

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 CONSTITUTIONAL
ACCOUNTABILITY CENTER
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution’s text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The centrality of the jury to the Framers cannot be overstated. “[A] paradigmatic image underlying the original Bill of Rights,” the “jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.” Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96-97 (1998).

The Founding generation’s focus on the jury as a central feature of a system of ordered liberty was strongly rooted in English common law. Blackstone, for example, called the jury a “sacred bulwark” of liberty. 4 William Blackstone, *Commentaries on the Laws of England* 344 (1769). In his words, “the most

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

transcendent privilege which any subject can enjoy, or wish for, [is] that he cannot 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 on the Laws of England* 379 (1768).

Drawing on that history, this Court has held that the Sixth Amendment, together with the Fourteenth Amendment, guarantees criminal defendants in state and federal court the right to a unanimous jury verdict. See *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020). Looking to “the common law, state practices in the founding era, [and] opinions and treatises written soon afterward,” *Ramos* concluded that when the Sixth Amendment was adopted, “trial by an impartial jury” necessarily meant that a “jury must reach a unanimous verdict in order to convict.” *Id.* at 90.

In so holding, this Court overruled an earlier decision, *Apodaca v. Oregon*, that permitted states to convict criminal defendants with nonunanimous jury verdicts. See *id.* at 105-09 (discussing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). *Apodaca* was premised on the view that the unanimity requirement did not serve “an important function in contemporary society.” *Id.* at 94 (quotation marks omitted). In abrogating that decision, this Court took the *Apodaca* plurality to task for “subject[ing] the ancient guarantee of a unanimous jury verdict to its own functionalist assessment”—an assessment that was “gravely mistaken” even on its own terms. *Id.* at 100, 106.

The same history and reasoning that led this Court to overrule *Apodaca* and hold that the Sixth

Amendment requires jury unanimity also compel the conclusion that the Sixth Amendment requires juries to consist of at least twelve people. When the Framers drafted the Constitution, “the twelve-person unanimous criminal jury was an institution with a nearly four-hundred-year-old tradition in England.” Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Re-Examination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621, 643 (1998). Indeed, as the states were ratifying the Sixth Amendment, Justice James Wilson declared that “[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity.” 2 James Wilson, *Works of the Honourable James Wilson* 350 (1804) (recording Wilson’s 1790s law lectures). The jury right the Framers enshrined in the Constitution was thus the right to a jury composed of twelve people.

Significantly, many of the same sources this Court relied on for its holding in *Ramos* also instruct—often in the very same passage—that juries must consist of at least twelve people. For example, one source stated that “the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of *twelve* of his equals and neighbours.” *Ramos*, 590 U.S. at 90 (alterations in original) (emphasis added) (quoting 4 Blackstone, *Commentaries* 343). Another provided that “a ‘verdict, taken from eleven, was no verdict’ at all.” *Id.* (quoting James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 88-89 n.4 (1898)). And a third instructed that “a defendant enjoys a ‘constitutional right to demand that his liberty should not be taken from him except by the

joint action of the court and the unanimous verdict of a jury of *twelve* persons.” *Id.* at 92 (emphasis added) (quoting *Thompson v. Utah*, 170 U.S. 343, 351 (1898)).

Despite the clear historical evidence that juries consisted of at least twelve people at the Framing, Hamed Kian was found guilty of five criminal charges by a jury with only six members. *See* Pet. App. 3a, 5a. That result was possible because this Court in *Williams v. Florida* permitted juries of as few as six people to convict criminal defendants. *See* 399 U.S. 78, 103 (1970).

But the same problems that doomed *Apodaca* haunt *Williams* in equal measure. Decided two years before *Apodaca*, *Williams* dismissed the long history confirming that the size of a jury has been fixed at twelve for over six hundred years as a “historical accident,” *id.* at 89, and rejected what it termed the “easy assumption” that “if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution,” *id.* at 92. *Williams* then conducted a functionalist analysis of the jury right, concluding that there was “little reason to think” that the goals of the Sixth Amendment “are in any meaningful sense less likely to be achieved when the jury numbers six.” *Id.* at 100.

Williams, like *Apodaca* soon after it, wrongly rejected the common-law history underlying the Sixth Amendment. As this Court’s more recent precedents make clear, it is improper to conduct a “functionalist analysis” of the jury right that “overlooks the fact that, at the time of the Sixth Amendment’s adoption, the right to trial by jury”

meant a jury of twelve people. *Ramos*, 590 U.S. at 100, 106.

Further, just like the empirical evidence *Apodaca* invoked, the evidence on which *Williams* relied failed to reckon with—and drastically understated—the deficiencies of juries with fewer than twelve members. *Williams* cited the “few experiments” it could find on the effect of jury size on verdict quality, *Williams*, 399 U.S. at 101, but these so-called experiments “were not empirical studies,” Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 *Judicature* 46, 52 (2020). Instead, they were merely “conclusory statements . . . supported at best by limited experience and anecdote.” *Id.* And even those conclusory statements were contradicted by “elementary statistical theory” that was “well established” at the time. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 715 n.32 (1971).

According to *Williams*, six-person juries deliberate just as well as twelve-person juries, are just as capable of representing a fair cross-section of the community, and produce verdicts of identical quality. *See Williams*, 399 U.S. at 100-02. But more recent academic research sheds new light on the relationship between jury size and the quality of their deliberations, representativeness, and decisions. *Cf. Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (drawing on studies conducted “since *Williams* was decided” 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”).

Numerous empirical studies, including many conducted post-*Williams*, confirm that twelve-member juries are markedly better along every measure *Williams* found critical. They provide for more considered deliberations by improving dissenting jurors' ability to withstand pressure to conform to the majority. See Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 457 (2008). They more accurately discuss evidence in deliberations and engage with probative information. See *id.* at 464-66. They better represent a cross-section of the community. See Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. Empirical Legal Stud. 425, 438, 442 (2009). And they produce higher-quality verdicts, including by decreasing the odds that innocent defendants will be convicted. See Stuart S. Nagel & Marian Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 Wash. U. L.Q. 933, 975.

In short, “*Williams* was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation’s courts.” *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from denial of certiorari). The decision of Florida’s Fourth District Court of Appeal should be reversed.

ARGUMENT

I. At the Founding, Juries Were Composed of Twelve People.

The jury has always been “justly dear to the American people[,] . . . an object of deep interest and solicitude.” *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830). Mentioned expressly in three of the first ten amendments to the Constitution, it is “a paradigmatic image underlying the original Bill of Rights,” Amar, *supra*, at 96; see Miller, *supra*, at 643; U.S. Const. amends. V, VI, VII.

The Founding generation’s belief in the jury had its foundation in English common law, which long recognized the jury as critical to preserving liberty. See Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1, 13 (1993) (“By the 1600s, when the thirteen colonies were founded, jury trial had become one of the great palladiums of English liberty.”); Larry T. Bates, *Trial by Jury After Williams v. Florida*, 10 Hamline L. Rev. 53, 53 (1987) (“[B]y the end of the thirteenth century the jury had become an important element in English criminal procedure.”). As William Blackstone emphasized, “the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.” 3 Blackstone, *Commentaries* 379. To Blackstone, trial by jury was “the most transcendent privilege which any subject can enjoy, or wish for.” *Id.*

At common law, a jury was defined in part by the number of people who served on it: twelve. See, e.g., Bates, *supra*, at 55 (concluding that an “essential characteristic[] of the petit jury at common law w[as] the number of persons which comprised the jury—

twelve”). As Blackstone explained, 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 Blackstone, *Commentaries* 379. Expanding on this point, Blackstone later commented that it was important that a trial by jury include “the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion.” 4 Blackstone, *Commentaries* 343. Other prominent legal thinkers of the time similarly embraced the twelve-member jury. See, e.g., Sir Matthew Hale, *The History of the Common Law of England* 256 (1713) (stating that a jury should be composed of “[t]welve, and no less, of such as are indifferent”); 3 Matthew Bacon, *A New Abridgement of the Law* 234 (3d ed. 1768) (stating that the “Petty Jury [must consist] of twelve, and can be neither more nor less”).²

The Framers shared this belief that a “jury”—as that term was used in the Sixth Amendment’s jury-trial guarantee in criminal cases—was composed of twelve people. See Arnold, *supra*, at 5 (“[I]t was a scholarly axiom at the time the Bill of Rights was drafted that a jury was comprised of twelve. This clearly was the understanding of the Founding Generation . . .”). Indeed, many colonial charters

² Although the origin of the jury’s twelve-person size is unknown, see Arnold, *supra*, at 5, that number was well established prior to the Framing, see *id.* at 3 (“For over six hundred years, Western civilization took it for granted that a jury must be composed of twelve persons.”); *id.* at 8 (“[A]ny variation in number ended during the reign of Edward IV (1461-1483) when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties.”).

required that criminal juries be composed of twelve members. *See* Miller, *supra*, at 640 n.115 (noting that New Hampshire, New York, Pennsylvania, Plymouth Plantation, Virginia, and West Jersey “specified that trial by jury in criminal cases meant trial by a panel of 12 indifferent members of the community reaching a unanimous verdict”); *see also* Wanling Su & Rahul Goravara, *What Is a Jury?*, 103 N.C. L. Rev. 969, 984 (2025) (explaining that the Fundamental Constitutions of Carolina required that “[e]very jury shall consist to twelve men” (alteration in original) (quoting Fundamental Constitutions of Carolina, 1669, art. 69, *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 108, 118 (1971))); Bates, *supra*, at 65-66 (surveying charters of the colonies and concluding that Constitutional Convention delegates understood that “trial by jury in criminal cases meant trial by a body of twelve persons all of whom agreed to the verdict”).

During the debates on ratifying the Constitution, Virginia Governor Edmund Randolph questioned the need for a Bill of Rights, emphasizing as to the jury right that “the 3d article provide[s] that the trial of all crimes shall be by jury,” and “[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 (Jonathan Elliot ed., 1836). William Pierce, a delegate to the Constitutional Convention, assumed while discussing “this new Constitution” that “trial by jury” necessarily meant a group of “twelve men.” Letter from Hon. William Pierce to St. George Tucker (Sept. 28, 1787), *reprinted in* 3 *The Documentary History of the*

Ratification of the Constitution: Ratification of the Constitution by the States 296, 296 (Merrill Jensen ed., 1978). And as the Sixth Amendment was being debated and ratified by the states, Justice James Wilson wrote in his 1790s Lectures on Law that “[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity.” Wilson, *supra*, at 350.

Moreover, just like the unanimity requirement, the twelve-person requirement was not “lost to time and only recently recovered.” *Ramos*, 590 U.S. at 92. Across the nineteenth century, this Court, state supreme courts, and influential legal thinkers all recognized that “[t]he term *jury* is well understood to be twelve men.” *Foot v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828). In *Thompson v. Utah*, for example, this Court asked whether “the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less,” and answered that question in the affirmative. 170 U.S. at 349; see *Williams*, 399 U.S. at 122 (Harlan, J., concurring in the result in *Williams*, 399 U.S. 78, and dissenting in *Baldwin v. New York*, 399 U.S. 66 (1970)) (“[B]efore [*Williams*,] it would have been unthinkable to suggest that the Sixth Amendment’s right to a trial by jury is satisfied by a jury of six.”). Similarly, New Hampshire’s highest court explained that the term “jury” has been “well known in the language of the law,” such that it was “used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men.” *Op. of the Justices of the Supreme Jud. Ct.*, 41 N.H. 550, 551 (1860); see

Cancemi v. People, 18 N.Y. 128, 138 (1858) (“It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury . . . for the court to allow of any number short of a full panel of twelve jurors”); *State v. Everett*, 14 Minn. 439, 444 (1869) (“The word ‘jury’ . . . imports a body of *twelve* men.”).

Justice Joseph Story embraced this requirement in his *Commentaries on the Constitution*. First, he explained that the forebears of the United States “brought this great privilege [of the jury trial] with them, as their birthright and inheritance, as part of that admirable common law.” 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1779, at 559 (5th ed. 1891). He then went on to explain that “[a] trial by jury is generally understood to mean *ex vi termini* [*i.e.*, by definition], a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional.” *Id.* at 559 n.2.

In the early twentieth century, this Court repeatedly emphasized that “there can be no doubt” that “a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution.” *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); see *Patton v. United States*, 281 U.S. 276, 288-90 (1930) (recognizing that the “common law elements” of a jury, including that the “jury should consist of twelve men, neither more nor less . . . are embedded in” the Sixth Amendment); *Rassmussen v. United States*, 197 U.S. 516, 528 (1905) (holding that a statute permitting six-person

juries in Alaska was unconstitutional); *id.* at 529 (Harlan, J., concurring) (“The constitutional requirement that ‘the trial of all crimes . . . shall be by jury,’ means, as this court has adjudged, a trial by the historical, common-law jury of twelve persons.”); *see also Williams*, 399 U.S. at 117 (Marshall, J., dissenting in part) (highlighting an “unbroken line of precedent going back over 70 years” confirming that “the jury guaranteed by the Sixth Amendment consists of twelve persons” (quotation marks omitted)).

And in more recent cases, this Court has repeatedly observed that the Sixth Amendment’s jury-trial guarantee includes the right to a twelve-member jury. In *Blakely v. Washington*, this Court explained that the “longstanding tenets of common-law criminal jurisprudence” underlying the Sixth Amendment include the rule “that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’” 542 U.S. 296, 301 (2004) (quoting 4 Blackstone, *Commentaries* 343).

This Court also affirmed that principle in *Apprendi v. New Jersey*, explaining that to “guard against a spirit of oppression and tyranny on the part of rulers,” and “as the great bulwark of [our] civil and political liberties,” trial by jury has been understood to require that “*the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours.*” 530 U.S. 466, 477 (2000) (alterations except ellipsis in original) (twice quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1779-80, at 540-41 (4th ed. 1873); and then quoting 4 Blackstone, *Commentaries* 343);

see *United States v. Booker*, 543 U.S. 220, 238-39 (2005) (same); see also *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (observing that a defendant’s guilt must be “determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens” (emphasis omitted)).

And, finally, many of the historical sources this Court cited in *Ramos* to show that jury decisions must be unanimous also confirmed that a jury must consist of twelve people. See, e.g., *Ramos*, 590 U.S. at 90 (quoting 4 Blackstone, *Commentaries* 343). Those sources emphasize that a “verdict, taken from eleven, was no verdict’ at all.” *Id.* (quoting Thayer, *supra*, at 88-89 n.4). And they underscore that “a defendant enjoys a ‘constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve.’” *Id.* at 92 (quoting *Thompson*, 170 U.S. at 351).

This Court has thus repeatedly recognized what history from the Framing makes clear: the “sacred bulwark of liberty,” 4 Blackstone, *Commentaries* 344, that the Framers codified in the Sixth Amendment was the jury that existed at common law—a jury of *twelve* of the defendant’s “equals and neighbours,” *Apprendi*, 530 U.S. at 477 (quotation marks omitted). That history is the proper lodestar for determining the meaning of the Amendment’s jury-trial guarantee, as the next Section describes.

II. The *Williams* Court Improperly Dismissed the Sixth Amendment's History in Determining Its Meaning.

Williams expressly rejected the relevance of the jury's common-law history to determining the scope of the Sixth Amendment's jury right. Despite recognizing that "[i]t may well be that the usual expectation was that the jury would consist of 12," *Williams*, 399 U.S. at 98, the *Williams* Court concluded that "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury," *id.* at 99.

But *Williams* "was wrong the day it was decided, it remains wrong today," and its approach is at odds with this Court's more recent Sixth Amendment cases. *Khorrami*, 143 S. Ct. at 23 (Gorsuch, J., dissenting from denial of certiorari). The *Williams* Court relied primarily on evidence from the drafting of the Sixth Amendment to support its conclusion that the Framers did not intend to embed the essential common-law features of the jury in the Constitution, observing that "provisions spelling out such common-law features of the jury as 'unanimity,' or 'the accustomed requisites'" that appeared in James Madison's original draft were omitted from the final version. *Williams*, 399 U.S. at 93-96. But this Court later expressly rejected that reasoning in *Ramos*, pointing out that this interpretation of the drafting process essentially blinds the Court to "everything history might have taught us about what it means to have a jury trial," which would "leave the right to a 'trial by jury' devoid of meaning." *Ramos*, 590 U.S. at 98. Indeed, such deletions "just as easily support" the inference that the excised language was

deemed superfluous in light of the well-understood meaning of the term “jury” at common law. *Id.* at 97; see *Williams*, 399 U.S. at 123 n.9 (Harlan, J., concurring in the result in *Williams*, 399 U.S. 78, and dissenting in *Baldwin*, 399 U.S. 66) (noting that “a more likely explanation of the Senate’s action is that it was streamlining the Madison version on the assumption that the most prominent features of the jury would be preserved as a matter of course”).

Based on its faulty interpretation of the Sixth Amendment’s drafting process, the *Williams* Court “turn[ed] to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution.” *Williams*, 399 U.S. at 99. According to *Williams*, “[t]he relevant inquiry . . . must be the *function* that the particular [jury] feature performs and its relation to the purposes of the jury trial.” *Id.* at 99-100 (emphasis added). That inquiry necessarily privileges a functional approach to determining constitutional meaning, unmoored from the text and history of the Sixth Amendment’s jury-trial guarantee.

But taking such an approach is at sharp odds with this Court’s more recent Sixth Amendment jurisprudence. As this Court declared in *Ramos*, “[w]hen the American people chose to enshrine [the jury-trial] right in the Constitution, they weren’t suggesting fruitful topics for future cost-benefit analyses.” *Ramos*, 590 U.S. at 100. And it is not this Court’s role to “reassess” whether the right to a twelve-person jury is “‘important enough’ to retain.” *Id.* Instead, the Sixth Amendment requires a reviewing court to determine what, “at the time of

the Sixth Amendment’s adoption, the right to trial by jury included.” *Id.* (emphasis omitted).

Indeed, long before *Ramos*, this Court recognized that the Sixth Amendment’s scope is defined by its original meaning, not a free-floating functional analysis. In this vein, *Apprendi* confirmed that “the historical foundation for our recognition of [the Sixth Amendment jury right] extends down centuries into the common law,” 530 U.S. at 477, which requires careful inquiry into the common law as it existed at the Framing to answer questions about the Amendment’s meaning, *see id.* at 478-83.

Moreover, as this Court explained in *Giles v. California* when addressing the scope of the Confrontation Clause, courts may not “extrapolate from the words of the Sixth Amendment to the values behind it, and then . . . enforce its guarantees only to the extent they serve (in the courts’ views) those underlying values.” 554 U.S. 353, 375 (2008). Instead, “[t]he Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen.” *Id.*; *see Crawford v. Washington*, 541 U.S. 36, 43-50 (2004) (looking to “historical background,” including common law and early state practice, to determine the Confrontation Clause’s meaning). And in holding that factors that increase a defendant’s sentence must be proven to a jury beyond a reasonable doubt, this Court has emphasized that what matters is not “whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice,” but rather “the Framers’ paradigm for criminal justice.” *Blakely*, 542 U.S. at 313.

Since this Court overruled *Apodaca* in 2020, *Williams* stands alone in rejecting the relevance of Sixth Amendment history to determining the meaning of the Amendment’s jury-trial guarantee. Both the Sixth Amendment’s history and this Court’s more recent decisions make clear that *Williams* erred in concluding that a criminal jury could have fewer than twelve members. But even if *Williams*’s reliance on an ahistorical functionalist analysis were correct (which it is not), that decision should still be overruled because, as the next Section discusses, empirical research belies the conclusion that juries of fewer than twelve people are functionally equivalent to twelve-person juries.

III. Empirical Research Shows that Juries of Fewer than Twelve People Undermine the Right to a Fair Trial Guaranteed by the Sixth Amendment.

Even if this Court maintains the functionalist approach applied (improperly) in *Williams*, it should still conclude that twelve-person juries are a constitutional floor. *Williams* assessed the effect of jury size along three primary dimensions: first, the quality of jury deliberations; second, the jury’s ability to represent a cross-section of the community; and third, the quality of jury verdicts. *See Williams*, 399 U.S. at 100-02. But the so-called “experiments” on which *Williams* relied amounted to little more than “conclusory statements . . . supported at best by limited experience and anecdote.” Higginbotham et al., *supra*, at 51-52 (quoting *Williams*, 399 U.S. at 101); *see Zeisel, supra*, at 713-15. Even at the time, those “experiments” did not support the conclusions the *Williams* Court drew and, since then, further research has confirmed that juries smaller than

twelve are worse in every regard *Williams* identified as essential to the Sixth Amendment's fair-trial guarantee. *See, e.g.,* Su & Goravara, *supra*, at 1013, 1019-28 (collecting empirical research to demonstrate that six-person juries are not "functionally equivalent" to twelve-person juries).

A. *Deliberation Quality*

Williams was not entirely clear about the factors it understood to "promote group deliberation," 399 U.S. at 100, but it suggested that the ability of a dissenting juror to withstand pressure to conform to the majority's view was important, *see id.* at 101 n.49. *Williams* reasoned that an "operative factor[]" influencing dissenting jurors' willingness to conform to majority pressure during deliberation is the "proportional size of the majority aligned against them," *id.*, such that "a minority faction in a jury divided 10-2 would be no better able to withstand majority influence than the minority faction in a jury divided 5-1," Smith & Saks, *supra*, at 457.

But the empirical studies *Williams* cited to support this proposition "found exactly the opposite." *Id.* They showed that if a dissenter has just one attitudinal ally, that dissenter is far more likely to resist pressure to conform; in contrast, a lone dissenter can be convinced by an otherwise unanimous majority to "disbelieve his own correct observation." *Id.* (quoting Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 463 (1966)). Because twelve-person juries are more likely to have multiple dissenting members, *see* Zeisel, *supra*, at 722-23, they improve dissenters' ability to resist majority pressure, minimizing the risk of erroneous decisions

reached by dint of sheer numbers and thus making way for more considered jury deliberations.

Research conducted since *Williams* confirms that twelve-person juries are more deliberative in other ways as well: they more accurately discuss evidence in deliberation, rely on more probative information, and better recall such information. See Smith & Saks, *supra*, at 465 (collecting studies). In one analysis, researchers reported that twelve-person juries discussed trial testimony more accurately than did their six-person counterparts. See Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 L. & Hum. Behav. 451, 458-59 (1997). Another study found that twelve-person juries “recall[ed] more probative evidence and relied less on nonprobative items” than did six-person juries. Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. Applied Psych. 121, 128 (2002).

These findings are consistent with social-psychology research explaining that larger groups perform better at decision-making because they can marshal more resources than smaller groups. See Saks & Marti, *supra*, at 458 (citing Ivan D. Steiner, *Group Process and Productivity* (1972)); see also *Ballew*, 435 U.S. at 232-33 (“Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.”). Larger juries may also be more sensitive to factual ambiguities than smaller juries. See Angelo Valenti & Leslie Downing, *Six Versus Twelve Member Juries: An Experimental Test of the Supreme Court*

Assumption of Functional Equivalence, 1 Pers. & Soc. Psych. Bull. 273, 274 (1974).

Research further indicates that larger juries deliberate longer than smaller ones. Eleven studies examined in a meta-analysis compared the length of deliberations between large and small juries, and all but one found larger juries deliberated longer. *See* Saks & Marti, *supra*, at 457-58. “The mean time difference for studies of actual juries . . . is forty-four minutes.” Smith & Saks, *supra*, at 465. Longer deliberation time is suggestive of “more substantive deliberation,” including “the sharing of more facts, more ideas, and more challenges to the tentative conclusions of others.” *See* Saks & Marti, *supra*, at 458.

B. *Community Representativeness*

Williams recognized that an “essential feature of a jury obviously lies . . . in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.” 399 U.S. at 100; *see Ballew*, 435 U.S. at 237 (“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.” (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940))). But it dismissed as “unrealistic” the concern that representation “will be significantly diminished” by reducing the size of juries to six. *Williams*, 399 U.S. at 102.

Williams’s assumptions on this point, however, contradict basic “principles of statistical sampling” that were well known at the time. Smith & Saks, *supra*, at 458; *see Zeisel, supra*, at 716. These principles make clear that increasing a sample’s size

necessarily increases the likelihood that it will contain “populations of any given stratification.” Smith & Saks, *supra*, at 458. To illustrate, in randomly impaneled six- and twelve-person juries from a population in which 10% hold a minority viewpoint (or demographic identity), over half of six-person juries will contain *no* minority member, while fewer than a third of twelve-person juries will lack minority representation. *See* Zeisel, *supra*, at 716.

Empirical findings confirm that six-person juries lack minority members much more frequently than twelve-person juries do. A meta-analysis of studies found overwhelming support for the proposition that twelve-person juries are more representative than six-person juries. *See* Saks & Marti, *supra*, at 455-57. The authors concluded that the “effect of jury size on minority representation is highly significant,” with the “effect of reduced jury size . . . equivalent to a decrease in the opportunity of [minority] representation from about 63-64% to about 36-37%.” *Id.* at 457. “Not one study contradicted this result.” Smith & Saks, *supra*, at 464.

A more recent study further strengthens these findings. Researchers analyzed data from 277 civil trials between 2001 and 2007: 89 with six-person juries and 188 with twelve-person juries. *See* Diamond et al., *supra*, at 434-35. Although Black potential jurors comprised 25% of the *venire* before and after peremptory challenges, *see id.* at 443, 28.1% of impaneled six-person juries lacked *even a single* Black juror compared to only 2.1% of twelve-person juries, *see id.* at 442. This underrepresentation is not “simply proportional,

which would occur if juries of both sizes were equally likely” to include a Black juror; instead, “58.3 percent of six-member juries had one-sixth or fewer black jurors, while 37.7 percent of 12-member juries had one-sixth or fewer black jurors.” *Id.* at 442. Importantly, it is jury size, not “patterns in the exercise of [peremptory] juror challenges, [that] accounts for this pattern.” *Id.* at 443.

Of course, the specific “impact of jury size on . . . minority representation is affected by the percentage of minorities on the venire.” *Id.* The same study also examined a proportionally smaller cohort of Hispanic venirepersons, finding that 66.3% of impaneled six-person juries lacked *any* Hispanic juror compared to 40.4% of twelve-person juries. *Id.* at 444. And just 9.0% of six-person juries included at least two Hispanic jurors compared to 25.5% of twelve-person juries. *Id.* Such underrepresentation “would emerge for *any* minority,” whether demographic, attitudinal, or otherwise. *Id.* at 445.

The effects of jury size on cross-sectional representation carry extra weight because Black jurors, in particular, are “vastly overrepresented” as dissenting jurors urging acquittal. Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1599 (2018) (analyzing 199 felony verdicts by “racially mixed, nonunanimous juries”). That fact is especially significant when combined with the findings discussed above that show a dissenter’s propensity to conform to majority pressure decreases in the presence of at least one attitudinal ally. See Smith & Saks, *supra*, at 457.

C. Verdict Quality

Williams claimed that “[w]hat few experiments have occurred . . . indicate that there is no discernible difference between the results reached by” six- and twelve-member juries. 399 U.S. at 101; *see id.* at 100-01 (“[T]he reliability of the jury as a factfinder hardly seems likely to be a function of its size.”). Once again, that proposition was wrong.

To begin, “not one of [the] ‘experiments’” *Williams* cited “provide[s] any evidence on the question at hand.” Smith & Saks, *supra*, at 455-56 (quoting *Williams*, 399 U.S. at 101) (cataloging and critiquing as inapt each source cited by footnote 48 of *Williams* to support its claim that different-sized juries reach indistinguishable results); *see* David F. Walbert, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case W. Rsrv. L. Rev. 529, 535 (1971) (“[T]he references cited do not support this conclusion.”).

And the claim is contradicted by published studies: there *are* “discernible differences” between the results reached by juries of six and juries of twelve. When such results “diverge,” for example, verdicts from twelve-member juries are “likely to be of somewhat higher quality” and “superior with respect to other important values.” Richard O. Lempert, *Uncovering “Nondiscernible” Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643, 698 (1975) (emphasis omitted).

Other “serious differences” include the fact that jury size “significantly affects the likelihood of conviction.” Walbert, *supra*, at 547 (noting that “the Court’s conclusion that both [six- and twelve-member] juries would return the same verdict is

erroneous”). More specifically, researchers report that “the probability of an innocent person’s being convicted increases . . . as the jury size decreases.” Nagel & Neef, *supra*, at 975; see *Brown v. Louisiana*, 447 U.S. 323, 332 (1980) (“[A] decline in jury size leads to less accurate factfinding and a greater risk of convicting an innocent person.”); cf. Angelo C. Valenti & Leslie L. Downing, *Differential Effects of Jury Size on Verdicts Following Deliberation as a Function of the Apparent Guilt of a Defendant*, 32 J. Pers. & Soc. Psych. 655, 662 (1975). And although “smaller juries may result in certain economies, by reducing the odds of a hung jury it may do so at the defendant’s expense.” Norbert L. Kerr & Robert J. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation*, 48 J. Pers. & Soc. Psych. 349, 360 (1985); see *Ballew*, 435 U.S. at 236 (noting that “the number of hung juries would diminish as the panels decreased in size”). As this Court has recognized, criminal verdicts “vary as juries become smaller, and . . . the variance amounts to an imbalance to the detriment of one side, the defense.” *Id.*

* * *

In sum, the central premises undergirding *Williams* were unsupported originally—and have been further undermined by later legal and factual developments. This Court should reject *Williams*’s anomalous holding. Doing so will restore coherence to this Court’s Sixth Amendment jurisprudence and protect the “sacred bulwark” of the jury.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of Florida's Fourth District Court of Appeal.

Respectfully submitted,

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