No. 18-5924

IN THE

Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. NACDL's mission is to serve as a leader in identifying and reforming flaws and inequities in the criminal justice system, redressing systemic racism, and ensuring that its members are equipped to serve all accused persons at the highest level.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. The issue before the Court is central to NACDL's mission because it implicates an accused's Sixth Amendment right to a trial by an impartial jury. *See* U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."). The jury trial right is, in fact, the foundation for most other Sixth Amendment

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[1] NACDL has conferred with counsel of record for the parties, and counsel has given consent to the NACDL to file this amicus brief. A letter of consent from each party accompanies this filing. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

rights, such as the right to notice of the charges, the right to confrontation, the compulsory process right, and the right to counsel—as the jury trial is the proceeding in which those rights are exercised. In Louisiana and Oregon, which are the only two states to permit non-unanimous verdicts in criminal cases, a jury's "guilty" verdict and the trial and deliberations that precede it are very different than in every other state. These differences fundamentally alter the nature of criminal justice in those two jurisdictions, and alter the representation an attorney will provide his client who stands accused of a crime in a jurisdiction that recognizes non-unanimous jury verdicts.

SUMMARY OF ARGUMENT

As criminal defense lawyers, we represent the people of the United States, one at a time, by defending individuals accused of criminal charges. *Kaley v. United States*, 571 U.S. 320, 358 (2014) (Roberts, C.J. dissenting). In this role, two of our most important functions are: (1) to advise clients on whether to exercise their Sixth Amendment right to trial by an impartial jury or whether to waive that right and plead guilty; and (2) to represent those clients who choose to go to trial before a jury. While these functions will vary slightly from state-to-state because of minor differences in the rules of criminal procedure, the variation between the non-unanimity jury-verdict rule in Louisiana and Oregon and the unanimity rule that applies in every other state and federal jurisdiction is far more extreme and pernicious. Those differences alter—sometimes dramatically—the nature of the jury trial right, creating a lesser form of protection for the accused in Louisiana and Oregon than exists everywhere else.

This reality ultimately changes the conversations that we, as defense lawyers, have with our clients about the trial and whether to exercise or waive this Sixth Amendment right. Our conversations on this issue often touch on many factors, including the strength of the evidence, the nature of any plea offer, and the likely sentence if a guilty verdict occurs. Inevitably, during these discussions, the client will ask: "What is my chance of being convicted if I go to trial?" In Louisiana and Oregon, the answer to this question is different than in all other jurisdictions, as we must advise our clients there that the chances of conviction are always greater in Louisiana and Oregon than everywhere else because 10 jurors out of 12 will be enough to convict. This means the jury trial right is worth less in Louisiana and Oregon, prompting rational defendants (including even some innocent defendants) to plead guilty more often and thereby attempt to avoid the "trial penalty" that inevitably results if they reject the plea offer and lose at trial. *See* Nat'l Ass'n of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), *available at* https://www.nacdl.org/trialpenaltyreport/.

Our conversations with our clients will not be limited to the lesser value of the jury trial right in plea bargaining, as we also must inform them about how Louisiana's non-unanimity rule will likely affect the trial itself and jury deliberations afterward. In most jurisdictions, prosecutors need every juror's vote for conviction, and the defense needs every juror's vote for acquittal. This produces a trial in which aggressive tactics on either side can be punished by hung juries, as the alienation of even a single juror

can prevent a unanimous verdict. In Louisiana and Oregon, however, prosecutors can afford to alienate a juror or two by making arguments and conducting examinations that might appeal to most members of the jury, while alienating others, as the cost of doing so in Louisiana and Oregon is far less. We must accordingly advise our clients that, because of these differences in the basic rules, their trials in Louisiana and Oregon will look far different than they would elsewhere, adding to the unpredictability of the result. This consequence, moreover, is borne out by the evidence, which suggests that jurors will deliberate for less time and make hastier verdicts if there is no unanimity requirement. The question of a client's liberty will, therefore, receive far less reasoned consideration in Louisiana and Oregon than in all other jurisdictions.

Faced with this advice, some clients will ask us why: Why are the rules in Louisiana and Oregon so different from everywhere else? Providing a truthful answer is often the most disturbing part of our conversation, as we must inform our clients that the non-unanimous jury-verdict rule was created precisely to disadvantage African-American criminal defendants by excluding other African-American Louisianans from participating fully on juries. History shows that this discriminatory rule has had precisely this intended effect, but it has also served to fundamentally skew the rules in a way that disadvantages every accused who is subject to it. Neither the Sixth Amendment nor ordered liberty permits such a rule to stand, and we urge the Court to disavow this pernicious relic from a bygone era.

ARGUMENT

I. NON-UNANIMOUS JURIES ARE FUNDAMENTALLY DIFFERENT AND LESS DELIBERATIVE THAN THE SIXTH AMENDMENT REQUIRES

Every time NACDL's members undertake to represent a criminal accused, we begin with a thorough inquiry into the costs and benefits of going to trial. One aspect of this analysis inevitably boils down to an assessment of the value of the jury trial right in each client's case. This assessment—and our resulting communications with our clients—begins with a healthy respect for the Sixth Amendment jury trial as one of the critical pillars of our criminal justice system. At our founding, the Framers "insisted upon" the jury trial right: "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *See Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). And this protection has become more vibrant in recent years, because this Court, in a series of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), restored the Framers' vision by reaffirming that juries must find all facts essential to a lawful sentence.

In Louisiana and Oregon, however, our conversation will quickly take a different tack, as we will then be compelled to explain that in 48 out of 50 states, and in every federal court in the United States (including Louisiana and Oregon) 12 jurors are given equal opportunity to confirm "the truth of every accusation." But in Louisiana and Oregon's state courts, the jury's status as a bulwark of citizen power

is diminished because the prosecutor's job is easier—they need only convince 10 members of the 12-person jury in order to obtain a criminal conviction. Easing conviction, however, undermines the jury-trial right, which, as this Court acknowledges, "has never been efficient; but it has always been free." *Apprendi*, 530 U.S. at 498. The most obvious consequence of needing only 10 jurors, as we must explain to our clients, is that it is easier to convict in Louisiana and Oregon on the same evidence than it is anywhere else.[2] Indeed, a recent analysis of 3,000 felony trials in Louisiana revealed 40 percent were non-unanimous verdicts. Jeff Adelson, Gordon Russell & John Simerman, *How an abnormal Louisiana law deprives, discriminates and drives incarceration: Tilting the scales*, The Advocate, Apr. 1, 2018, *available at* https://www.theadvocate.com/new_orleans/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

But that is not all we must say to our clients, as we must advise them that, in our experience, the sort of "jury" that decides whether they keep their liberty will likely be less thorough than in other jurisdictions. Studies and experience have shown that non-unanimous juries take less time discussing the evidence and considering it. Studies comparing the quality of deliberation of unanimous juries with non-unanimous juries have found that non-unanimous juries are less thorough and tend to cease

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[2] We also explain to the client that it is slightly easier to acquit, but that empirical evidence shows that the non-unanimity requirement has not had this effect in practice. Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593 (2018) (explaining the majority of non-unanimous verdicts are convictions, not acquittals).

deliberations when the required quorum is reached. *See* Reid Hastie, Steve D. Penrod & Nancy Pennington, *Inside the Jury*, 85 (Harv. Univ. Press 1983) (finding that the farther the jury gets from the unanimity rule, the fewer key categories of evidence are discussed); Dennis J. Devine, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol., Pub. Pol'y & L. 622, 669 (2001).

In practice, this means that in 10-2 verdict juries, when a majority develops, the jury has less incentive to reach a consensus and continue to consider dissenting opinions. The two dissenting jurors may not even have a chance to speak to other jury members about their opinion. Because a non-unanimous jury can completely discount the opinions of two jurors, it is at greater risk of reacting to swift judgments. In contrast with a unanimous jury, if there is even one juror who is unconvinced, the jury may discuss the case to convince the one hold-out juror. Studies show that hold-out jurors on a unanimous jury incentivize the jury to request additional instructions from the judge and clarifications on standard of proof beyond a reasonable doubt. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1273 (2000) ("Twenty-seven percent of the requests for additional instructions from the judge, twenty-five percent of the oral corrections of errors made during discussion, and thirty-four percent of the discussions of the standard of proof beyond a reasonable doubt occurred in efforts to reach unanimity after a majority view had surfaced."). Under a system where a jury can completely ignore the opinions of two jurors and still reach a decision, the likelihood that the jury

engaged in robust discussion of the evidence against a defendant decreases. The jury trial right is, accordingly, worth considerably less in Louisiana and Oregon than it is everywhere else.

II. NON-UNANIMOUS JURIES ALSO FUNDAMENTALLY SKEW THE DECISION OF WHETHER TO EXERCISE THE JURY TRIAL RIGHT

The diminished quality and nature of deliberations is not the only pernicious effect of Louisiana's non-unanimous jury-verdict rule. The rule also skews one of the most critical decisions regarding criminal charges: Whether to exercise the right to jury trial or to waive it by pleading guilty. That calculus is always a complex one, involving a discussion between counsel and client of the strength of the evidence, the nature of any plea offer, the geographic location of the trial, the likely sentence if the trial is lost, and a number of unique factors that differ in every trial and with every accused. *See McMann v. Richardson*, 397 U.S. 759, 769–70 (1970) (explaining the varied questions in considering a plea deal and noting "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case."); *see also Premo v. Moore*, 562 U.S. 115, 124–25, (2011) ("Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.") Despite the varied nature of these considerations, however, they often boil to a single question from client to counsel: "What are my chances of getting convicted if I go to trial?" In Louisiana and Oregon, the answer to this

fundamental question is very different than it is everywhere else, as the chances of getting convicted are always greater. As a Louisiana criminal judge explains: "'Once you lower the threshold for a guilty verdict, that spills over into a lawyer's and his client's evaluation of what your chances are at trial. . . . It's the hidden thing.'" Gordon Russell, John Simerman & Jeff Adelson, *Louisiana leads nation in locking up people for life; often, jurors couldn't even agree on guilt*, The Advocate, Apr. 21, 2018, *available at* https://www.theadvocate.com/new_orleans/news/article_48a11022-43e8-11e8-a984-df8200880997.html.

In evaluating the likelihood of success at trial, defense counsel must advise the client that the non-unanimous jury rule changes the very nature of the trial itself. Jury trials in Louisiana and Oregon are different because prosecutorial and defense strategies are altered at all phases—during opening statements, choosing witnesses, cross examination, and closing arguments—to account for the practical effects of the non-unanimity rule on the standard of proof.

Under the Sixth Amendment, the duty of the prosecution is to establish a defendant's guilt beyond a reasonable doubt of 12 jurors. *See United States v. Booker*, 543 U.S. 220, 239 (2005) ("'[T]rial by jury has been understood to require that 'the truth of every accusation[. . .]should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" (quoting *Apprendi*, 530 U.S. at 477)). At the end of trial, if one juror believes that the evidence shows that the defendant may have not committed the crime, the jury cannot convict him. If one juror feels it *highly likely* the defendant committed the crime, the jury cannot convict him. If one juror has any reasonable doubt that a defendant

is guilty, the jury cannot convict him. In 48 out of 50 states, all 12 jurors must agree that there is no reasonable doubt in their minds that a defendant committed the charged offense. This rule helps to protect the innocent from being wrongly convicted. *See In re Winship*, 397 U.S. 358, 363 (1970). As this Court explained in *Winship*:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

However, in Louisiana, a prosecutor must only convince 10 out of 12 jurors of guilt beyond a reasonable doubt. This means that if two jurors harbor reasonable doubt, their opinions are discounted, and the defendant will be found guilty. This lower standard of proof increases the likelihood that innocent people will go to jail in Louisiana—making trial much riskier even for criminal defendants with strong defenses. Because of this, Louisiana attorneys change their calculation of whether to go to trial. As one attorney has put it: "'I would take that shot (at trial) more than I do now'. . . '[r]ight now, I need three (jurors to vote for not guilty), when all I would need is one.'" Gordon Russell, et al.,

Louisiana leads nation in locking up people for life; often, jurors couldn't even agree on guilt.

Further, the non-unanimity rule transforms the trial strategy for both prosecutors and defense counsel. In 48 of 50 states, alienating a single juror has serious costs for both sides, and counsel must behave accordingly. When only jury unanimity can result in conviction or acquittal, both sides are acutely aware that all jurors will have a say in jury deliberations. So, on unanimous juries that have a cross-section of the community represented, a more divisive strategy in argument or the presentation of evidence could backfire or be exposed. By contrast, where the voices of jurors of color are eliminated, by a prosecutor striking them or the non-unanimity rule disempowering them, a prosecutor can employ a more divisive strategy, even racially inflammatory one. *See* Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 375 (2012) (explaining that a defendant was convicted after a Louisiana prosecutor struck every juror of color and compared the defendant to O.J. Simpson in closing). Under the non-unanimous rule, even when prosecutors comply with *Batson v. Kentucky*, 476 U.S. 79 (1986), and permit people of color to participate on a jury, a majority of other jurors can still override the one or two minority jurors. *Johnson v. Louisiana*, 406 U.S. 356, 397 (1972) (Stewart, J. dissenting) (referring to non-unanimous juries, "nine jurors can simply ignore the views of their fellow panel members of a different race or class."). So, "[a]s a prosecutor, you have the luxury of saying, even if you have one or two jurors who you believe are problematic, well, you can still get the conviction. It gives you a little bit of

margin." Gordon Russell, et al., *Louisiana leads nation in locking up people for life; often, jurors couldn't even agree on guilt*. Practically, this means a prosecutor knows the views of minority jurors will not be relevant to the deliberations. This effectively encourages prosecutors to adopt a more divisive strategy, safe in the knowledge that the non-unanimity rule will protect them even if their tactics are exposed by defense counsel and rejected by at least some jurors.

The difference in trial also changes the entire dynamic in which client and attorney consider a plea because the jury trial right in Louisiana is worth far less. During any plea negotiation, a criminal defendant is bargaining their jury-trial right, so diminishing that right undermines the defendant's position and infects the fairness of the plea process. *Cf. Missouri v. Frye*, 566 U.S. 134, 143 (2012) (explaining "[t]he reality" that plea bargains are "central to the administration of the criminal justice system"). This means that calculus will tip in favor of a guilty plea more often. As a Louisiana attorney explains:

> A lot of people plead guilty to charges that prosecutors would have a hard time convicting people of with (a requirement for) a unanimous jury. . . I have clients who would have gone to trial on manslaughter and taken their chances. But looking at life without parole from a nonunanimous jury, knowing he's facing the possibility of being convicted by 10 of 12, he takes the deal.

Gordon Russell, et al., *Louisiana leads nation in locking up people for life; often, jurors couldn't even agree on guilt*. In Louisiana and Oregon, in other words, guilty pleas will be more likely despite weaker evidence, worse plea offers or other conditions that, in 48 states, would lead the accused to exercise the Sixth Amendment jury trial right and demand a trial. *Cf.* Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 451 (1971) (explaining how prosecutors generally "offer large concessions to induce a guilty plea" when they have a weak case). In some cases, innocent defendants may be persuaded to plead guilty in Louisiana and Oregon because they have a lower chance of winning at trial and the serious risk of greater punishment if they reject the plea offer. *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, Cornell Law Faculty Working Papers, 17–18 (2014) ("Many defendants, even innocent ones, are willing to accept a lesser punishment in return for avoiding the risk of a much harsher sentence following conviction. . ."). A Louisiana judge summed it up:

> The state goes into any criminal trial with an overwhelming advantage. . . . That's why a lot of cases don't go to trial. Defense lawyers realize that because of this law, the burden is so huge they don't feel like they've got a chance. So the best thing is to work out a plea.

Gordon Russell, et al., *Louisiana leads nation in locking up people for life; often, jurors couldn't even agree on guilt*.

What's more, the skewed incentives to plead out directly contribute to Louisiana being a leader in per capita incarceration rates. *Id.* More than 90 percent of Louisiana's new inmates have plead guilty to charges. *Id.* The Louisiana bar, judges, and lawyers alike, acknowledge the corrupting role the non-unanimity jury-verdict rule has in the plea process, thereby contributing to the sky-high incarceration rates. *Id.* ("'I do think clearly it's a contributing factor to the number of people incarcerated,' Paul Bonin, a Criminal District Court judge in Orleans Parish[. . .]said of the split-verdict rule.").

In short, the term "trial by an impartial jury" means something very different in 48 states and the federal courts—in every aspect—than it does in Louisiana and Oregon. The Sixth Amendment does not permit such a result.

III. THE PERNICIOUS RACIAL ORIGINS OF THE NON-UNANIMITY RULE FURTHER UNDERMINE THE SIXTH AMENDMENT JURY TRIAL RIGHT

Understanding the problems with non-unanimous juries, a client may be tempted to ask why Louisiana would use such a system. If there were a good answer, perhaps the resulting discussion would be an easier one as the rule would at least have "the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). But the truthful answer to this question is not a good one, and further serves to undermine the Sixth Amendment jury trial right. When faced with this question, our members are compelled to explain that the non-unanimity rule was enacted during the Jim Crow era, to disadvantage

African-American criminal defendants by excluding other African-American Louisianans from participating fully on juries. *See Louisiana v. Hankton*, 122 So. 3d 1028, 1035 (La. App. 4th Cir. 8/2/13) (acknowledging Louisiana adopted non-unanimous juries in an "atmosphere of hate" toward Black citizens); *see also* Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593 (examining the history and effects of Louisiana's non-unanimous criminal jury system).

The non-unanimity rule stretches back to the aftermath of Reconstruction, when Louisiana, along with many other Southern States, held a constitutional convention aimed at enshrining white supremacy in the state constitution. *Id.* at 1597, n.18 (collecting sources). Among many changes intended to strip Black citizens of political and civil rights, the all-white delegation to the 1898 Constitutional Convention adopted articles amending the jury system. One of these changes permitted non-unanimous juries (nine of twelve, then) to convict in noncapital felony cases. The purpose behind this rule was clear: in the event Black citizens were jurors, the non-unanimity provision would prevent them from hanging the jury. *See* Angela A. Allen-Bell, *How the Narrative About Louisiana's Non-Unanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 Mercer L. Rev. 585, 597 (2016). Indeed, editorials at the time profess racially discriminatory concerns about Black citizens serving on juries, opining that Black jurors would become the "earnest champion" of any Black defendant such that a "hung jury is the usual result." *Id.* (quoting *Future of the Freedman*, The Daily Picayune, Aug. 31, 1873, at 5); *see also* Robert J.

Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 375 (2012). Against this backdrop, Louisiana adopted the non-unanimous jury-verdict rule to dilute the civic power of Black citizens and nullify acquittal votes.

Counsel would then be compelled to advise the client that, indeed, the rule has succeeded in nullifying acquittal votes by Black jurors. Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. at 1636–37. Frampton explains:

> Because the overwhelming majority of nonunanimous verdicts are non-unanimous *convictions* as opposed to *acquittals*, the discrepancies mean that the nonunanimous-verdict rule continues to operate today as it was designed to operate during the *Plessy* era—black jurors are more likely than white jurors to cast 'empty votes' (i.e., dissenting votes that are overridden by supermajority verdicts).

Id. at 1622. The real-world effect for a client considering whether to stand trial is that they must not only weigh the strength of their defenses, but also the "empty vote" problem. And for a Black defendant, "empty votes" are a greater part of the calculus because the jury is less likely to be a jury of peers if a Black juror's vote is the one overridden. In these ways, the racially discriminatory origins and effects of the non-unanimous jury rule continues to dilute the civic power of Black Louisianans and burden Black criminal defendants. Neither the Sixth Amendment nor ordered liberty permits such a rule to stand.

CONCLUSION

For the foregoing reasons, the Court should reverse the court below.

Respectfully submitted,

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