No. 18-5924

In The
Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of Louisiana, Fourth Circuit

BRIEF FOR INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society.

IJ recently appeared before this Court on behalf of Marion, Indiana, resident Tyson Timbs. *See Timbs* v. *Indiana*, 139 S. Ct. 682 (2019). Like this case, *Timbs* involved whether a Bill of Rights protection (there, the Excessive Fines Clause) applies to the States under the Fourteenth Amendment. Like this case, *Timbs* raised the related issue of whether an incorporated right applies identically in state and federal court. Consistent with IJ's arguments, the Court held in *Timbs* that the Excessive Fines Clause applies to the States and that, generally, there is "no daylight" between the scope of federal constitutional rights when asserted in state rather than federal court. *Id.* at 687. The Court noted the "sole exception" to this principle of "no daylight"—the jury-unanimity rule of *Apodaca* v. *Oregon*, 406 U.S. 404 (1972)—under which criminal juries must be unanimous in federal court, under the Sixth Amendment, but need not be unanimous in state court, under the Fourteenth Amendment. *See Timbs*, 139 S. Ct. at 687 n.1. That "sole exception" is now at issue, and IJ questions its continuing viability.

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[1] All parties have consented to the filing of this brief. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Additionally, IJ has cases pending before this Court that involve the correct application of the Fourteenth Amendment to the States. *See* Pet. for Cert., *Espinoza* v. *Mont. Dep't of Revenue*, No. 18-1195 (Mar. 12, 2019); Br. for Respondent Affluere Invs., Inc., *Tenn. Wine & Spirits Retailers Assoc.* v. *Thomas*, No. 18-96, (Dec. 13, 2018). And it has dozens more such cases pending in state courts, federal district courts, and the federal courts of appeal.

For these reasons, IJ submits this *amicus curiae* brief in support of Petitioner.

SUMMARY OF ARGUMENT

Amicus agrees with Petitioner: The Sixth Amendment requires a unanimous jury verdict before a person can be convicted of a serious crime and the Fourteenth Amendment's Due Process Clause incorporates that protection against the States.

Amicus writes separately to emphasize an alternative basis for incorporation—the Privileges or Immunities Clause. *See* Br. for Petitioner 37–38. As Justice Thomas has observed, the original public meaning of the Privileges or Immunities Clause commands, at minimum, applying the familiar provisions of the Bill of Rights to the States. *See Timbs* v. *Indiana*, 139 S. Ct. 682, 691–92 (2019) (Thomas, J., concurring in the judgment); *McDonald* v. *City of Chicago*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring in part and concurring in the judgment). As Petitioner demonstrates, the

right to conviction by a unanimous jury has a pedigree in Anglo-American law stretching back centuries. *See* Br. for Petitioner 18–27. And the Sixth Amendment incorporated that deeply rooted right of Englishmen by guaranteeing an "impartial jury." *See id.* at 15–18. As one of the precious rights enshrined in the Nation's founding documents, the right to conviction by a unanimous jury is one of the "privileges or immunities of citizens of the United States," no less deserving of incorporation than the Second Amendment right to armed self-defense (incorporated in *McDonald*) or the Eighth Amendment right to be free from excessive fines and forfeitures (incorporated in *Timbs*). Unlike in *McDonald* and *Timbs*, however, incorporating the right in question through the Due Process Clause would require the Court to overrule precedent (*i.e.*, *Apodaca* v. *Oregon*, 406 U.S. 404 (1972)). For that reason, the Court should apply the Sixth Amendment's unanimity requirement to the States through the Privileges or Immunities Clause.

If the Court applies the well-established due-process standard instead, *Amicus* urges the repudiation of the so-called two-track approach to incorporation adopted by Justice Powell in *Apodaca* and its companion case. *See Johnson* v. *Louisiana*, 406 U.S. 366, 369 (1972) (Powell, J., concurring in the judgment in *Apodaca*). As this case shows, state officials still rely on the idea of two-track incorporation to deny federal constitutional rights. *Cf. Timbs*, 139 S. Ct. at 690–91 (rejecting Indiana's argument that rights apply to the States only after this Court announces their incorporation in a particular situation, such as civil forfeitures). But incorporated

rights do not change in scope or force when asserted in state court. Rights are rights. And the individual rights enshrined in the Constitution apply identically in state and federal courts. *See id.* at 687 (when "a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires"). The two-track approach is also precluded by the text of the Privileges or Immunities Clause.

ARGUMENT

I. The common law right to conviction by a unanimous jury applies to the States through the Privileges or Immunities Clause.

The question presented asks whether the Fourteenth Amendment fully incorporates the Sixth Amendment's guarantee of conviction by a unanimous jury verdict. *See* Br. for Petitioner i. Although this Court's modern incorporation cases "have been built upon the substantive due process framework," *McDonald* v. *City of Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in the judgment), the Privileges or Immunities Clause provides a viable alternative basis for applying federal constitutional protections against the States, *see, e.g.*, *Timbs* v. *Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."); *see also id.* at 691–92 (Thomas, J., concurring

in the judgment); *McDonald*, 561 U.S. at 805–58 (Thomas, J., concurring in part and concurring in the judgment).

1. The original public meaning of "privileges or immunities" is synonymous with "rights," *McDonald*, 561 U.S. at 813 (Thomas, J., concurring in part and concurring in the judgment), and the right to an "impartial jury," unanimous in its verdict of conviction, ranks among the foundational guarantees that the Privileges or Immunities Clause made applicable to the States, *id.* at 835 (showing that, at the time of its ratification, the Privileges or Immunities Clause was publicly understood to "enforce[] at least those fundamental rights enumerated in the Constitution against the States"). Not only was unanimity understood as an essential component of the "impartial jury" guaranteed by the Sixth Amendment, it had been regarded as fundamental for centuries before the Founding. *See* Br. for Petitioner 18–27; *cf. Timbs*, 139 S. Ct. at 695 (Thomas, J., concurring in the judgment) (noting that "[a]s English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen" (internal quotation omitted)). As in *Timbs*, the historical evidence is "overwhelming," 139 S. Ct. at 689 (majority opinion); jury-unanimity easily ranks alongside those rights that this Court has already held apply to the States, *cf. id.* at 692–93 (Thomas, J., concurring in the judgment) (observing that "[t]he historical record overwhelmingly demonstrates" that the prohibition on excessive fines is one of the "inalienable rights" guaranteed by the Privileges or Immunities Clause).

It is precisely because jury unanimity has such deep roots in Anglo-American law that this Court observed, no fewer than four times before *Apodaca*, that jury unanimity is required by the Sixth Amendment.[2] Justice Powell acknowledged these precedents when he observed that, "[i]n an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial." *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*) (emphasis in original). Seven years after *Apodaca*, the Court held that unanimity is, in fact, required in state criminal trials when the jury is composed of just six members (the constitutional minimum). *Burch* v. *Louisiana*,

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[2] *See Andres* v. *United States*, 333 U.S. 740, 748 (1948) ("[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply"); *Patton* v. *United States*, 281 U.S. 276, 288 (1930) ("That the word ['jury' in the Sixth Amendment] means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized by this country and England when the Constitution was adopted, is not open to question. Those elements [include] . . . that the verdict should be unanimous."), *abrogated on other grounds by Williams* v. *Florida*, 399 U.S. 78 (1970); *Thompson* v. *Utah*, 170 U.S. 343, 351 (1898) (holding that the accused has 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"), *overruled on other grounds by Collins* v. *Youngblood*, 497 U.S. 37 (1990); *Am. Pub. Co.* v. *Fisher*, 166 U.S. 464, 468 (1897) ("Now, unanimity was one of the peculiar and essential features of the trial by jury at the common law. No authorities are needed to sustain this proposition."); *see also* Br. for Petitioner 16–18 (collecting more cases).

441 U.S. 130, 134 (1979).[3] This Court has never confronted the question of exactly where—between a jury composed of six people and one composed of twelve—the unanimity requirement is triggered. Rather than wrestle with that difficult question, the Court should hold (consistent with its decisions before and after *Apodaca*) that jury unanimity is required under the Sixth Amendment. *See* Br. for Petitioner 15–18. It follows that an identical right applies to the States by virtue of the Privileges or Immunities Clause. *See id.* at 37–38.

In sum, jury unanimity is one of the "inalienable rights," which no State may abridge. *See Timbs*, 139 S. Ct. at 692 (Thomas, J., concurring in the judgment). Like the right to keep and bear arms and the right to be free from excessive fines and forfeitures, jury unanimity is guaranteed by the Bill of Rights and, therefore, fits comfortably within the original public meaning of the Privileges or Immunities Clause.[4]

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[3] The three dissenting Justices in *Burch* agreed that the Fourteenth Amendment requires unanimous jury verdicts in state court; they dissented because they believed that state juries *also* must be composed of twelve members. 441 U.S. at 140 (Brennan, J., joined by Stewart & Marshall, JJ., concurring in part and dissenting in part). In fact, the dissenters in *Burch* also dissented in *Apodaca*, arguing that the Due Process Clause of the Fourteenth Amendment requires unanimity in state criminal trials. *See Johnson*, 406 U.S. at 380–94 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting in *Apodaca*); *Apodaca*, 406 U.S. at 414–15 (Stewart, J., dissenting).

[4] The rights included in the first eight Amendments are, of course, not the only "privileges or immunities." *See, e.g.*, Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or*

2. The Court need not overrule *Apodaca* to rule for Petitioner based on the Privileges or Immunities Clause. *Apodaca* addressed only the Due Process Clause. *See* 406 U.S. at 411 (plurality opinion). And whatever the failings of the *Slaughter-House Cases*,[5] the Court there acknowledged that Bill of Rights protections are among the rights of national citizenship that the Privileges or Immunities Clause protects. *See* 83 U.S. (16 Wall.) 36, 79 (1873) (listing the "right to peaceably assemble and petition for redress of grievances" as among the "privilege[s] of a citizen of the United States"); *cf. McDonald*, 561 U.S. at 808 (Thomas, J., concurring in part and concurring in the judgment)

Immunities, 11 U. Pa. J. Const. L. 1295, 1303 (2009); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 208–10 (1998); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 41, 74–75, 219 (1986). As the principal author of the Fourteenth Amendment said, the "privileges and immunities of citizens of the United States . . . are *chiefly* defined in the first eight amendments." Cong. Globe, 42d Cong., 1st Sess., App. 84 (1871) (emphasis added); *cf. McDonald*, 561 U.S. at 831 (Thomas, J., concurring in part and concurring in the judgment) (documenting public awareness that the Fourteenth Amendment would, "*at a minimum*, enforce constitutionally enumerated rights of United States citizens against the States" (emphasis added)).

[5] Virtually "everyone" agrees that *Slaughter-House* was wrongly decided. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi. Kent L. Rev. 627, 627 (1994); *cf.* Laurence H. Tribe, *American Constitutional Law* 1320–21 (3d ed. 2000) ("The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection from state rights infringement is very powerful indeed."); Amar, *supra*, at 213 (explaining "[t]he obvious inadequacy—on virtually any reading of the Fourteenth Amendment—of [Justice] Miller's opinion" in *Slaughter-House*).

(noting that *Slaughter-House* "arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship"). This is no novel theory; it reflects the text and history of Section 1 as it has been understood by this Court. *See* Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 105 (2009) (noting that "[a] careful examination reveals nothing in *Slaughter-House* that is inconsistent with incorporation"); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1619–20 (2007) (explaining the textual basis for incorporation of the Bill of Rights through the Privileges or Immunities Clause). Bill of Rights protections apply to the States not in spite of *Slaughter-House*, but because of it.

However, in a pair of subsequent decisions, the Court misread *Slaughter-House* to foreclose *any* application of the first eight Amendments against the States. *See Maxwell* v. *Dow*, 176 U.S. 581, 597–98 (1900); *In re Kemmler*, 136 U.S. 436, 448–49 (1890). Those decisions should be overruled to the extent that the Court reads them to exclude the right to a unanimous jury verdict from the "privileges or immunities of citizens." *See* U.S. Const. amend. XIV, § 1. The reasoning of those decisions has been effectively abrogated by a century of selective-incorporation case law, which has applied virtually every provision of the Bill of Rights to the States. And both decisions conflict with the original public meaning of the Privileges or Immunities Clause. *Cf. McDonald*, 561 U.S. at 854 (Thomas, J., concurring in part and

concurring in the judgment) ("To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer.").

Any correct reading of Section 1 would acknowledge that the Privileges or Immunities Clause provides an alternative basis for applying to the States, at minimum, those individual rights enumerated in the first eight Amendments. *See Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring). Here, there is special reason to do so because *Apodaca* stands in the way of incorporation under the Due Process Clause. Rather than overrule *Apodaca* (which *Amicus* urges the Court to do, if it chooses to apply the due-process framework), the Court should hold that the Privileges or Immunities Clause requires the States to convict people of serious crimes only by the unanimous verdict of an "impartial jury."[6] *See* U.S. Const. amend. VI.

II. If the Court applies the Due Process Clause, it should repudiate the two-track approach used in *Apodaca*—incorporated rights apply to the States the same way they apply to the federal government.

In addition to departing from the text and history of the Constitution, Justice Powell's concurrence in

[6] There is no textual basis for a two-track approach to incorporation under the Privileges or Immunities Clause because rights of national citizenship—by definition—apply everywhere in the Nation. *See* U.S. Const. amend. XIV, § 1 ("*No State* shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*. . . ." (emphasis added)).

Apodaca is rooted in the questionable concept of "two-track" incorporation under the Due Process Clause—the idea that "a federal constitutional right should not be fully binding on the States." *McDonald*, 561 U.S. at 784 (plurality opinion). The Court should reject that approach once and for all and declare, instead, that incorporated rights apply to the States the same way they apply to the federal government.

As the plurality noted in *McDonald*, "[t]here is nothing new in the argument" for two-track incorporation, yet it has failed "[t]ime and again." *Id.* After some debate early in the era of selective-incorporation, "the Court abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,'" calling it "'incongruous' to apply different standards 'depending on whether the claim was asserted in state or federal court.'" *Id.* at 765 (majority opinion) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964)). Far from endorsing "two-track" incorporation, "the Court decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* (quoting *Malloy*, 378 U.S. at 10) (collecting cases).

The "one exception" is the non-unanimous jury rule of *Apodaca*, which this Court has characterized as "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation." *Id.* at 766 n.14 (majority opinion); *see also*

Timbs, 139 S. Ct. at 687 n.1 (similar). And last Term, the Court once again rejected an invitation to adopt the two-track approach, unanimously holding that civil *in rem* forfeitures are governed by the same Eighth Amendment excessiveness standard in state and federal court. *Timbs*, 139 S. Ct. at 687, 689–91.

There is no reason to endorse the two-track approach now. Just the opposite: This case offers the perfect opportunity to overturn *Apodaca*, the controlling opinion of which is premised on the two-track approach. Whatever the Court concludes with respect to the meaning of the Sixth Amendment (and it should conclude that the Sixth Amendment requires unanimous jury verdicts), it should emphasize that when a right is incorporated under the Due Process Clause, that right applies identically in state and federal forums. After all, the Constitution sets a floor of rights below which state authorities may not go; yet, under the two-track approach, state and local authorities can (and do) fall beneath the federal constitutional minimum. *See* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 Ariz. L. Rev. 227, 227 (2008). This Court should not allow the States to construct a basement of rights somewhere beneath the federal floor. *See* U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

Overturning *Apodaca* should not be hard. Justice Powell's concurrence is based on social science more than law. His opinion acknowledges (as shown above) that the roots of the Sixth Amendment's unanimity requirement run deep. And the import of that acknowledgement is that jury unanimity is a fundamental right. Only in social-science research and legal commentary did Justice Powell find "a legitimate basis for experimentation and deviation from the federal blueprint." *Johnson*, 406 U.S. at 377 (Powell, J., concurring in the judgment in *Apodaca*). But there is never a legitimate basis for "deviation from the federal blueprint," *id.*, when that blueprint is the Constitution, *cf. McDonald*, 561 U.S. at 790 (plurality opinion) ("Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights."); *see also Burch*, 441 U.S. at 138–39 (holding that the individual right to an "impartial jury" prevails against a state's interest in the "'considerable time' savings" that might be gained from using non-unanimous, six-person juries). The Constitution is an inexorable command, impervious to "empirical research," *see Johnson*, 406 U.S. at 374 n.12 (Powell, J., concurring in the judgment in *Apodaca*), and unyielding to "experimentation" in the States, *id.* at 377, even in service of such salutary ends as "innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused," *id.* at 376. Because "the Sixth Amendment requires a unanimous jury verdict to convict in a *federal* criminal trial," *id.* at

371 (emphasis in original), the same is required to convict a person in a state criminal trial.

CONCLUSION

The Court should hold that the Sixth Amendment's guarantee of jury unanimity is a privilege or immunity of national citizenship, which Section 1 of the Fourteenth Amendment makes applicable to the States. If the Court resolves the question presented on due-process grounds instead, it should overrule *Apodaca* and hold that the Sixth Amendment right to conviction by a unanimous jury applies to the States because it is deeply rooted in our Nation's history and traditions and fundamental to our scheme of ordered liberty.

Respectfully submitted,

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