

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 THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether Petitioner was deprived of his right, under the Sixth and Fourteenth Amendments, to a trial by a twelve-person jury.

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's interest in this case arises from its commitment to defending the jury's constitutionally assigned role as a vital check on government abuse, as well from its interest in ensuring that criminal defendants enjoy the full protection of the Sixth Amendment.

¹ Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Hamed Kian was charged with five counts of practicing chiropractic medicine with a suspended license—a felony punishable by up to five years in prison. Pet. Br. 14. Florida law authorizes criminal defendants to be tried before six-person juries. Here, a six-person jury convicted Mr. Kian on all counts. *Id.* He appealed his conviction, arguing that the use of a six-person jury violated his right to trial by jury under the Sixth and Fourteenth Amendments. *Id.* The appellate court affirmed his conviction without a written opinion, and Mr. Kian subsequently asked this Court to review his conviction. *Id.*

In trying criminal cases by six-person juries, “Florida does what the Constitution forbids.” *Cunningham v. Florida*, 144 S. Ct. 1287, 1287 (2024) (Gorsuch, J., dissenting from denial of certiorari). The common law criminal jury required twelve jurors. This Court’s decision approving Florida’s deviation—*Williams v. Florida*, 399 U.S. 78, 103 (1970)—broke from centuries of tradition and should be overruled.

Trial by jury was exceptionally important to the Framers. See THE FEDERALIST No. 83 (Alexander Hamilton) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury”). In the Constitution, they directed that the trial of federal criminal cases “shall be by jury” and enumerated defendants’ right to trial by jury because they understood that, for centuries, citizen juries have acted as a vital check on government overreach. U.S. CONST. art. III, § 2, cl. 3; amend. VI. These provisions drew little deliberation because the Framers readily understood the importance—and contours—of the

venerable common law institution they sought to protect.

While the Constitution’s text does not spell out those contours in detail, this Court has rightly begun looking to historical practices to recognize and enforce aspects of the jury it incorporates. *See Ramos v. Louisiana*, 590 U.S. 83, 90 (2020) (holding that the Sixth Amendment requires a unanimous criminal jury verdict). Protecting the common law jury bolsters the legitimacy of courts and increases civic engagement.

One central requirement of the common law jury is the need for twelve people to serve in criminal cases. Twelve-person juries remained the undisputed norm for centuries, required by this Court until *Williams*. *See, e.g., Thompson v. Utah*, 170 U.S. 343, 346 (1898) (someone charged with a felony “could not have been tried by a jury of a less number than twelve”); *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). *Williams* unjustifiably went astray. This Court should overrule it and restore the common law jury ensured by the Constitution.

In doing so, this Court should make clear that *Williams*’s “functionalist” approach has no place in determining the scope of the constitutionally required jury. *Williams* decided that certain attributes of the common law jury are not incorporated into the Constitution if they can be discarded without impairing the jury’s “function.” *Williams*, 399 U.S. at 99. This holding quickly devolved into arbitrary and untenable line-drawing. *See Ballew v. Georgia*, 435 U.S. 223 (1978). In overruling *Williams*, this Court should confirm that the “very enumeration of the right” at issue “takes out of the hands of government—even the Third Branch of Government—the power to

decide on a case-by-case basis whether the right is *really worth* insisting upon.” *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). This Court should reverse the decision below.

ARGUMENT

I. THE SIXTH AMENDMENT INCORPORATES THE COMMON LAW JURY WITH ALL OF ITS UNENUMERATED ATTRIBUTES.

A. The Constitutional Trial by Jury Incorporates the Common Law Jury’s Attributes.

The Founding Generation understood that trial by jury was integral to individual liberty. Trial by jury in criminal cases was “the only right secured in all state constitutions penned between 1776 and 1787.” Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991). It is found in Article III of the Constitution and the Sixth Amendment. Plainly, “[t]he Constitution is obsessed with juries.” Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 964 (2010); *see also* U.S. CONST. amends. V, VII; Amar, *supra*, at 1190 (“If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury.”).

The jury’s pervasive presence in the Constitution reflects the “prevailing political philosophy” of the Founding Era: “popular control over, and participation in, government should be maximized.” Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964). Americans have guarded criminal trial by jury zealously since the Founding. *See Parsons v. Bedford*, 28 U.S. 433, 446 (1830). The

Framers knew the jury served a critical, structural role when they secured it in the Constitution. The Sixth Amendment preserves this institution—and the attributes it developed over centuries.

The jury’s primary function was to operate as a check on government. *See Amar, supra*, at 1183 (“the key role of the jury was to protect ordinary individuals against governmental overreaching”). Its repeated inclusion in the Constitution and Bill of Rights “reflect[s] a profound judgment about the way in which law should be enforced and justice administered.” *Duncan*, 391 U.S. at 155. The accused are protected “against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Id.* at 156. The Framers had “faith in the ability of the common people” to adjudicate conduct in their own communities rather than leaving that task to government officials. Note, *supra*, at 172.

This confidence was founded on centuries of experience with the petit criminal jury as it existed at common law, an institution the Framers viewed as their “birth right.” John Dickinson, *Letters of Fabius IV* (1788).² “From the moment it was adopted, the Sixth Amendment was widely understood to protect” the common law jury. *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from denial of certiorari). As this Court has explained, the institution carried “the meaning affixed to [it] in the law as it was in this country and in England at the time of the adoption.” *Thompson*, 170 U.S. at 350; *see also Ex Parte Grossman*, 267 U.S. 87, 108–09 (1925) (“The language of the Constitution cannot be interpreted

² Available at <https://tinyurl.com/52mvzrrz>.

safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.”).

The Framers “were not prepared to leave [criminal justice] to the State” and later political discretion, “which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights.” *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring); *see also Blakely v. Washington*, 542 U.S. 296, 308 (2004). They feared that trial by jury “could be lost not only by gross denial, but by erosion.” *Jones v. United States*, 526 U.S. 227, 248 (1999). They constitutionally enshrined it as a “fundamental reservation of power” that establishes popular control over the judiciary. *Blakely*, 542 U.S. at 306. Like other fundamental guarantees, it is not subject to “a freestanding ‘interest-balancing’ approach.” *Heller*, 554 U.S. at 634. “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.” *Id.* at 634–35.

When courts fail to uphold the common law jury trial required by the Constitution, “it is inevitable” that arbitrary lines will be “drawn somewhere” as a substitute. *Burch v. Louisiana*, 441 U.S. 130, 137 (1979). This judicial lawmaking tends to erode “the rare opportunity for individuals . . . to participate in our democracy.” Kathleen M. O’Malley, *Trial by Jury: Why It Works and Why It Matters*, 68 AM. U. L. REV. 1095, 1109 (2019). Courts have previously weakened trial by jury by “depart[ing] from [its] strictly historical requirements.” *Burch*, 441 U.S. at 137. Once that line is crossed, there are “no principled stopping

points for the Court to prevent further erosion.” Robert H. Miller, Comment, *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, 628 (1998).

The Constitution is meant to prevent this. While its text does not detail what a jury is or what trial by one entails, the guarantee “surely meant *something*—otherwise, there would have been no reason to write it down.” *Ramos*, 590 U.S. at 89. It “carried with it *some* meaning about the content and requirements of a jury trial.” *Id.* And that content must have been “fixed” or else it could “scarcely [be] a constitutional command.” Larsen, *supra*, at 963; *see also id.* (“not *everything* about jury trials can be up for grabs”); *Am. Publ’g Co. v. Fisher*, 166 U.S. 464, 467 (1897) (the jury right includes “not merely” its form, “but also all its substantial elements”). “Any imprecision here seems less to invite innovation than to assume that the words of the text are themselves sufficiently precise to convey a particular meaning.” Larsen, *supra*, at 991.

History clarifies that meaning. The jury is an institution “long pre-dating the Constitution, even on American soil,” which is why “[l]ittle additional explanation was likely needed.” *Id.* at 991–92. “The Framers’ reference to trial by jury in article III of the Constitution, and again in the sixth amendment could not have meant anything but a common-law jury.” Larry T. Bates, *Trial by Jury after Williams v. Florida*, 10 HAMLINE L. REV. 53, 68 (1987); *see also* Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL. U. L. REV. 373, 383 (2004) (the Framers viewed Article III as “perpetuat[ing] the right to trial by jury in criminal

matters as it had existed at common law”). The Framers “were seeking to ensure that their children’s children would enjoy the same hard-won liberty they enjoyed,” *Ramos*, 590 U.S. at 100—trial by jury as defined by its common law attributes.

B. This Court Has Often Looked to the Common Law to Identify the Jury’s Unenumerated Attributes.

Accordingly—*Williams* being a conspicuous exception—this Court has looked to the common law to give the constitutionally guaranteed trial by jury “intelligible content.” *Blakely*, 542 U.S. at 305; *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). Historical practices have shaped its understanding of the meaning and scope of the jury trial right. *See e.g.*, *Maxwell v. Dow*, 176 U.S. 581 (1900); *United States v. Gaudin*, 515 U.S. 506, 515 (1995) (“We do not doubt that historical practice is relevant to what the Constitution means by such concepts as trial by jury”). “The historical foundation” of the jury as it descended “down centuries into the common law” has guided much of the Court’s precedent. *Apprendi*, 530 U.S. at 477 (majority opinion); *see also Ring v. Arizona*, 536 U.S. 584, 599 (2002); *Blakely*, 542 U.S. at 308 (recognizing that “the Framers put a jury-trial guarantee in the Constitution” to foreclose judicial redefinition). For decades, the Court has followed “an originalist interpretation.” Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL’Y 53, 56 (2011); *see also Ramos*, 590 U.S. at 89–90.

The Court has thus recognized jury attributes the text never mentions but that are part of the common law institution. The Court’s most thoroughly

originalist analysis was in *Ramos v. Louisiana*, where the petitioner challenged the permissibility of nonunanimous criminal jury verdicts. 590 U.S. at 87. The Court recognized that the Sixth Amendment “says nothing else about what a ‘trial by an impartial jury’ entails,” but refused to treat the constitutional guarantee as “hollow.” *Id.*

So the Court looked to the common law. It examined Blackstone, early state constitutions, and legal treatises, finding that “unanimous verdicts had been required for about 400 years” before the Constitution’s ratification. *Id.* at 90–91. The Court rejected a state contention that the absence of the word “unanimity” in the constitutional provisions changed “the meaning of the text that remains.” *Id.* at 98. If that were true, then all the jury’s “accustomed requisites”—“*everything* history might have taught us about what it means to have a jury trial”—would have to be discarded. *Id.* But it “can’t be right” that the Constitution would impose a requirement “devoid of meaning.” *Id.* The Court thus concluded that unanimity was one of the “accustomed requisites” of the common law jury enacted into the Constitution. *Id.* at 97.

The Court used the same methodology in *Apprendi v. New Jersey* and its progeny. In *Apprendi*, the Court determined the constitutionality of sentence enhancements based on fact findings made by the judge, rather than the jury. *Apprendi*, 530 U.S. at 468–69. While there is no constitutional text requiring the jury to find sentence-aggravating facts, this requirement existed in “longstanding tenets of common-law criminal jurisprudence” acknowledged by “courts and treatises since the earliest days of

graduated sentencing,” so it is constitutionally required. *Blakely*, 542 U.S. at 301–02.

Relatedly and “equally well founded” at the common law was the “companion right” to have guilt proven beyond a reasonable doubt before conviction. *Apprendi*, 530 U.S. at 478. While the Constitution is silent as to the burden of proof, the “demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times” and recognized at the Founding—meaning it, too, is part of the meaning of constitutional trial by jury. *Id.*; see also *Gaudin*, 515 U.S. at 510 (describing this rule as having “an impressive pedigree”).

The Sixth Amendment says nothing about sentencing enhancements, the unanimity of verdicts—or the required number of jurors. Yet, apart from *Williams*, this Court has recognized historical attributes as incorporated into the constitutional text. It has worked to restore the jury that had devolved into “a shadow of its former self.” Amar, *supra*, at 1190. This case presents the opportunity to continue that work by restoring the common law numerosity requirement, and to further confirm the importance of originalism.

II. THE COMMON LAW JURY REQUIRES TWELVE JURORS.

The common law jury required twelve jurors. *Khorrami*, 143 S. Ct. at 23 (Gorsuch, J., dissenting from denial of certiorari) (“By the time of the Sixth Amendment’s adoption, the 12-person criminal jury was ‘an institution with a nearly four-hundred-year-old tradition in England.’”) (quoting Miller, *supra*, at

643). *Williams* erred in misconstruing the Sixth Amendment to guarantee less.

The precise historical origin of twelve-person juries is disputed. “Scholars have traced the origins to sources as diverse as ancient Greece, the Roman Conquest, [and] the Biblical importance of the number twelve” Miller, *supra*, at 632. The “general infrastructure of the criminal jury as a twelve-member body rendering unanimous verdicts was clearly established by the time of Edward III in 1377.” *Id.* at 638–39. Pre-colonial English legal authorities reflected this. 4 WILLIAM BLACKSTONE, COMMENTARIES *343 (1769) (general verdicts should be rendered “by the unanimous suffrage of twelve of his equals and neighbors”); 2 MATTHEW HALE, HISTORIA PLACITORUM CORONÆ, THE HISTORY OF THE PLEAS OF THE CROWN 161 (1736) (“But in case of a trial by petit jury, it can be by no more or less than twelve, and all affirming to the verdict”); 2 JOSEPH CHITTY, CHITTY’S CRIMINAL LAW 505 (1816) (“The petit jury, when sworn, must consist precisely of twelve, and is never to be either more or less”).

The common law jury was “brought over and immediately integrated, unchanged, into pre-Revolutionary War America.” Miller, *supra*, at 643. It “seems clear that to most of the delegates to the Constitutional Convention in 1787, trial by jury in criminal cases meant trial by a body of twelve persons all of whom agreed to the verdict.” Bates, *supra*, at 66. This was apparently so “obvious” as to receive no debate at the convention itself. *See id.*

That view was unchallenged for most of American history. *See, e.g., Thompson*, 170 U.S. at 351 (a “unanimous verdict of a jury of twelve persons” was

the defendant’s “constitutional right”); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899) (trial by jury in the “American constitutions” is “a trial by a jury of twelve men”); *Rassmussen v. United States*, 197 U.S. 516, 529 (1905) (trial by jury means “a trial by the historical, common law jury of twelve persons”); *Patton v. United States*, 281 U.S. 276, 290 (1930) (the “common law elements” of a twelve-person jury are “embedded in the constitutional provisions”). By the early 20th century, the Court had held that the numerosity requirement was “not open to question.” *Khorrami*, 143 S. Ct. at 25 (Gorsuch, J., dissenting from denial of certiorari) (quoting *Patton*, 281 U.S. at 288).

“Decided against this backdrop, *Williams* was an anomaly the day it was issued in 1970.” *Id.* at 24. Indeed, just two years before, the Court had reaffirmed the twelve-person requirement. *See Duncan*, 391 U.S. at 151–52. In deciding that this was not in fact a “necessary ingredient,” *Williams* had to reject “eight hundred years of settled jurisprudence.” Miller, *supra*, at 621.

The Court should overrule *Williams* as a deviation from the original meaning of trial by jury.

III. WILLIAMS’S FUNCTIONALIST APPROACH HAS NO PLACE IN SIXTH AMENDMENT JURISPRUDENCE.

A. Sixth Amendment “Functionalism” Is Illegitimate.

Like King Lear’s daughters, the Court soon found that a number made negotiable is subject to endless negotiation: “Goneril: Hear me, my lord. What need you five-and-twenty, ten or five? Regan: What need

one?” WILLIAM SHAKESPEARE, *KING LEAR* act 2, sc. 4, ll. 300–03. Just a few years after *Williams* permitted states to try criminal defendants before six-person juries, the Court found itself having to explain why the number of jurors could not fall further. The Court reasoned that judicial line-drawing was inevitable—admitting that its choice to set them at six is not “wholly satisfactory.” *Burch*, 441 U.S. at 137–38.

Instead of history, the *Williams* Court chose to rely on “functionalism,” substituting “bad social science for careful attention to the Constitution’s original meaning.” *Cunningham*, 144 S. Ct. at 1288 (Gorsuch, J., dissenting from denial of certiorari); *see also Heller*, 554 U.S. at 634–35 (rejecting ahistorical “interest-balancing” approaches to the Bill of Rights). *Williams* concluded that the number twelve was “a historical accident” resting on “little more than mystical or superstitious insights.” *Williams*, 399 U.S. at 88–89 (referring to “12 apostles, 12 stones, 12 tribes, etc.”). It held that courts should instead ask whether a lesser number of jurors could perform the same “function.” *Id.* at 99.

Despite claiming empirical grounding for equating six jurors to twelve, the Court’s evidence “spanned only three paragraphs of the twenty-six-page majority opinion.” Miller, *supra*, at 652. The Court cited “six social-science ‘experiments’” that have since been rebutted as “entirely unreliable, and in fact . . . not ‘experiments’ at all”—much less ones answering the constitutional question for which the Court repurposed them. *Id.* at 652–54; *see also Williams*, 399 U.S. at 101 (acknowledging having considered only a “few experiments”). “This is scant evidence by any standards.” Hans Zeisel, *And Then There Were None*:

The Diminution of the Federal Jury, 38 U. CHI. L. REV. 710, 715 (1971).

Unsurprisingly, the Court’s functionalist claims “have not aged well.” *Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari). The *Williams* Court claimed that a six-member jury could “prevent oppression by the Government” because it was “large enough to promote group deliberation” and represent a cross-section of the community. *Williams*, 399 U.S. at 100. Research has contradicted both claims. A systematic review found: “Trial testimony was discussed more accurately in the deliberations of larger juries.” Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451, 459 (1997). Larger juries were better at remembering the evidence. *Id.* They were more likely to reach a deadlock, and they paid greater attention to minority voices. *Id.* at 459, 461.

Further, twelve-person juries are significantly more likely to have minority members. Shari S. Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 449 (2009). Their voices aid defendants by “improv[ing] the quality of deliberation,” and their inclusion “increases de facto legitimacy” because the “perceived fairness of the jury system depends” on its ability to reflect the community. *Id.* at 425–26.

Though the *Williams* Court mishandled social science, its greater error was relying on it in the first place. *Ramos*, 590 U.S. at 100 (holding that the jury guarantee should never have been subjected to a “functionalist assessment”). The Court soon changed course yet again. Just a few years later, when asked to

allow for five-member juries, the Court admitted: “we do not pretend to discern a clear line between six members and five.” *Ballew*, 435 U.S. at 239. Judicial whims were all that remained.

“None of this supplies a sound basis for judicial tinkering with an ancient tradition,” *Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari). The Framers constitutionally enshrined trial by jury, fearing it would otherwise degrade over time. Their foresight long protected it, until *Williams*. This Court should reject that decision’s arbitrary functionalism and restore originalism as the way to make sense of trial by jury.

B. Sixth Amendment “Functionalism” Has Impaired the Jury’s Functions in Civic Life.

Ironically, *Williams*’s functionalism has harmed more than just the coherence of the law—it has undermined the jury’s function in American life by threatening to reduce the number of people who decide criminal cases. Jury service connects citizens to government and builds confidence in the justice system. The jury has always “provided a means by which the American citizenry could participate in and make decisions regarding the political system.” Victoria A. Farrar-Myers & Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 S.M.U. L. REV. 1857, 1858 (2001). As the jury is the most “direct expression of popular sovereignty,” its members can make known Americans’ “communal values.” *Id.* at 1868; see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting) (a group of ordinary citizens brings “common sense and community values”

and avoids the “stereotypes said to infect the judicial eye”).

Alexis de Tocqueville thought that jury service was “the soundest preparation for free institutions” because it “imbues all classes” with respect for public liberty under law. Alexis de Tocqueville, *Causes Mitigating Tyranny in the United States*, in *DEMOCRACY IN AMERICA* (Henry Reeve ed. 1835).³ Modern empirical research confirms that citizens who sit on a criminal jury “are more likely to vote in an election.” Mary R. Rose et al., *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUD. 33, 34 (2012). They also “tend to come away with more favorable impressions of the legal system.” *Id.* The jury room is where Americans “learn self-government by doing self-government.” Amar, *supra*, at 1187.

The jury is part of Americans’ self-governance. Restoring the numerosity requirement and so increasing the size of juries would advance this important function intended by the Framers.

CONCLUSION

Each attribute of common law trial by jury—a unanimous verdict, proof beyond a reasonable doubt, juror factfinding, jury numerosity—is included in the Constitution’s guarantees. *Williams* erred by thinking its law-chamber social science knew better than the wisdom of the centuries relied upon by the Framers. It did not. That case should be overruled and the decision below reversed.

³ Available at <https://tinyurl.com/czu2ujyv>.

Respectfully submitted,

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