qualifications for juror service was not new. The 1865 constitution required jurors to be white men “possessed of such qualifications as may be prescribed by law.”³⁷ Reconstruction removed the racial requirement and left the power to prescribe qualifications in place. In 1868, the Legislature exercised it, writing the integrity and good character standard back into the jury statute. The language chosen by the Legislature was common for jury selection across the South, and it was “used to eliminate almost every black citizen from the southern trial venire.”³⁸

Under federal supervision, with Black men on the voter rolls, Florida elected its first Black officeholders.³⁹

35. *Gibson*, 16 Fla. at 292; Ch. 1628, § 3, Laws of Fla. (1868).

36. *Id.*

37. Fla. Const. of 1865, art. XVI, § 3.

38. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 89-90 (1990).

39. Bowen, *supra* note 10, at 22.

But progress was brief. Although Congressional Reconstruction “overthrew the 1865 Constitution and the ‘Black Codes,’” the “remainder of the Reconstruction-era subjected African Americans in Florida to oppression by the state’s white inhabitants on the path to a return of Democratic ‘white home rule’ in 1877.”⁴⁰ When that return came, the jury statute of 1868 was still on the books and the character standard was still the test for who could serve: “approved integrity, fair character, sound judgment and intelligence,” qualities decided by a white official.

c. 1875: The Power to Set the Number of Jurors.

In 1875, the Florida Legislature proposed amendments to the Florida Constitution of 1868.⁴¹ One of those amendments rewrote the Jury Clause to provide that “[g]rand and petit jurors shall be taken from the registered voters of the respective counties,” and that “[t]he number of jurors for the trial of causes in any court may be fixed by law.”⁴²

The amendment did not fix the number of jurors; it authorized the Legislature to do so. Until the Legislature acted, the common-law rule of 12 jurors continued to govern.⁴³

40. *Id.*

41. Ch. 2041, Laws of Fla. (1875). The acts and resolutions of the Florida general assembly, going back to 1845, are available at <https://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/>.

42. *See Gibson*, 16 Fla. at 300; *Florida Fertilizer & Mfg. Co. v. Boswell*, 45 Fla. 301, 304, 34 So. 241, 241 (1903).

43. *See Florida Fertilizer*, 45 Fla. at 305, 34 So. at 242 (Florida Supreme Court confirming that where no statute fixes the

The same legislative sessions that amended the jury clause also reduced the number of citizens summoned for jury service. Chapter 2043, approved February 20, 1875, cut the petit jury draw from 36 as required in 1868 to 24 in counties with more than 1,000 registered voters, and 12 in counties with fewer.⁴⁴ Through the 1875 and 1876 legislative sessions, 12 jurors tried criminal cases in Florida. These were the last years of Republican control of the executive, and Black men remained on the voter rolls.⁴⁵

d. January 1877: The Government Changes.

The presidential election of November 1876 was disputed in Florida, as it was in Louisiana and South Carolina, and the governor's race in Florida turned on the same contested returns. After a fight in the canvassing board and in the courts, Florida declared the Democrat, George F. Drew, the winner.⁴⁶

Reconstruction ended in Florida before it ended nationally. The Army withdrew its troops from Tallahassee on December 9, 1876, leaving a single infantry company, which remained until January 18, 1877.⁴⁷ Governor Drew was inaugurated on January 2, 1877, replacing

number of jurors, "the common law, fixing the number of jurors in such cases," controls).

44. Ch. 2043, § 1, Laws of Fla. (1875); *Gibson*, 16 Fla. at 293.

45. Shofner, *supra* note 10, at 333, 343.

46. *Id.* at 333.

47. *Id.*

the Republican governor Marcellus Stearns.⁴⁸ President Hayes did not remove the troops from Louisiana and South Carolina until April 1877, and Professor Shofner is explicit that this step, the one ordinarily identified with the Compromise of 1877, “had nothing to do with Democratic accession to power in Florida.”⁴⁹ The Democrats already held the offices, and the soldiers had already gone. The national electoral commission would not settle the presidential contest until early March.⁵⁰

Governor Drew was a lumberman and a former Whig, chosen as the Democratic candidate “because of his appeal to the Whig-Unionist elements and the Negroes.”⁵¹ He told the Legislature it was the State’s responsibility to educate Black Floridians so that a man “might vote intelligently and make a good citizen,” and asked the Legislature to “bury the passions of the past because all within the state were one people, with one hope and one destiny.”⁵²

In fiscal and economic matters, the new government largely continued its predecessors’ policies.⁵³ “The only major policy shift between the Democratic administrations after 1876 and their Republican predecessors was in civil

48. *Id.*

49. *Id.* at 333, 341.

50. *Id.* at 338-39.

51. *Id.*

52. Edward Williamson, *George F. Drew, Florida’s Redemption Governor*, 38 Fla. Hist. Q. 206, 208 (1959).

53. Shofner, *supra* note 10, at 343-44.

rights.”⁵⁴ On that question, the Democratic party was of one mind: “[n]early all Conservative-Democrats agreed on opposition to Negro suffrage and equality.”⁵⁵ And it now held the means to act. With the governorship came control “of both state and local governments, including the election machinery,” and, “freed from the scrutiny of federal agencies,” the Democrats “destroyed the Republican party and relegated Negroes to a status much like their former situation.”⁵⁶ Professor Shofner describes the method that followed:

Cautiously but with increasing confidence, the Democrats incorporated white supremacy into statute and constitutional law.⁵⁷

That work began with the voter rolls. A bill reaching the senate on February 16, 1877, called for a re-registration of every voter in Florida, offered as a measure to eliminate multiple voting.⁵⁸ Black legislators “predicted in the senate that this bill would prevent all illiterate persons from voting.”⁵⁹ Robert Meacham, one of the more prominent Black officeholders in Reconstruction Florida, “called the proposed change unjust, unfair and unlawful.”⁶⁰

54. *Id.* at 344.

55. *Id.*

56. *Id.* at 343.

57. *Id.* at 344.

58. Williamson, *supra* note 52, at 210.

59. *Id.*

60. *Id.*

Nevertheless, “the Democratic majority rushed the bill through both houses and before the end of the month, [Governor] Drew signed it.”⁶¹

The registration bill reached more than the list of voters. Under the 1875 jury amendment, “[g]rand and petit jurors shall be taken from the registered voters of the respective counties.”⁶² Therefore, a man who did not appear on the voter rolls under the new bill would not appear on the list from which the jury pool was drawn.

The Legislature enacted Chapter 3010 the next day, February 17, 1877.

e. February 17, 1877: Chapter 3010—A Jury of 6.

In *Khorrami*, Justice Gorsuch observed that Arizona’s 1972 six-member jury law may have been a cost-savings measure rather than a racially motivated one.⁶³ Florida’s record does not permit a similar reading.

Florida had held the power to reduce jury size since 1875; two years passed without any change to the common-law jury of 12. Then, on February 17, 1877, only six weeks after the change of government and one day after the re-registration bill reached the senate, the Legislature enacted Chapter 3010.⁶⁴ The national electoral commission

61. *Id.*; Ch. 3021, Laws of Fla. (1877).

62. *Gibson*, 16 Fla. at 300; *Florida Fertilizer*, 45 Fla. at 304, 34 So. at 241.

63. 143 S. Ct. at 27 (Gorsuch, J., dissenting) (citations omitted).

64. *Gibson*, 16 Fla. at 294.

would not settle the presidential contest for another two weeks.

Chapter 3010 cut the trial jury in half. Section 6 provided that “twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other offences prosecuted by indictment, presentment, or information, and to try all civil causes within the jurisdiction of the circuit courts of this State.”⁶⁵

It did not stop at that number. The same act declared that “selections of jurors made during January, 1877, are hereby declared to be null and void.”⁶⁶ Those lists had been compiled by the outgoing county commissioners. Section 1 directed the incoming commissioners to make fresh selections,⁶⁷ choosing “such persons only as they know, or have good reason to believe, are of approved integrity, fair character, sound judgment and intelligence.”⁶⁸ The standard was not new. What was new was that every jury list in Florida would be compiled again, by officials of a government that had taken office six weeks earlier, under a test that required them to record nothing and permitted no review. A jury of six, drawn from a list of their choosing.

Chapter 3010 added a further filter. Section 7 provided that “when the nature of any case, civil or criminal, requires that a knowledge of reading, writing, and

65. *Gibson*, 16 Fla. at 297-98; Ch. 3010, § 6, Laws of Fla. (1877).

66. *Gibson*, 16 Fla. at 294; Ch. 3010, § 2.

67. Ch. 3010, § 1.

68. *Id.*

arithmetic, or either, is necessary to enable a juror to understand the evidence . . . it shall be a cause of challenge if he does not possess such qualification, to be determined by the judge presiding at the trial.”⁶⁹ The registration bill that had passed was expected to keep illiterate men off the voter rolls; this provision reached those who remained.

Chapter 3010 cannot be understood as a cost-savings measure. The act reduced the petit jury draw but *enlarged* the grand jury draw, which previously was 12 to 15 persons. Now, section 3 directed the clerk to draw “not less than fifteen, nor more than eighteen, persons to serve as grand jurors,” and, for the petit jury, “in counties containing less than one thousand registered voters, the names of twelve persons . . . and in counties having over one thousand registered voters, the names of eighteen persons.”⁷⁰ Section 5 provided that “every grand jury shall consist of not less than fifteen persons.”⁷¹ Thus, the grand jury, which returns indictments, grew; the petit jury, which returns verdicts, shrank.

A Legislature attempting to reduce costs on jurors does not summon more of them for one body while cutting the other.

69. *Gibson*, 16 Fla. at 295-96; Ch. 3010, § 7.

70. *Gibson*, 16 Fla. at 294-95; compare Ch. 2043, § 1 with Ch. 3010, § 3.

71. Ch. 3010, § 5.

f. 1877: The Convict-Lease System.

The same Legislature that created the six-person jury abolished the state prison and, in its place, implemented the convict-lease system under which prisoners were leased to private enterprises for their labor.⁷² The lease system rested on the notion that “the possession of a convict’s person is an opportunity for the State to make money,” and the “amount to be made is whatever can be wrung from him.”⁷³

Accounts of the first lease describe sadistic guards, inadequate food, absent medical care, and a malaria epidemic that killed half the leased men.⁷⁴ As the convict population increased, “Florida gained national notoriety for the brutality of its penal system.”⁷⁵ A reporter in *The Chicago Inter Ocean* wrote that the “majority of prisoners

72. See generally, Connor Donegan, *The Making of Florida’s “Criminal Class”: Race, Modernity, and the Convict Leasing Program, 1877-1919*, 97 Fla. Hist. Q. 408 (2019); Ch. 3034, Laws of Fla. (1877). Chapter 2090, enacted the same year, authorized counties to put county jail inmates to work on roads and other public works rather than to lease them. Ch. 2090, Laws of Fla. (1877). Leasing **county** prisoners to private parties was not authorized until 1879. Ch. 3137, Laws of Fla. (1879).

73. E. Carson Eckhard, *If He Dies, It Is But a Small Loss: Whiteness as Property and Convict Leasing in Florida 1875–1925*, 49 Ethnic & Racial Stud. 2171, 2174 (2026), quoting G.W. Cable, *The Silent South* 124 (1885).

74. Williamson, *supra* note 52, at 211.

75. Eckhard, *supra* note 73, at 2172.

are colored and illiterate . . . many of them young,” and called convict leasing “worse than slavery.”⁷⁶

E. B. Bailey, the son of a Civil War general and enslaver, entered the Florida Senate in 1889 and within a year held the lease on every prisoner in the State, around 400 inmates.⁷⁷ His bid promised the Legislature “1000 bales (of cotton) from 400 acres of new land” and sought the labor of “300 Negroes” at “\$20 per head.”⁷⁸ By 1909, Florida incarcerated more than 1,750 people, most of whom were Black.⁷⁹ At the 1911 American Prison Association Congress, Florida Governor A.W. Gilchrist told the delegates that “fully 80 per cent of our convicts are negroes.”⁸⁰

g. June 1877: *Gibson v. State*, 16 Fla. 291 (1877).

The Florida Supreme Court upheld the six-person jury in June 1877, four months after Chapter 3010 was enacted and five months after the change of government. *Gibson* remains the decision on which Florida’s six-member jury rests.

76. Eckhard, *supra* note 73, at 2172 (quoting *Southern Prison Horrors*, Chicago Inter Ocean, Feb. 15, 1890, at 12).

77. Eckhard, *supra* note 73, at 2179.

78. *Id.* (quoting Bailey, Bid for State Convicts (Sept. 16, 1889), Florida State Archives).

79. *Id.*

80. *Id.* at 2177 (citing Gilchrist, *The Jails and Prisons of Florida*, in Proceedings of the Annual Congress of the American Prison Association 243-44 (1911)).

Thomas Gibson was convicted of larceny in March 1877, weeks after Chapter 3010 took effect. He argued that “the section providing that a trial may be had by a jury of six persons is not constitutional.”⁸¹ The Court affirmed. It began with the common law: “The provision in the bill of rights that ‘the right of trial by jury shall remain inviolate forever,’ taken by itself, refers to a jury, according to the common law, to be composed of twelve persons.”⁸²

What displaced that meaning was the amendment of 1875. Because the amendment “is a part of the same Constitution that secures the right of trial by jury,” it “qualifies and controls, without destroying or infringing, the right of trial by a jury.”⁸³ The Court observed that “six persons are made sufficient in many of the States under similar constitutional provisions or under statutes, and these regulations have been sustained by the courts.”⁸⁴ It held that “a jury composed of six persons is a constitutional jury.”⁸⁵

h. After 1880: Excluding Black People from the Jury by Other Means.

Three years after Florida Chapter 3010 became law, this Court declared unconstitutional a West Virginia

81. *Gibson*, 16 Fla. at 300.

82. *Id.* at 300.

83. *Id.*

84. *Id.*

85. *Id.*

statute barring Black men from jury service.⁸⁶ Florida’s 1865 Constitution contained the same kind of provision: “[t]he Jurors of this State shall be white men, possessed of such qualifications as may be prescribed by law.”⁸⁷ That provision never took effect, and after *Strauder* Florida could never return to it.

But *Strauder* left an opening. A State, the Court said, “may prescribe the qualifications of its jurors, and in so doing make discriminations,” and may confine jury service “to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.”⁸⁸ As this Court explained in *Ramos*, legislatures understood that overt discrimination against Black jurors would be struck down, so legislators adopted rules that were “facially race-neutral” but designed “to ensure that African-American juror service would be meaningless.”⁸⁹

Florida already had such a rule. Chapter 3010 required the county commissioners to compile the jury list from persons “of approved integrity, fair character, sound judgment and intelligence.”⁹⁰ Nothing required a commissioner to record why a name was left off.

86. *Strauder v. West Virginia*, 100 U.S. 303, 308-09 (1880).

87. Fla. Const. of 1865, art. XVI, § 3.

88. *Strauder*, 100 U.S. at 310.

89. *Ramos*, 590 U.S. at 88.

90. Ch. 3010, § 1.

Reconstruction had ended by the time *Strauder* was decided.⁹¹ *Strauder* recognized the right of Black Americans to serve on juries, “yet that right remained unenforced for most of a century.”⁹² Even into the mid-twentieth century, this Court “was required to declare unconstitutional such flagrantly discriminatory devices as the color-coding by race of tickets placed in the box for jury selection and selection from among the friends and acquaintances of white jury commissioners.”⁹³ Of the period from the end of Reconstruction (1877) to the New Deal (1933), it has been said that

the systematic exclusion of black men from Southern juries was about as plain as any legal discrimination could be, short of proclamation in state statutes or confession by state officials.⁹⁴

Florida’s six-member jury was enacted amid that systematic exclusion of Black men.

i. 1885: The Redeemer Constitution.

By the mid-1880s the Democrats “felt secure enough to call a convention to replace the 1868 constitution.”⁹⁵

91. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 893 (1994).

92. *Id.* at 894.

93. *Id.* at 895 (citing *Avery v. Georgia*, 345 U.S. 559 (1953); *Cassell v. Texas*, 339 U.S. 282 (1950)).

94. *Id.*

95. Shofner, *supra* note 10, at 344.

The charter that convention produced governed Florida until 1968.

The charter set the minimum number of trial jurors: “[t]he number of jurors for the trial of causes in any court may be fixed by law, but shall not be less than six in any case.”⁹⁶

It authorized a poll tax as a condition of voting; by 1890 most Black Floridians had stopped voting.⁹⁷

It also reached the officials who compiled the jury lists. Most offices were made elective, but the State “assured” white control of the Black-majority counties “by continuing the appointment of county commissioners by the governor.”⁹⁸ Those were the same officers that Chapter 3010 charged with compiling the jury lists.⁹⁹

j. The Present.

Florida replaced the 1885 charter in 1968, and the “not fewer than six” floor carried over unchanged. Today, Article I, Section 22 of the Florida Constitution provides that “[t]he qualifications and the number of jurors, not fewer than six, shall be fixed by law.” Florida Rule of Criminal Procedure 3.270 and section 913.10 of the Florida Statutes both provide: “Twelve persons shall

96. Art. V, § 38, Fla. Const. (1885).

97. Shofner, *supra* note 10, at 344.

98. *Id.*

99. Ch. 3010, § 1.

constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.”

* * *

Florida’s six-person jury was enacted in February 1877 by the first Legislature to sit after Redemption, while that Legislature was moving a bill to require every voter in the State to register anew, and in the same session in which it authorized the leasing of the State’s prisoners. Amicus respectfully submits that the historical record shows the six-person jury was born of deliberate efforts to suppress Black voices in public affairs, including jury service, and urges the Court to restore the right to a jury of 12.

II. FLORIDA IS ALREADY EQUIPPED TO RETURN TO 12-PERSON JURIES

Florida contends that overruling *Williams* would have “sweeping consequences” because it would force “thousands of retrials.”¹⁰⁰ It claims no other reliance interests.¹⁰¹ But—as in *Ramos*—the State “can cite no case in which the one-time need to retry defendants has *ever* been sufficient to inter a constitutional right forever.”¹⁰²

100. Br. in Opp. 18.

101. *See id.*

102. *Ramos*, 590 U.S. at 111.

Trying serious criminal offenses by mini-jury has not “become part of our national culture,” either.¹⁰³ Only seven States impanel criminal juries of fewer than 12. Florida—which leads the nation in the number of prisoners serving life without parole¹⁰⁴—is one of just two states that use mini-juries to try offenses that are punishable by life.¹⁰⁵

Florida already has the administrative capacity to use 12-person juries for serious offenses. Throughout the *Williams* era, Florida has continued to impanel 12-person juries in cases where the ultimate punishment may be given. The same statute that limits juries to six people in noncapital cases requires a jury of 12 people in capital cases.¹⁰⁶ Florida seats 12-person juries every day it tries a capital case—and it has tried more of them, producing more new death sentences, than any other state four years

103. *Cf. Dickerson v. United States*, 530 U.S. 428, 443 (2000) (refusing to overrule precedent requiring police to issue *Miranda* warnings because “the warnings have become part of our national culture.”).

104. A census of state prisons in 2024 found that “[t]he number of people serving LWOP is highest in Florida (10,915), California (5,111), Pennsylvania (5,059), Louisiana (3,900), and Michigan (3,551); these five states combined account for half the people serving LWOP nationwide.” Ashley Nellis and Celeste Barry, *A Matter of Life: The Scope and Impact of Life and Long Term Imprisonment in the United States*, THE SENTENCING PROJECT, (Jan. 8, 2025), <https://www.sentencingproject.org/reports/a-matter-of-life-the-scope-and-impact-of-life-and-long-term-imprisonment-in-the-united-states>.

105. The other state is Utah. *See* Utah Code Ann. § 78B-1-104(1)(b)-(c).

106. *See* § 913.10, Fla. Stat. (2026); Fla. R. Crim. P. 3.270.

running.¹⁰⁷ A jury box that holds 12 in a capital case can hold 12 in any other case.

Florida may respond that some courthouses use a designated courtroom for death penalty trials, and that the courtrooms where most noncapital offenses are tried are not as large. But even though Florida limits *deliberation* to six jurors in noncapital cases, Florida’s jury boxes routinely seat more than six jurors during noncapital trials. This is because Florida routinely seats “alternate jurors” who listen to opening statements, witness testimony, closing arguments, and jury instructions alongside the panel of six “principal jurors.”¹⁰⁸ If a principal juror becomes unable to serve midtrial, an alternate juror replaces that juror; but in most cases, the alternate jurors are simply discharged when the six principal jurors retire to deliberate.¹⁰⁹ Restoring 12-person juries will not require Florida to rebuild its courthouses.

Restoring 12-person juries will not create conflict with Florida’s constitution, either. By providing that “[t]he

107. In annual 50-state surveys, Florida imposed the most new death sentences in 2025, 2024, 2023, and 2022. See DEATH PENALTY INFORMATION CENTER, The Death Penalty in 2025, https://files.deathpenaltyinfo.org/documents/YER2025_FINAL2.pdf; The Death Penalty in 2024, <https://files.deathpenaltyinfo.org/documents/DPI-2024-Year-End-Report.pdf>; The Death Penalty in 2023: Year End Report, <https://files.deathpenaltyinfo.org/documents/reports/year-end/Year-End-Report-2023.pdf>; The Death Penalty in 2022: Year End Report, <https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2022-year-end-report>.

108. See Fla. R. Crim. P. 3.280.

109. See *id.*

qualifications and the number of jurors, *not fewer than six*, shall be fixed by law,”¹¹⁰ the state constitution merely sets a floor for the minimum number of jurors—not a ceiling.

Florida is ready to resume seating 12 jurors to try serious offenses. It has simply been excused from doing so since the Jim Crow era.

III. *WILLIAMS v. FLORIDA* IS WRONG EVEN UNDER ITS OWN FUNCTIONALIST TERMS

Williams invoked functionalist reasoning to deny a constitutional right to a 12-person jury.¹¹¹ The Court reasoned that “[t]he relevant inquiry, as we see it, must be the function that the particular feature [of the jury trial system] performs and its relation to the purposes of a jury trial.”¹¹² To the *Williams* Court, the purpose of a jury trial is preventing government oppression by placing between the accuser and the accused “[t]he commonsense judgment of a group of laymen, and in the community participation and shared responsibility” that results.¹¹³ The *Williams* Court cited social science experiments that it said “indicate that there is no discernible difference between the results reached by the two different-sized juries” and “neither currently available evidence nor theory suggests” a 12-person jury is more advantageous to the accused than a six-person jury.¹¹⁴

110. Art. I, § 22, Fla. Const. (emphasis added).

111. 399 U.S. 78 (1970).

112. *Id.* at 99-100.

113. *Id.*

114. *Id.* at 101-02.

In the 56 years since *Williams* was decided, the Court has turned away from the functionalist reasoning underpinning it. In interpreting the Constitution, the Court looks at what the document says and what the framers meant—not the practices that contemporary psychologists or sociologists would recommend to fulfill the Sixth Amendment’s function.

In *Ramos*,¹¹⁵ the Court rejected the “functionalist” approach of *Apodaca v. Oregon*¹¹⁶ as to the jury trial right, calling it a “muddy yardstick” produced via a “breezy cost-benefit analysis” as to which different social science studies produce different findings, and finding that “[t]he deeper problem is that the plurality [in *Apodaca*] subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place.” And more recently, in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, this Court rejected means-end or cost-benefit analysis of constitutional rights.¹¹⁷ “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”¹¹⁸

115. 590 U.S. at 98-100.

116. 406 U.S. 404 (1972).

117. 597 U.S. 1, 20-26 (2022).

118. *Id.* at 23 (citing *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)).

Williams's holding that the Constitution allows six-person juries has not stood the test of time. *Williams* assumed that juries of six and juries of 12 function identically. Current social science shows they do not.¹¹⁹

In *Ballew v. Georgia*, decided less than a decade after *Williams*, this Court held that criminal juries of fewer than six are unconstitutional and tempered its reliance on the research it cited in *Williams*.¹²⁰ Reviewing the research available at the time, the Court explained that “[s]tudies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.”¹²¹ The decades since *Ballew* have produced even stronger empirical evidence that 12-person juries are more accurate, more deliberative, and more likely to reflect a representative cross-section of the community than six-person juries.

119. In fact, this was true when *Williams* was decided. None of the “experiments” cited in *Williams* provide scientific proof that six- and 12-person juries are functionally equivalent. Alisa Smith & Michael Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 455-56 (2008); Robert H. Miller, *Six of One is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 650-57 (1998).

120. 435 U.S. 223, 232-36 (1978) (opinion of Blackmun, J., joined by Stevens, J.).

121. *Id.* at 239.

This research matters not because the Court should continue to apply *Williams*'s functionalist approach, but because *Williams* was wrong even on its own terms.

Without reiterating the research that Petitioner already discusses in his brief, additional post-*Williams* studies have confirmed that there is a qualitative difference between 12-person juries and the six-person juries that Florida has been using. Larger juries give jurors who hold a minority view a greater opportunity to influence the verdict, largely because it is difficult to maintain a minority viewpoint without allies.¹²² A 12-person jury provides a greater chance that there will be more than one juror with a minority viewpoint, and therefore that the minority viewpoint will be able to influence the majority and ultimately the verdict.¹²³

Moreover, studies have shown that jury size also influences representativeness.¹²⁴ Smaller juries mean fewer opportunities for racial, religious, political, or socioeconomic minorities to serve.¹²⁵

Ultimately, though, this Court does not “need a barrage of statistical studies” to conclude that the Sixth

122. M. Sean Limon & Franklin Boster, *The Impact of Varying Argument Quality and Minority Size on Influencing the Majority and Perceptions of the Minority*, 49 Comm. Q. 350, 359-60 (2001).

123. *Id.*

124. See Mary R. Rose et al., *Jury Pool Underrepresentation in the Modern Era*, 15 J. Empirical Legal Stud. 378 (2018).

125. See *id.*

Amendment requires 12-person juries.¹²⁶ “*Williams* made the unthinkable a reality. In doing so, it substituted bad social science for careful attention to the Constitution’s original meaning.”¹²⁷ *Williams* does not stand the test of time regarding either its empirical-research claims or its broader conclusion that juries comprised of six versus 12 members are functionally, let alone constitutionally, equivalent.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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126. *Khorrami*, 143 S. Ct. at 27 (Gorsuch, J., dissenting from denial of certiorari).

127. *Cunningham v. Florida*, 144 S. Ct. 1287, 1288 (2024) (Gorsuch, J., dissenting from denial of certiorari).