No. 21-

IN THE

Supreme Court of the United States

RAMIN KHORRAMI,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN L. COLEMAN
BENJAMIN L. COLEMAN LAW PC
1350 Columbia St., Ste 600
San Diego, CA 92101

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real, Ste 400
Palo Alto, CA 94306

ELEANOR DAVIS
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
EDWARD C. O'CALLAGHAN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ETHAN A. SACHS
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State St.
Boston, MA 02109

QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments guarantee the right to a trial by a 12-person jury when the defendant is charged with a felony.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Mr. Ramin Khorrami respectfully petitions for a writ of certiorari to review the judgment in this case of the Arizona Court of Appeals.

INTRODUCTION

How many members must a jury have when a criminal defendant is charged with a felony? For hundreds of years—from the signing of Magna Carta until the late twentieth century—the answer was the same: "[N]o person could be found guilty of a serious crime unless 'the truth of every accusation … should … be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" *Ramos* v. *Louisiana*, 140 S. Ct.

1390, 1395 (2020). "A verdict, taken from eleven, was no verdict at all." *Id.* (quotation marks omitted).

By any historical metric, the traditional 12-person jury requirement falls within "what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption." *Ramos*, 140 S. Ct. at 1395. It was recognized by "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward." *Id.* This Court has stated that because the 12-person requirement has been accepted since 1215, "[i]t *must*" have been "that the word 'jury'" in the Sixth Amendment was "placed in the constitution of the United States with reference to [that] meaning affixed to [it]." *Thompson* v. *Utah*, 170 U.S. 343, 349-350 (1898) (emphasis added).

This Court, however, took a wrong turn when it held, in *Williams* v. *Florida*, 399 U.S. 78, 86 (1970), that juries as small as six were constitutionally permissible. *Williams* accorded no weight to the historical record, acknowledging that the Framers "may well" have had "the usual expectation" in drafting the Sixth Amendment "that the jury would consist of 12" members. *Id.* at 98-99. Instead, *Williams* rested on its view that the essential "function" of a jury is decision-making made with "community participation and [with] shared responsibility"—a function it thought empirical research suggested could be as easily performed with six jurors as with 12. *Id.* at 100-102 & n.48. As a result, a half-dozen States—including Arizona—currently permit criminal juries as small as eight or six members, even though this Court subsequently recognized that the empirical studies that formed the basis for *Williams*'s holding were badly flawed. *Ballew* v. *Georgia*, 435 U.S. 223, 232-237 (1978); *see also* ABA, *Principles for Juries and Jury Trials* Principle 3 cmt., at 18 (rev. 2016) ("The

shortcomings of [the] studies [relied upon in *Williams*] have been demonstrated by subsequent scholarly analysis").[1]

The time has come for this Court to discard the ahistorical and unfounded *Williams* rule, just as *Ramos* overturned a similar decision from the same era that permitted a defendant to be convicted of a serious crime by a nonunanimous jury. Indeed, *Ramos*'s reasoning has already effectively overruled *Williams*, as the *Ramos* decision rejected precisely "the same fundamental mode of analysis" as that adopted in *Williams*. *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

In any event, this Court should now formally discard *Williams*. Its reasoning is egregiously wrong, as it disregards history in favor of now-discredited empirical research. *Williams*'s holding has had real-world negative consequences: It increases the odds of an erroneous conviction and decreases the representative nature of the juries in the six affected States. Any "reliance interest" those six States might claim in having to "retry a slice of their prior criminal cases … cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Ramos*, 140 S. Ct. at 1408 (plurality op.); *id.* at 1419 (Kavanaugh, J., concurring in part) (invalidating "limited class" of convictions that violate Sixth Amendment is a "'small price to pay for the uprooting of this weed'").

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[1] The six States that allow for felony convictions to be issued by juries containing fewer than 12 members are: Arizona, *see* A.R.S. § 21-102; Connecticut, *see* Conn. Gen. Stat. § 54-82; Florida, *see* Fla. R. Crim. Proc. § 3.270; Indiana, *see* Ind. Code § 35-37-1-1(b)(2); Massachusetts, *see* Mass. Gen. Laws, ch. 218, § 26A; and Utah, *see* Utah Code § 78B-1-104.

The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The Arizona Supreme Court's order denying Mr. Khorrami's petition for review, App. 1a, is unreported. The Arizona Court of Appeals' opinion, App. 3a-21a, is unreported but is available at 2021 WL 3197499. The Superior Court of Arizona's judgment is unreported, App. 23a-31a.

JURISDICTION

The Arizona Supreme Court denied Mr. Khorrami's petition for review on February 8, 2022. On March 25, 2022, Justice Kagan extended the time for filing this petition until June 8, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]"

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or proper-

ty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Arizona Revised Statute § 21-102.A-B provides:

"A. A jury for trial of a criminal case in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons, and the concurrence of all shall be necessary to render a verdict.

B. A jury for trial in any court of record of any other criminal case shall consist of eight persons, and the concurrence of all shall be necessary to render a verdict."

STATEMENT

In May 2012, Mr. Khorrami—a U.S. citizen and management consultant living in Los Angeles—began a romantic relationship with a woman living in Arizona. App. 4a. The woman, who "frequently traveled to spend time with [Mr.] Khorrami," later told him that she was married but "planned to leave" her husband, and "discussed a future together" with Mr. Khorrami. *Id.*; C.A. Opening Br. 3.

Their relationship, however, soured, and in 2013, "after … [a] falling-out, [Mr.] Khorrami accused [the woman] of repeatedly lying to him and … threatened to reveal their affair to" her husband. App. 4a-5a. Despite conflicting text messages, the woman maintained that Mr. Khorrami told her that he would not reveal the affair if she paid him $30,000—even though, under the prosecution's theory, Mr. Khorrami "always intended" to ultimately tell the woman's husband about the affair. App. 5a, 15a; C.A. Opening Br. 5, 7-8. Mr. Khorrami was charged with, *inter alia*, two Arizona felonies,

fraudulent schemes and artifices (A.R.S. § 13-2310) and theft by material misrepresentation (A.R.S. § 13-1802.A(3)). App. 6a.

In May 2019, Mr. Khorrami was tried in front of an eight-person jury in Maricopa County Superior Court and was convicted on both counts. App. 24a; C.A. Opening Br. 2. Mr. Khorrami appealed, arguing (among other things) that Arizona law—which provides that juries in criminal cases where the maximum sentence is less than thirty years "shall consist of eight jurors"—violated his Sixth and Fourteenth Amendment right to a 12-person jury. App. 19a-20a; A.R.S. 21-102.B. Mr. Khorrami advanced arguments under both the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses. *See* C.A. Opening Br. 50-56; C.A. Reply Br. 26-27.[2]

The Arizona Court of Appeals rejected Mr. Khorrami's constitutional arguments. App. 20a. The court considered itself bound by this Court's ruling in *Williams* v. *Florida*, 399 U.S. 78 (1970), which held that a 12-person jury "is not a necessary ingredient of [the Sixth Amendment's] 'trial by jury.'" App. 20a. In the Court of Appeals' view, *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), did not change this analysis, as it involved "unanimous verdicts in criminal trials" and "the Supreme Court 'does not normally overturn … earlier authority *sub silentio*.'" App. 20a. Accordingly, the

[2] Although Mr. Khorrami did not raise the 12-person jury argument in the trial court, the Arizona Court of Appeals concluded that the issue was preserved as a matter of state law and considered it on the merits. App. 19a-20a; *see also State* v. *Kuck*, 129 P.3d 954, 955 (Ariz. Ct. App. 2006) ("Improper denial of a twelve-person jury is fundamental error that may provide a basis for review if not raised in the trial court.").

Court of Appeals "decline[d Mr.] Khorrami's invitation to reconsider the constitutionality of eight-person juries in Arizona." *Id.*

Mr. Khorrami filed a petition for review with the Arizona Supreme Court on the 12-person jury question, which was denied without opinion. App. 1a.

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S CASE LAW AND RELIES ON PRECEDENT WHOSE REASONING HAS BEEN CONCLUSIVELY REJECTED

A. The Court of Appeals' Decision Cannot Be Squared With *Ramos*

1. *Ramos* Established That The Scope Of The Sixth Amendment Jury Trial Right Is Determined By Analyzing The "Original Public Meaning" Of The Right

Two years ago, this Court held that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious crime. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020). Because the text of the Sixth Amendment "says nothing … about what 'a trial by an impartial jury' entails," the Court's analysis focused on "what the term … meant at the time of the Sixth Amendment's adoption." *Id.* at 1395-1396; *see also Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1556 (2021) (acknowledging that "*Ramos* … adhered to the original meaning of the Sixth Amendment's right to a jury trial").

To determine the "original public meaning" of the jury right, this Court consulted "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward." *Ramos*, 140 S. Ct. at

1395-1396. All those authorities pointed to the same "unmistakable" "answer"—the phrase "trial by … jury" referred to a *unanimous* jury at the time the Sixth Amendment was enacted. *Id.*

Ramos also placed importance on the fact that this Court had "repeatedly and over many years[] recognized that the Sixth Amendment requires unanimity." 140 S. Ct. at 1396-1397 & nn.19-20 (citing *Thompson* v. *Utah*, 170 U.S. 343, 351 (1898); *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900); *Patton* v. *United States*, 281 U.S. 276, 288 (1930)). The only detour from the Court's adherence to this "simple" and "straightforward principle[]" arose in the 1970s, when *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), was issued and the Court's jurisprudence "took a strange turn," *Ramos*, 140 S. Ct. at 1397.

The *Apodaca* plurality erred, *Ramos* explained, by "subject[ing] the Constitution's jury trial right to an incomplete functionalist analysis of its own creation" rather than "grappling with the historical meaning of the Sixth Amendment's jury trial right." 140 S. Ct. at 1405. Specifically, the *Apodaca* plurality "declared that the real question before them was whether unanimity serves an important 'function' in 'contemporary society'" and quickly concluded that "unanimity's costs outweigh its benefits in the modern era." *Id.* at 1398. Not only was this "breezy cost-benefit analysis" "skimpy" in its reasoning, but it also "overlook[ed] the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict." *Id.* at 1401-1402. In other words, it is "not [the] role [of judges] to reassess whether" a right "enshrine[d] … in the Constitution" is "'important enough' to retain." *Id.* at 1402.

A majority of the Court accordingly held that *Apodaca*'s logic was indefensible and not entitled to the protection of *stare decisis*. *See Ramos*, 140 S. Ct. at 1405; *id.* at 1410 (Sotomayor, J., concurring) ("Today, [*Apodaca* is] rightly[] relegated to the dustbin of history."); *id.* at 1420 (Kavanaugh, J., concurring in part) ("I … agree with this Court's decision to overrule *Apodaca*."); *see also id.* at 1425 (Thomas, J., concurring) (taking the position that *Apodaca* "does not bind us" because it did not address the scope of the Sixth Amendment when viewed in light of the Fourteenth Amendment's Privileges or Immunities Clause).

2. The Original Public Meaning Of "Trial By An Impartial Jury" Included A Right To A 12-Person Jury

Just as in *Ramos*, "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward" all point to the same "unmistakable" "answer" here: The phrase "trial by an impartial jury" referred to a 12-person jury at the time the Sixth Amendment was enacted. *Ramos*, 140 S. Ct. at 1396; *see also* ABA, *Principles for Juries and Jury Trials* Principle 3 cmt., at 18, 21 (rev. 2016) ("colonial and federal constitutional considerations [as well as] long historical experience" support requiring a "twelve-person jury in all non-petty criminal cases").

The 12-member requirement dates back nearly 900 years to the reign of King Henry II, who "established twelve as the usual number" for a jury. Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 295, 295 (1892). In the early 13th century, this rule was incorporated into Magna Carta. When the document "declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it

[too] referred to a trial by twelve jurors." *Thompson*, 170 U.S. at 349. And "[b]y the middle of the fourteenth century[,] the requirement of twelve had probably become definitely fixed" and had "c[o]me to be regarded with something like superstitious reverence." Scott, *Fundamentals of Procedure in Actions at Law* 75-76 (1922). Indeed, in 1769, Blackstone explained that "no person could be found guilty of a serious crime unless 'the truth of every accusation … [was] … confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" *Ramos*, 140 S. Ct. at 1395 (quoting 4 Blackstone, *Commentaries on the Laws of England* 343 (1769)). In short, a "'verdict, taken from eleven, was no verdict' at all." *Id.* (quoting Thayer, *A Preliminary Treatise on Evidence at the Common Law* 88-89 n.4 (1898)).

When considered in light of this history, "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*, 176 U.S. at 586.[3] In particular, in the first few decades after the Sixth Amendment was enacted, a bevy of state courts interpreted the phrase "trial by an impartial jury" to require a 12-person jury. *See, e.g.*, Miller, *Six Of One Is Not A Dozen Of The Other*, 146 U. Pa. L. Rev. 621, 643 & n.133 (1998) (collecting cases). In 1794, for instance, a South Carolina court interpreted the jury right enshrined in the state constitution as requiring the "rights of the citizens … to be determined … by 12 men

[3] *Maxwell*, along with several other of this Court's pre-1970 decisions concerning the contours of a jury trial, were abrogated by the Court's decision in *Williams* v. *Florida*, 399 U.S. 78 (1970). As discussed below, however, *Williams* was effectively overruled by *Ramos* and—if for some reason it was not—it should be now. *Infra* pp. 15-27.

… indiscriminately drawn from every class of their fellow citizens." *Zylstra* v. *Corporation of City of Charleston*, 1 S.C.L. 382, 389 (1794). Six years later, a North Carolina court explained that the same phrase (which also appears in the North Carolina constitution) referred to the "ancient mode" of a trial, in which a jury must contain 12 members—no more and no less. *Whitehurst* v. *Davis*, 3 N.C. 113, 113 (1800) (per curiam) ("Any innovation amounting in the least degree to a departure from this ancient mode … may … endanger or pervert this excellent institution from its usual course."). And in the following years, the Supreme Courts of Pennsylvania, Alabama, and Georgia interpreted similar language in their own constitutions to require 12-person juries. *See Emerick* v. *Harris*, 1 Binn. 416, 426 (1808); *Foote* v. *Lawrence*, 1 Stew. 483, 483 (Ala. 1828); *Rouse* v. *State*, 4 Ga. 136, 147 (1848).

The same understanding held among state high courts throughout the rest of the 19th century. For example:

- The Ohio Supreme Court wrote in 1853 that its state constitutional provision protecting "[t]he right of trial by jury" required that "[t]he number [of jurors] must be twelve," explaining that "diminishing the number impairs [the jury trial] right, lessens the security of the accused, and increases the danger of conviction." *Work* v. *State*, 2 Ohio St. 296, 304-305 (1853).
- The New York Court of Appeals warned in 1858 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" "in refence to criminal cases, upon the ancient and invaluable institution of trial by jury, and the consti-

tution … establishing and securing that mode of trial." *Cancemi* v. *People*, 18 N.Y. 128, 138 (1858).

- The Supreme Court of Missouri held in 1860 that the Missouri Constitution, which "adopted" the "term 'trial by jury'" from "the common law," referred to a trial "of twelve men." *Vaughn* v. *Scade*, 30 Mo. 600, 603-604 (1860).
- Also in 1860, the Supreme Court of New Hampshire ruled that its state's legislature could not allow for juries of fewer than 12 because "[t]he term[] … 'trial by jury' [is], and for ages ha[s] been well known in the language of the law"—and was thus "used at the adoption of the constitution"—to refer to "a body of twelve men." *Opinion of Justices*, 41 N.H. 550, 551 (1860).

Numerous scholars in the 18th and 19th centuries came to the same conclusion. For example, James Wilson—considered by some "the second most important framer of the Constitution," Mosvick, *Forgotten Founders, James Wilson, Craftsman of the Consitution*, The National Constitution Center (July 13, 2020)[4]—explained shortly after the Sixth Amendment was drafted that "[t]o the conviction of a crime, the undoubting and unanimous sentiment of the *twelve jurors* is of indispensable necessity," 2 Wilson, *The Works of the Honourable James Wilson* 350 (1804) (emphasis added). That view was echoed by Justice Joseph Story's *Commentaries on the Constitution*, which explained that "trial by jury is generally understood to mean … a trial by a jury of *twelve* men, impartially selected[.]" 1 Story, *Commentaries on the Constitution*

[4] *Available at* https://constitutioncenter.org/blog/forgotten-founders-james-wilson-craftsman-of-the-constitution.

of the United States § 1779, at 541 n.2 (4th ed. 1873). Other treatises from that era agreed, explaining that (1) "in a case in which the Constitution guarantees a jury trial," a statute allowing "a verdict upon any thing short of the unanimous consent of the *twelve jurors*" is "void" and (2) "a trial by jury is understood to mean—generally—a trial by a jury of *twelve* men." 1 Bishop, *Commentaries on the Law of Criminal Procedure* § 897, at 546 (2d ed. 1872) (emphasis added); Tiffany, *A Treatise on Government and Constitutional Law* § 549, at 367 (1867) (emphasis added).

This Court, too, has "repeatedly and over many years[]," *Ramos*, 140 S. Ct. at 1396, recognized that the Sixth Amendment requires a 12-member jury—and in many of the same cases that *Ramos* relied upon to show the consensus over the unanimous jury requirement. The Court first addressed the 12-person requirement in 1898, when it overturned a conviction issued by an eight-person jury in Utah. *Thompson*, 170 U.S. at 349. The Court explained that "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." *Id.* *Thompson* reached this conclusion by relying on the Amendment's original public meaning, determining that "the words 'trial by jury' were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument." *Id.* at 350.

In the years following *Thompson*, this Court noted the 12-person requirement again and again. For example, just one year later, the Court said that "'[t]rial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is … a

trial by a jury of 12 men." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13 (1899). And again in 1900, the Court stated that "there can be no doubt" "[t]hat a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment." *Maxwell*, 176 U.S. at 586; *see also Rassmussen* v. *United States*, 197 U.S. 516, 527 (1905) (reciting *Thompson*'s holding that the Sixth Amendment guarantees "the right to be tried by a jury of twelve persons").

As the twentieth century rolled on, this Court's statements about the 12-person jury right became even more unqualified. By 1930, this Court stated that it was "not open to question" "[t]hat … 'trial by jury'" "mean[t] a trial by jury as understood and applied at common law," including the element "[t]hat the jury should consist of twelve men, neither more nor less," *Patton*, 281 U.S. at 288. And in 1968, this Court emphasized that "the right to trial by jury guaranteed by the Sixth Amendment … is fundamental to the American scheme of justice" and quoted Blackstone for the proposition that "'the truth of every accusation … should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'" *Duncan* v. *Louisiana*, 391 U.S. 145, 149-152, 155 & n.23 (1968) (quoting 4 Blackstone, *Commentaries on the Laws of England* 343).

In sum, the same considerations this Court identified in *Ramos* as establishing that the Sixth Amendment requires a unanimous jury verdict also require a 12-person jury. Indeed, after reviewing many of the sources discussed above, *Ramos* itself approvingly quoted *Thompson*'s holding 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.'" 140 S. Ct. at 1396-1397 (quoting 170 U.S. at 351).

B. *Williams*'s Holding That A Six-Person Jury Is Constitutionally Permissible Either Was Effectively Overruled By *Ramos* Or Is Non-Binding Under The Privileges or Immunities Clause

The Court of Appeals' only stated reason for disregarding the history and precedent supporting a 12-person jury requirement was that it was bound by this Court's holding in *Williams* v. *Florida*, 399 U.S. 78 (1970). *See* App. 20a. While the decision below was understandable, this Court is not bound by *Williams*, for two reasons.

1. This Court's ruling in *Ramos* "repudiated the reasoning on which" the Court of Appeals relied in *Williams*, meaning that *Williams* "must be regarded as retaining no vitality." *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1697 (2019); *see also South Carolina* v. *Baker*, 485 U.S. 505, 524 (1988) (confirming "that subsequent case law has overruled the holding" in prior decision); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U.S. 648, 664 n.16 (1981) (similar).[5]

[5] Notably, the only other two courts to address the issue—even in passing—have cast doubt on *Williams*'s continuing viability after *Ramos*. *See Wofford* v. *Woods*, 969 F.3d 685, 707 n.27 (6th Cir. 2020) (noting that "*Williams* may no longer be completely sound after *Ramos*"), *cert. denied*, 141 S. Ct. 1745 (2021); *Phillips* v. *State*, 316 So.3d 779, 788 (Fla. Dist. Ct. App. 2021) (Makar, J., concurring) ("It seems a small step from the demise of the reasoning in *Apodaca* … as announced in *Ramos* to conclude that the reasoning in *Williams*, upon which [*Apodaca*] relied, is also in jeopardy."), *cert. denied*, 142 S. Ct. 721 (2021). Of the two cases, only the defendant in *Phillips* raised the *Ramos*/*Williams* issue in

Williams cannot stand in light of *Ramos*'s holding that the Sixth Amendment's scope is determined by its original public meaning. The *Williams* Court openly acknowledged that the Framers "may well" have had "the usual expectation" in drafting the Sixth Amendment "that the jury would consist of 12" members. 399 U.S. at 98-99. But *Williams* took the view that such "purely historical considerations" were not dispositive. *Id.* at 99. Rather, the Court focused on the "function" that the jury plays in the Constitution. *Id.* at 100-101. It concluded that "the essential feature" of a jury is that it leaves justice to the "commonsense judgment of a group of laymen" and thus allows "guilt or innocence" to be determined via "community participation and [with] shared responsibility." *Id.* With this understanding of the jury right in mind, the *Williams* Court concluded that "[w]hat few experiments have occurred—usually in the civil area" "suggest[ed]" that that function could just as easily be performed with six jurors as with twelve. *Id.* at 101-102 & n.48.

As Justice Harlan explained at the time, this reading "stripp[ed] off the livery of history from the jury trial" and ignored both "the intent of the Framers" and the Court's long held understanding that constitutional "provisions are framed in the language of the English common law, and … read in light of its history." *Baldwin* v. *New York*, 399 U.S. 117, 122-123 (1970) (Harlan, J., concurring in the result in *Williams).* And three times during that same decade, this Court reaffirmed

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his petition to this Court. This Court likely denied review because that question had not been preserved below. *See Phillips*, 316 So.3d at 786-787 (noting that defendant's argument turned on the "statutory interpretation of the phrase 'capital cases'" under state law—an "entirely separate issue from" the "constitutional issue" of the jury size required by the Sixth and Fourteenth Amendments).

that *Williams* had "departed from the strictly historical requirements of jury trial." *Burch* v. *Louisiana*, 441 U.S. 130, 137 (1979); *accord Ballew* v. *Georgia*, 435 U.S. 223, 229 (1978) ("[C]ommon-law juries included 12 members."); *Apodaca*, 406 U.S. at 407-408 ("[T]he requirement that juries consist of 12 men … arose during the Middle Ages and had become an accepted feature of the common law jury by the 18th century.").

More broadly, in overruling *Apodaca*, *Ramos* rejected the "same fundamental mode of analysis as that in *Williams*." *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting). *Apodaca* expressly recognized that *Williams* "consider[ed] a related issue" and used *Williams* as a lodestone for its reasoning. *Apocada*, 406 U.S. at 406-414; *accord Ramos*, 140 S. Ct. at 1433 (noting that *Apodaca* "built on the analysis in *Williams*"). All told, the *Apodaca* plurality cited *Williams* 11 times in a seven-page opinion, including to (1) "cast[] … doubt on the … assumption … that if a given feature existed in a jury at common law in 1789, it was necessarily preserved in the Constitution," (2) conclude that "[o]ur inquiry [in determining the scope of the Sixth Amendment] must focus on the function served by the jury in contemporary society," and (3) hold that the only "'essential feature of a jury'" guaranteed by the Sixth Amendment is that it must "consist[] of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate[.]" 406 U.S. at 408-410 (quoting *Williams*, 399 U.S. at 92-93, 99-100). *Ramos* repudiated precisely this *Williams*-inspired reasoning as an improperly "muddy yardstick" for safeguarding "the right to jury trial" that the "American people chose to enshrine … in the Constitution." 140 S. Ct. at 1401-1402 (majority op.).

Accordingly, *Ramos*'s decision to "reject [the plurality] opinion in *Apodaca*" and hold that "the Fourteenth Amendment incorporates the Sixth Amendment right to a unanimous jury against the States," *Vannoy*, 141 S. Ct. at 1554, had the necessary result of effectively overruling *Williams* as well. And because "*Ramos* is the law," it should be "give[n] … all the consequence it deserves." *Id.* at 1573 n.1 (Kagan, J., dissenting); *see Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2267-2268 (2020) (Alito J., concurring) ("I lost, and *Ramos* is now precedent.").

2. At a minimum, *Williams*—which considered only the Fourteenth Amendment's Due Process Clause—does not impede this Court from recognizing a right to a 12-person jury under the Privileges or Immunities Clause. As Justice Thomas explained in an analogous situation when concurring in the judgment in *Ramos*: (1) this Court's "decisions have long recognized [that a 12-person jury] is required," (2) "[t]here is … considerable evidence that this understanding persisted up to the time of the Fourteenth Amendment," and (3) the only contrary ruling (here, *Williams*) was decided under the Due Process Clause. *Ramos*, 140 S. Ct. at 1421-1425. Thus, even if *Williams* remained good law under the Due Process Clause, it has no bearing on whether "the Privileges or Immunities clause" "protect[s]" the right to a 12-person jury "against the States." *Id.* at 1423. And because all other evidence beyond *Williams* suggests that the Sixth Amendment imposes a 12-member jury requirement, *see supra* pp. 7-15, this Court should hold that this right has been extended against the States, if not under the Due Process Clause, then under the Privileges or Immunities Clause.

C. To The Extent *Williams* Is Binding On The 12-Member Jury Issue, This Court Should Formally Overrule It

"[T]he force of *stare decisis* is at its nadir" in cases like this one—i.e., those "concerning [criminal] procedur[e] rules that implicate fundamental constitutional protection." *Alleyne* v. *United States*, 570 U.S. 99, 116 n.5 (2013). *Stare decisis*'s "role is … reduced … in the case of a [criminal] procedural rule" because such rules "do[] not serve as … guide[s] to lawful behavior." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). Moreover, because this Court's interpretation of the Constitution "can only be altered by constitutional amendment or by overruling … prior decisions," *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997), the strength of *stare decisis* considerations is "reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution." *Gaudin*, 515 U.S. at 521.

With this threshold point in mind, this Court's *stare decisis* analysis considers a variety of factors that "fold into three broad considerations": (1) whether the precedent is "egregiously wrong as a matter of law," taking into account "the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors"; (2) whether "the prior decision caused significant negative jurisprudential or real-world consequences"; and (3) whether "overruling the prior decision [would] unduly upset reliance interests." *Ramos*, 140 S. Ct. at 1414-1415 (Kavanaugh, J., concurring in part); *see also Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019) (laying out similar factors). Each consideration suggests that *Williams* should be overruled.

1. *Williams* Is Egregiously Wrong

As explained above, *Williams* is flawed for the same reason *Apodaca* was. *See supra* p. 17. That is, the *Williams* Court spent little time "grappling with the historical meaning of the Sixth's Amendment's jury trial right [or] this Court's long-repeated statements that it demands [a jury of 12 members]" and "[i]nstead … subjected the Constitution's jury trial right to an incomplete functionalist analysis of its own creation." *Ramos*, 140 S. Ct. at 1405. This error in approach was "not just wrong"—it was "egregiously wrong." *Id.* at 1414-1416 (Kavanaugh, J., concurring in part).

At the date of its issuance, *Williams* (like *Apodaca*) was "already an outlier in the Court's jurisprudence," *Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part), as it was plainly inconsistent with centuries of related decisions and history. It contradicted ancient common law guarantees and hundreds of years of precedent from state high courts and this Court alike. *See supra* pp. 9-15. In 1900—seventy years before *Williams* was decided—this Court already expressed "no doubt" that "the Sixth Amendment" "intended" "a jury composed … of twelve jurors." *Maxwell*, 176 U.S. at 586. And within a decade after *Williams* issued, three other decisions from this Court recognized that it had departed from the traditional historical understanding of the jury trial right. *See supra* pp. 16-17.

As explained, *Williams*'s reasoning and holding have also been fatally undercut by *Ramos*. *See supra* pp. 17-18. To give one additional example, *Ramos* demolished *Williams*'s brief attempt at historical analysis. Specifically, *Williams* placed weight on the fact that, in enacting the Sixth Amendment, the Senate chose not to include language that had been proposed

by James Madison to clarify that "trial by jury" included the "requisite of unanimity for conviction, of the right to challenge, and other accustomed requisites." 399 U.S. at 94 (quoting 1 Annals of Cong. 435 (1789)). That omission suggested to the *Williams* Court that the Sixth Amendment was not intended to include a jury's "accustomed requisites," such as the common law practice of including 12 members. *Id.* at 95-97. *Ramos*, however, explicitly rejected this precise argument, albeit in considering unanimity. 140 S. Ct. at 1400 (noting that the "snippet of drafting history could just as easily support the … inference" that the language was deleted because it was "so plainly included in the promise of a 'trial by an impartial jury'").

Even taking the *Williams* functionalist approach as valid, the decision suffers from another significant flaw: It was based on "suggest[ions]" from a "few experiments" that were undermined shortly after the opinion issued. 399 U.S. at 101. Specifically, the *Williams* Court "f[ou]nd little reason to think" that the goals and traditional function of the jury—including, among others, "to provide a fair possibility for obtaining a representative[] cross-section of the community"—"are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12." *Id.* at 100. The Court theorized that "in practice the differences between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible." *Id.* at 102.

Empirical research issued shortly after *Williams* undermined this speculation, as this Court recognized eight years later in *Ballew*. *See* 435 U.S. at 232-237. *Ballew*, which concluded that the Sixth Amendment barred the use of a *five*-person jury, noted that post-*Williams* research showed that (1) "smaller juries are

less likely to foster effective group deliberation[s]," *id.* at 232; (2) smaller juries may be less accurate and cause "increasing inconsistency" in verdict results, *id.* at 234; (3) the chance for hung juries decreases with smaller juries, disproportionally harming the defendant, *id.* at 236; and (4) decreasing jury sizes "foretell[] problems … for the representation of minority groups in the community," undermining a jury's likelihood of being "'truly representative of the community,'" *id.* at 236-237. Moreover, the *Ballew* Court "admit[ted]" that it "d[id] not pretend to discern a clear line between six members and five," effectively concluding that the studies it relied on also cast doubt on the effectiveness of the six-member jury. *Id.* at 239; *see also id.* at 245-246 (Powell, J., concurring) (observing that "the line between five- and six- member juries is difficult to justify"). Although *Ballew* declined to overrule *Williams* outright, the bench, bar, and scholars have all recognized that it cast serious doubt on the strength of *Williams*'s reasoning. As the American Bar Association summarized, *Ballew* "acknowledged the empirical findings pointing to the superiority of twelve member juries … when it concluded that juries of fewer than six are unconstitutional." ABA, *Principles for Juries and Jury Trials* Principle 3 cmt., at 18.[6]

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[6] *See also State* v. *Hamm*, 423 N.W.2d 379, 382 n.2 (Minn. 1988) (noting that *Ballew*'s "acknowledg[ement] of the substantial threat to the right to a jury trial posed by smaller juries" makes "an excellent argument that could be used to support a 12-person jury" and "declin[ing] to follow" *Williams* when interpreting state constitution); *Opinion of Justices*, 431 A.2d 135, 136 (N.H. 1981) ("Although … *Ballew* expressed these concerns [regarding decreases in jury size] in the context of a decision regarding a further reduction of criminal trial juries from six to five, we note these problems may also arise in the context of reducing the size of juries in civil cases from twelve to six."); Smith & Saks, *The Case*

Research post-dating *Ballew* further undermines *Williams*'s view that a small jury can provide a representative cross-section of the community. Current empirical evidence indicates that "reducing jury size *inevitably* has a drastic effect on the representation of minority group members on the jury." Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. of Empirical Legal Stud. 425, 427 (Sept. 2009); *see also* Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (Summer 2020) ("Larger juries are also more inclusive and more representative of the community. … In reality, cutting the size of the jury dramatically increases the chance of excluding minorities."). Because "the 12-member jury produces significantly greater heterogeneity than does the six-member jury," Diamond et al., *Achieving Diversity*, 6 J. of Empirical Legal Stud. at 425, 449, it increases "the opportunity for meaningful and appropriate representation" and helps ensure that juries "represent adequately a cross-section of the community." *Ballew*, 435 U.S. at 237.

Other important considerations also weigh in favor of the 12-member jury. For instance, studies indicate that 12-member juries deliberate longer, recall evidence better, and are less likely to rely on irrelevant

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For Overturning Williams *v.* Florida *And The Six-Person Jury*, 60 Fla. L. Rev. 441, 441 (2008) (arguing that *Ballew* rendered *Williams* "a dead letter" because "the [*Ballew*] Court implicitly abandoned" *Williams*'s functionalist reasoning); Frampton, *The Uneven Bulwark: How (And Why) Criminal Jury Trial Rates Vary By State*, 100 Cal. Law. Rev. 183, 218 (2012) ("When the Court declined to extend *Williams* in 1978 … it persuasively articulated many of the reasons why juries with less than twelve jurors significantly disadvantage criminal defendants.").

factors during deliberation. *See* Smith & Saks, *The Case for Overturning* Williams *v.* Florida *and the Six-Person Jury*, 60 Fla. L. Rev. at 465. Minority views are also more likely to be considered in a larger jury, as "having a large minority helps make the minority subgroup more influential," and, unsurprisingly, "the chance of minority members having allies is greater on a twelve-person jury." *Id.* at 466. And larger juries deliver more predictable results. In the civil context, for example, "[s]ix person-juries are four times more likely to return extremely high or low damage awards compared to the average." Higginbotham, 104 Judicature at 52.[7]

In sum, whether *Williams*'s reasoning is analyzed under the historical test laid out in *Ramos* or under the functionalist test that *Williams* itself created, it is egregiously, incontrovertibly wrong.

2. *Williams* Has Caused Significant Negative Jurisprudential And Real-World Consequences

Decisions following *Williams* have illustrated the jurisprudential difficulties it created: in *Ballew*, a split Court struggled to apply the functionalist approach, with multiple members acknowledging that the line being drawn had little foundation in law or fact. *See su-*

[7] In addition, "subsequent research" has disproven the *Williams* Court's theory that smaller juries have significant cost and efficiency benefits. ABA, *Principles for Juries and Jury Trials* Principle 3 cmt., at 20. At best, "six person juries are only minimally more efficient or cheaper than twelve person juries" and "[o]verall, little court time is saved by reducing jury size." *Id.*

pra pp. 21-22. And, of course, this Court fundamentally rejected its approach in *Ramos*. *See supra* pp. 8-9.[8]

Jurisprudential conflict aside, the *Williams* Court's conclusion that a six-member jury is no different than a 12-member jury has "caused significant negative … real-world consequences." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). As noted above, juries of less than 12 are less likely to include members of minority groups, spend less time deliberating, recall less evidence, are more likely to rely on irrelevant factors, are less likely to consider minority viewpoints, and are less predictable than 12-member juries. *See supra* pp. 23-24. *Williams* thus permits "the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule," a drastic "consequence [that] has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent." 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) (citing *Malloy* v. *Hogan*, 378 U.S. 1 (1964)).

Even beyond the individual defendants affected by the *Williams* rule, permitting 6- or 8-person juries in felony cases does real harm to public perception of the jury as a legitimate, representative body. As this

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[8] *Williams* is also an outlier in the sense that it decreased the likelihood that a given jury will adequately represent a cross-section of the community. In contrast, other seminal decisions have made it more likely that the "jury [will be] selected from a cross section of the entire community." *Ramos*, 140 S. Ct. at 1402 n.47 (majority op.); *see also*, *e.g.*, *Taylor* v. *Louisiana*, 419 U.S. 522, 527, 531 (1975) (noting that "[t]o exclude racial groups from jury service [is] 'at war with our basic concepts of a democratic society and a representative government '" and that "the fair-cross-section requirement is violated by the systematic exclusion of women").

Court has explained, "[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government," and, to fulfill that function, the jury must "be a body *truly representative* of the community." *Taylor* v. *Louisiana*, 419 U.S. 522, 527 (1975) (emphasis added and quotation marks omitted). The *Williams* rule increases the odds that in the six States that continue to permit juries of less than 12, the jury will not include a true cross-section of the community—and that the members who do belong to a racial, religious, or cultural minority will be given less of an opportunity to express their views. Put slightly differently, *Williams* threatens the vitality of one of the "most essential" constitutional protections, *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring): America's "deep commitment … to the right of a jury trial … as a defense against arbitrary law enforcement," *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 515-516 (1974) (quotation marks omitted).

3. Any Reliance On *Williams* Is Limited And Outweighed By The Importance Of The Sixth Amendment Right

Much like in *Ramos*, overruling *Williams* would not implicate the kind of "prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke." 140 S. Ct. at 1406. Nor can Arizona reasonably argue that juries with less than 12 members "have 'become part of our national culture,'" as 12-member juries are required for felony trials in 44 States and federal court. *Id.* And while the six States that permit smaller juries in criminal cases may well have to retry some cases that are pending on direct appeal, "new rules of criminal procedures … often affect[]

significant numbers of pending cases across the … country." *Id.*

At the same time, allowing *Williams* to remain in place harms "the most important" "reliance interest[]"—that "of the American people" "in the preservation of our constitutionally promised liberties." *Ramos*, 140 S. Ct. at 1408 (plurality op.). That a few States might have "to retry a slice of their prior criminal cases … cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Id.*; *accord* 140 S. Ct. at 1419 (Kavanaugh, J., concurring in part); *see also Vannoy*, 141 S. Ct. at 1575 (Kagan, J., dissenting) (recognizing "the need to ensure" that the Sixth Amendment "keep[s] with the Nation's oldest traditions" so that defendants are provided "fair and dependable adjudications of [their] guilt"). Indeed, there does not appear to be a single "case in which a one-time need to retry defendants has *ever* been sufficient to inter a constitutional right forever." *Ramos*, 140 S. Ct. at 1408. The *Williams* rule should not be the first.

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"This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice.'" *Ramos*, 140 S. Ct. at 1397 (quoting *Duncan*, 391 U.S. at 149). That right is diminished by the continuing use of juries smaller than 12, since "any [] reduction [in jury size] that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance," *Ballew*, 435 U.S. at 239. Absent intervention from this Court, defendants in six States will continue to be denied their right to a

12-member jury—one that adequately represents a cross-section of their communities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BENJAMIN L. COLEMAN
BENJAMIN L. COLEMAN LAW PC
1350 Columbia St., Ste 600
San Diego, CA 92101

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real, Ste 400
Palo Alto, CA 94306

ELEANOR DAVIS
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
EDWARD C. O'CALLAGHAN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ETHAN A. SACHS
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State St.
Boston, MA 02109

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