No. 21-1553

# In the Supreme Court of the United States

RAMIN KHORRAMI,

*Petitioner*,

v.

ARIZONA,

*Respondent.*

**On Petition for a Writ of Certiorari to the Arizona Court of Appeals**

## BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, AND RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER


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The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU routinely submits amicus briefs in cases raising issues related to the constitutional right to a jury trial. The ACLU of Arizona is its state affiliate in Arizona.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

## SUMMARY OF ARGUMENT

The original meaning of "jury," as the word appears in the Constitution, was a body with twelve members.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties received timely notice of this brief and have consented to its filing.

Under English common law, a jury had to have twelve members. A group that was smaller or larger could not deliver a verdict.

When the Constitution and the Bill of Rights were ratified, the American common law rule was identical. A jury could be neither smaller nor larger than twelve.

Numerous post-ratification cases and treatises demonstrate that the word "jury" in the Constitution and the Bill of Rights was originally understood to bear its common law meaning. It was a body that had to have twelve members. A verdict rendered by a group smaller than twelve was therefore unconstitutional.

## ARGUMENT

### The original meaning of "jury," as the term is used in the Constitution, was a body with twelve members.

The Sixth Amendment guarantees criminal defendants the right to be tried by a "jury." When the Bill of Rights was ratified, "jury" was a familiar term from English and American common law. It referred to a body that could have no more and no less than twelve members. The Constitution's use of the term was understood to incorporate this common law requirement. A group numbering more or less than twelve was simply not a "jury" as the term was used in the Constitution.

### A. Under English common law, a "jury" could only have twelve members.

By the eighteenth century, the institution of the twelve-member jury had been firmly established in

English law for centuries, in both criminal and civil trials. J.H. Baker, *An Introduction to English Legal History* 509 (4th ed. 2007) ("If a prisoner pleaded Not guilty, as most did, and put himself on the country, twelve jurors were sworn."); Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1, 8 (1993) (dating the twelve-member requirement to the fourteenth century).

This requirement of twelve was emphasized in the leading eighteenth-century treatise on English criminal law, Matthew Hale's *History of the Pleas of the Crown*. At trial, Hale explained, "the jury are commanded to look on the prisoners, and then severally twelve of them, neither more nor less, are sworn." 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 293 (London, 1736). Hale observed that if the jurors numbered less than twelve, they had no power to act. If one juror "goes out of town," he noted, "whereby only eleven remain, these eleven cannot give any verdict without the twelfth." *Id.* at 295. The eleven remaining jurors had to "be discharged, and a new jury sworn, and new evidence given, and the verdict taken of the new jury." *Id.* at 295-96. Likewise, "[i]f only eleven be sworn by mistake, no verdict can be taken of the eleven." *Id*. at 296.

The same principle—that a jury must have twelve members—was repeated in many other English treatises of the period. The "Number must be Twelve," insisted one treatise on juries. Giles Duncombe, *Trials Per Pais: or the Law of England Concerning Juries* 79 (London, 5th ed. 1718). "And the Law is so precise in this Number of Twelve, that if the Trial be

by more or less, it is a Mistrial." *Id.* at 79-80. As another author explained, "no One shall be Convict by Verdict, unless the Offence is found … by Twelve (not more or less) of the *Petty Jury* upon Trial." Thomas Wood, *An Institute of the Laws of England* 623 (London, 3d ed. 1724). Another treatise declared that "on a trial by a petit jury no more nor less than twelve can be allowed." Joseph Bingham, *A New Practical Digest of the Law of Evidence* 63 (London, 1797).

Manuals for judges explained that when conducting a criminal trial, exactly twelve jurors had to be sworn. "[C]all the Foreman of the Jury, and say to him, Lay your Hand on the Book," instructed one guidebook. Once the foreman had been sworn, "[t]hen call the Second, and swear him in like Manner, and so to Twelve; and neither more nor less must be sworn." Michael Dalton, *The Country Justice* 654 (London, 1727). To be on the safe side, the judge was advised to "count them Twelve" before proceeding any further. *Id.*

For this reason, legal dictionaries of the era defined "jury" as a body of twelve people. A grand jury could have twelve or more members, one dictionary specified, in contrast to "the petty jury of twelve, [which] can be neither more nor less." 2 T. Cunningham, *A New and Complete Law-Dictionary* (London, 3d ed. 1783) (unpaginated; quotation is from section 3 of the definition of "jury"). Another dictionary cited Hale for the proposition that "upon a trial by a petit jury, it can be by no more, nor less, than 12." 2 Richard Burn, *A New Law Dictionary* 45 (London, 1792).

The same point was made in works intended to summarize the English legal system for a general

audience. "[B]y a fundamental law in our government," one book explained, no one could be convicted "for any crime whatsoever, but upon being found guilty on two several tryals (for so may that of the grand and petit jury be called) and the judgment of twice twelve men at least." *British Liberties, or the Free-born Subject's Inheritance* 370 (London, 1766). The "twice twelve" referred to the size of the grand and petit juries: "twelve or more to find the bill of indictment against him, and twelve others to give judgment upon the general issue of *Not guilty*." *Id.* The petit jury "always consists of twelve men, and no more nor any less." *Id.* at 376-77. Another book likewise observed that conviction of a crime required the verdict of "no less than *twelve honest, substantial, impartial men*." John Hawles, *The Englishman's Right* 9 (London, 1771).

The requirement that juries have twelve members was so well established in eighteenth-century England that when William Blackstone composed his ubiquitous *Commentaries*, he did not need to belabor the point, because it was already familiar to his readers. Blackstone praised "[t]he antiquity and excellence" of the English institution of jury trial, which he contrasted with juryless places like "France or Turkey," where monarchs could "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." 4 William Blackstone, *Commentaries on the Laws of England* 343 (Oxford, 1769). It was one of the "liberties of England" that one could not be convicted of a crime without "the unanimous suffrage of twelve of his equals and neighbours." *Id.*

In the late eighteenth century, English law was thus clear. A "jury" was a body with twelve members. A group that was smaller could not render a verdict in a criminal case.

### B. When the Constitution was ratified, Americans likewise understood the term "jury" to mean a group of twelve.

American law in the Founding era was largely copied from English law. The size of criminal juries was no exception. American guidebooks for judges, like their English predecessors, instructed that juries should be no smaller or larger than twelve. *Conductor Generalis: or, the Office, Duty and Authority of Justices of the Peace* 393 (Woodbridge, N.J., 1764); *Burn's Abridgment, or the American Justice* 380 (Dover, N.H., 2d ed. 1792). "What is a verdict?", asked Justice Wilson in the lectures he delivered in 1790-91 at the College of Philadelphia. He answered his own question: "It is the joint declaration of twelve jurymen upon their oaths." 2 James Wilson, *The Works of the Honourable James Wilson, L.L.D.* 343 (Philadelphia, 1804). As Chief Justice McKean of the Pennsylvania Supreme Court put it in 1788, "I have always understood it to be the law, independent of [the state constitution's bill of rights], that the twelve jurors must be unanimous in their verdict." *Respublica v. Oswald*, 1 U.S. 319, 323 (Pa. 1788).

The correspondence of members of the Continental Congress likewise shows that juries were understood to have twelve members. In one letter, John Dickinson explained that the right to jury trial means "that neither Life, Liberty, or property can be taken from the Possessor, until twelve of his Coun-

trymen and Peers" reach a verdict. 1 *Letters of Delegates to Congress, 1774-1789* at 238 (Paul H. Smith ed., 1976). William Pierce of Virginia was skeptical of the value of jury trials, but he too understood the jury to have twelve members. "I cannot but think," Pierce scoffed, "that an able Judge is better qualified to decide between man and man than any twelve men possibly can be." 24 *id.* at 447.

In fact, the requirement that juries have twelve members was the basis for one of the first instances of judicial review in the United States. New Jersey's constitution of 1776 provided that "the inestimable Right of Trial by Jury shall remain confirmed." N.J. Const. of 1776, art. 22. Although the state constitution did not specify the size of the jury, the New Jersey Supreme Court held in *Holmes v. Walton* (N.J. 1780) that a statute providing for six-person juries was void because a jury of six "was not a constitutional jury." *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802). (*Holmes* was not reported, but it was discussed in *Parkhurst*.)

Article III of the Constitution guarantees the right to trial by jury in criminal cases, U.S. Const. art. III § 2, but the size of juries was not debated at the Constitutional Convention or at the state ratifying conventions, because no one proposed to make juries smaller or larger. The state ratifying debates do include some references to the size of juries, however, during disputes over whether the new Constitution sufficiently protected the right to a jury trial. On each occasion, the delegates assumed that juries would have twelve members.

For instance, in the Virginia ratifying convention, Edmund Randolph defended the Constitution

against the claim that it was deficient because it lacked a bill of rights. (Randolph was then the state's governor. When the Constitution was ratified, he became the nation's first attorney general.) Randolph argued that no bill of rights was necessary. "Is there not provision made, in this Constitution, for the trial by jury in criminal cases?" he asked. He insisted that there was no reason for the Constitution to address the topic in any more detail, because "[t]here is no suspicion that less than twelve jurors will be thought sufficient." 3 Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 467 (Philadelphia, 1836).

On the other side of the Virginia debate, Patrick Henry, the state's former governor, attacked the Constitution for lacking a bill of rights. He feared that "we are to part with that trial by jury which our ancestors secured their lives and property with." Henry extolled the jury as an "excellent mode of trial," because "[t]he unanimous verdict of twelve impartial men cannot be reversed." *Id.* at 544.

In the Pennsylvania ratifying convention, Thomas McKean, the state's chief justice, defended the Constitution's grant of appellate jurisdiction to the Supreme Court by observing that at common law, appellate courts often reviewed the decisions of trial courts, even in some cases tried to a jury. McKean declared: "Juries are not infallible because they are twelve in number." 2 *id.* at 540.

The First Congress did not debate the size of juries when it was formulating what became the Sixth Amendment. Again, no one proposed shrinking or expanding the jury. The Sixth Amendment simply

used the word "jury," a term that was universally understood to mean a body with twelve members.

### C. Post-ratification cases and treatises demonstrate that the word "jury" in the Constitution was originally understood to bear its common law meaning—a jury with twelve members.

The question sometimes arose in the early United States: Was a body with less than twelve members a "jury" as the term was used in the state and federal constitutions? American courts and commentators consistently held that it was not. They reasoned that the word "jury" meant a jury with twelve members, because the state and federal constitutions had incorporated the conventional common law understanding of the term. Trials thus required "a jury of twelve men, as now established by the constitution." William Barton, *Observations on the Trial by Jury* 10 (Strasburg, Pa., 1803).

Early American courts used the same interpretive method that is still used today: When a legal text, such as a constitution, includes a term with a well-established meaning, the term should be given that meaning where no contrary intent appears. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012). In the oft-repeated words of Justice Frankfurter, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

The word "jury," as used in constitutions, thus meant the familiar twelve-member body that had been standard for centuries. As one court explained:

> The trial by jury is a great constitutional right, and when the convention incorporated the provision into the constitution of the country, they most unquestionably had reference to the jury trial as known and recognized by the common law. It is a well ascertained fact, that the common law jury consisted of twelve men, and as a necessary consequence, since the constitution is silent on the subject, the conclusion is irresistable [sic] that the framers of that instrument intended to require the same number.

*Larillian v. Lane & Co.*, 8 Ark. 372, 374-75 (1848).

The Mississippi Supreme Court reversed a conviction obtained before an eleven-member jury for this reason. *Carpenter v. State*, 5 Miss. 163 (1839). To define the right to a trial by jury, the court observed, "we must necessarily recur to the provisions of the common law defining the qualifications, and ascertaining the number of which the jury shall consist; as the standard to which, doubtless, the framers of our constitution referred." *Id.* at 166. Because "[a]t common law the number of the jury, for the trial of all issues involving the personal rights and liberties of the subject, could never be less than twelve," the same was necessarily true under the constitution. *Id.*

The Ohio Supreme Court reached the same conclusion by the same route. It began by noting that in the constitution, "the *right* of jury trial is recognized to exist." *Work v. State*, 2 Ohio St. 296, 302 (1853). The court asked: "What, then, is this right? It is nowhere defined or described in the constitution. It is

spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind." *Id.* The court reviewed the history of juries in England and the United States, which showed "beyond controversy the number of the jury at common law …. The number must be twelve." *Id.* at 304. The court accordingly reversed a conviction obtained with a jury of less than twelve. *Id.* at 308.

For similar cases, *see Byrd v. State*, 2 Miss. 163, 177 (1834) ("Our statute nowhere defines the number necessary to constitute a jury; but the number twelve, known as the number at common law, is no doubt what is meant by the constitution and all the statutes, when a jury is mentioned."); *State v. Cox*, 8 Ark. 436, 446-47 (1848) ("From the earliest period of the common law the term *jury* has had a technical and specific meaning, and has ever signified a body of twelve citizens …. The constitutional provisions securing the right of trial by a jury means a jury of twelve men, according to the known technical meaning of the term."); *Norval v. Rice*, 2 Wis. 22, 29 (1853) (holding that the constitutional right to trial by jury requires twelve-member juries because "the meaning of the language used in our Constitution must be gleaned from the common law").

The New Hampshire Supreme Court provided an especially thorough discussion of the issue in response to a request from the legislature for an opinion as to whether the legislature had the authority to reduce the size of juries. *Opinion of Justices*, 41 N.H. 550 (1860). "The terms 'jury,' and 'trial by jury,' are, and for ages have been well known in the language of the law," the court began. *Id.* at 551. "They were 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." *Id.* When the constitution was adopted, the court continued, "no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known, or ever been the subject of discussion in any country of the common law." *Id.* at 552. For this reason, the court concluded that "no body of less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the constitution; nor would a trial by such a body, though called a trial by jury, be such, within the meaning of that instrument." *Id.*

In short, as one court summarized, "[w]henever there is a constitutional guaranty of the right of trial by jury, the jury must be composed of twelve men." *State v. Mansfield*, 41 Mo. 470, 475 (1867).

Early American courts therefore consistently held that juries must have twelve members. *See Burk v. State*, 2 H. & J. 426, 426 (Md. Ct. App. 1809) (referring to "the legal number of twelve sworn on the jury"); *State v. Burket*, 9 S.C.L. 155, 155 (S.C. Const. Ct. App. 1818) ("To constitute a jury, every lawyer knows that twelve lawful men are necessary, and that without this number no jury can exist."); *Foote v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828) ("There can be no question that every issue of fact must be tried by a jury of twelve men" because "[t]he term *jury* is well understood to be twelve men."); *Wolfe v. Martin*, 2 Miss. 30, 31 (1834) ("There is no jury for the trial of issues known to the constitution and laws of this state, except that which consists of 'twelve good and lawful men.'"); *Grayson v. Cummins*, Dall. 391, 393

(Tex. 1841) ("It has been often ruled that a less number than twelve is no jury."); *In re Klein*, 14 F. Cas. 719, 729 (D. Mo. 1843) ("Could congress direct a trial by jury, and provide that the jury should consist of three men; and that a majority should convict? No person will assert the affirmative."), *rev'd on other grounds*, 42 U.S. 277 (1843); *Cancemi v. People*, 18 N.Y. 128, 135 (1858) ("A legal jury, according to the common law, consists of twelve persons; our constitution declares that 'the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever.'") (citations omitted).

On the rare occasions when cases were tried to putative juries of less than twelve, the resulting judgments were accordingly reversed. *See Briant v. Russel*, 2 N.J.L. 146, 146 (1806) ("It appeared by the record, that the cause was tried by eleven jurors; for which cause the judgment was reversed."); *Doebler v. Commonwealth*, 3 Serg. & Rawle 237, 237 (Pa. 1817) (reversing conviction obtained by a jury of eleven); *Dixon v. Richards*, 3 Miss. 771, 771 (1838) ("The third error assigned is fatal. A jury must consist of twelve men: no other number is known to the law: here there was but eleven. The judgment must be reversed."); *Jackson v. State*, 6 Blackf. 461, 461 (Ind. 1843) ("The judgment must be reversed. It appears from the transcript of the record, that the jury that tried the cause was composed of eleven men only, and not twelve as the law requires."); *Brown v. State*, 8 Blackf. 561, 561 (Ind. 1847) (reversing conviction obtained by a jury of eleven); *Bowles v. State*, 37 Tenn. 360, 362-63 (1858) (same); *Cowles v. Buckman*, 6 Iowa 161, 163 (1858) (noting that an eleven-person jury is "a fatal defect in criminal cases");

*State v. Meyers*, 68 Mo. 266, 266 (1878) ("It appears from the record that only eleven jurors were present when the verdict of the jury was received by the court. This is a fatal defect, and the judgment must, therefore, be reversed.").[2]

Early American treatises reflected this consensus that the Constitution's use of the term "jury" required a jury of twelve, because such was the accepted meaning of the term at common law. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* 588 (Boston, 3d ed. 1858) ("[A] trial by jury is generally understood to mean, *ex vi termini* [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."); 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* 532 (Boston, 1866) ("[I]t is a point upon which the authorities agree, that, within the meaning of our constitutional provisions, a jury of less than twelve men is not a jury; and a statute authorizing a jury of less, in a case in which the constitution guarantees a jury trial, is void.").

*See also* Arthur Joseph Stansbury, *Elementary Catechism on the Constitution of the United States* 63 (Boston, 1828) ("[T]he jury consists of twelve per-

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[2] Where an offense was so minor that no jury was constitutionally required, a jury smaller than twelve was permissible. *See People ex rel. Booth v. Fisher*, 11 How. Pr. 554, 560 (N.Y. Sup. Ct. 1855); *Baurose v. State*, 1 Iowa 374, 378 (1855). In eminent domain cases, where the value of land was determined by a "jury of appraisers," this body could also be smaller than twelve. *Cruger v. Hudson River R.R. Co.*, 12 N.Y. 190, 198-99 (1854).

sons."); Peter Oxenbridge Thacher, *Observations on Some of the Methods Known in the Law of Massachusetts to Secure the Selection and Appointment of an Impartial Jury in Cases Civil and Criminal* 7 (Boston, 1834) ("The trial by jury is by twelve free and lawful men."); Francis Hilliard, *The Elements of Law* 288 (Boston, 1835) ("*A jury* consists of twelve men."); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 505 (Springfield, Mass., 3d American ed. 1836) ("The petit jury, when sworn, must consist precisely of twelve …. If, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed for error."); Warren Woodson, *A Treatise on American Law* 158 (Nashville, 1843) ("The jury is to consist of twelve men."); 3 John Bouvier, *Institutes of American Law* 327 (Philadelphia, 1851) ("By *jury* is understood a body of twelve men."); Henry Flanders, *An Exposition of the Constitution of the United States* 217 (Philadelphia, 1860) ("A *petit* jury consists of twelve men.").

In short, the original meaning of the constitutional right to a trial by "jury" was a right to a trial by a jury with twelve members, because the Constitution had incorporated the common law requirement of twelve jurors. As the Michigan judge Thomas Cooley summed up this consensus in his mid-19th century treatise on constitutional law,

> A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case as they are delivered from the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and

> not such a jury as the constitution preserves to accused parties.

Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 319 (Boston, 1868).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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