No. 18-5924

IN THE

Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

BRIEF FOR AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourteenth Amendment fully incorporates the Sixth Amendment's guarantee of a unanimous verdict.

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is one of the largest voluntary professional membership organizations in the United States. The ABA's more than 400,000 members include attorneys in private firms, corporations, nonprofit organizations, and government agencies, including prosecutors and defense counsel, as

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

well as judges, legislators, law professors, law students, and non-lawyers in related fields.[2]

The ABA has long recognized that a requirement of jury unanimity in criminal cases is fundamental to the right to jury trial secured by the Sixth Amendment and is essential to maintaining public confidence in the criminal justice system.[3] In 1976, the ABA's Commission on Standards of Judicial Administration recommended, and the ABA adopted, Standard 2.10 of the ABA *Standards Relating to Trial Courts*, which stated: "The verdict of the jury [in criminal cases] should be unanimous." The ABA then also revised its Criminal Justice Standards, which reflect extensive study by a broad array of participants in the criminal justice system, to require unanimous verdicts. ABA, *Criminal Justice Standard* 15-1.1(c) (1978) ("The verdict of the jury should be unanimous."); *see id.* at 126 (explaining that a unanimity requirement "enhances the reliability of the jury's verdict" and "require[s] the majority both

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council participated in the adoption of or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] Before 1976, the ABA's Criminal Justice Standards permitted non-unanimous jury verdicts. *See* ABA, *Standards for Criminal Justice, Trial by Jury*, Standard 1.1 (Approved Draft 1968); *Johnson* v. *Louisiana*, 406 U.S. 366, 377 & n.12 (1972) (Powell, J.). Since that time, ABA has comprehensively revisited the question and has surveyed extensive social science and historical research, leading it to conclude that non-unanimous verdicts are inconsistent with a fundamentally fair criminal justice system.

to listen to and respect the minority opinions during the deliberative process").[4]

Further study by ABA has solidified its view that jury verdicts in criminal cases should be unanimous. In its 2005 *Principles for Juries and Jury Trials*, ABA discussed empirical studies concluding that a non-unanimous decision process may reduce the reliability of jury determinations, silence minority viewpoints, and erode confidence in the criminal justice system. ABA, *Principles for Juries and Jury Trials*, Principle 4.B Commentary 24-24 (2005).[5] And in 2018, the ABA House of Delegates, the policymaking body of the Association, adopted Resolution 100B, which "urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases." As discussed below, that resolution was accompanied by a further study examining social science research as well as historical research indicating that, in both Louisiana and Oregon, the practice of non-unanimous juries was adopted in part for racially discriminatory reasons.

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[4] This Court "long [has] referred to the[] ABA Standards as guides to determining what is reasonable." *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005); *see* Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 252 (1974) (hailing the Standards as "a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual").

[5] In 2008, ABA filed an amicus brief urging this Court to hold that unanimous jury verdicts are constitutionally required in both state and federal courts. Br. for Amicus Curiae American Bar Ass'n, *Lee* v. *Louisiana*, No. 07-1523 (U.S. filed July 7, 2008).

For the reasons given below, ABA urges the Court to hold that the Fourteenth Amendment fully incorporates the Sixth Amendment's requirement of jury unanimity and to overrule *Apodaca* v. *Oregon*, 406 U.S. 404 (1972).

SUMMARY OF ARGUMENT

I. This Court should hold that the Sixth Amendment, of its own force and as incorporated against the States through the Due Process Clause of the Fourteenth Amendment, requires that jury verdicts in felony criminal cases be unanimous. Although a divided Court allowed a non-unanimous verdict to stand against a Sixth Amendment challenge in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), no opinion commanded a majority of the Court, and the plurality and concurring opinions that supported the judgment relied on differing, even contradictory reasoning—and in each case on rationales inconsistent with both prior and subsequent decisions of this Court. Under these exceptional circumstances, and where individual constitutional rights necessary to secure a fundamentally fair trial are at stake, the Court should overrule *Apodaca*.

Four Justices in *Apodaca* would have held that the Sixth Amendment by itself does not require unanimous juries. But that reasoning was rejected by five other Justices, deviated from prior decisions, and has been rejected in other opinions stating without qualification that the Sixth Amendment requires unanimous jury verdicts. One Justice would have held that, even though the Trial by Jury Clause of the Sixth Amendment does require unanimous verdicts, the Fourteenth Amendment does not incorporate that particular requirement. But that partial approach to incorporation has never been adopted by the Court and has been expressly repudiated in subsequent decisions. Thus, giv-

en its weak underpinnings and inconsistency with both earlier and later precedents, *Apodaca* has little claim to the force of *stare decisis*.

II. The precedential effect of *Apodaca* is further undermined by two factors that the Court did not consider in that decision: scholarship demonstrating that unanimity is important to the functioning of the jury, and historical evidence showing that in both Louisiana and Oregon, non-unanimous verdicts have a racially tainted origin. First, the *Apodaca* Court had little empirical evidence about non-unanimous juries, but subsequent research supports a conclusion that juries operating under a unanimity rule deliberate more carefully and thoughtfully, and with greater respect for all jurors' opinions, including those representing minority and dissenting viewpoints. These qualities are essential if the jury is to play its fundamental constitutional role as the conscience of the community, and in particular the representative of a fair cross-section of a diverse community.

Second, the ability of a majority-rule jury to ignore minority viewpoints is particularly troubling given historical evidence that, in both Louisiana and Oregon, the non-unanimous verdict was authorized as a vehicle of racial discrimination. In Louisiana, non-unanimous verdicts were written into its constitution at the 1898 Convention, which adopted numerous measures to reinforce white supremacy in the State. And in Oregon, non-unanimous verdicts were authorized after a sweep of anti-Semitism and other discriminatory attitudes across the State following the partial acquittal of a Jewish defendant. The tainted origins of these measures provide further reason the Court should not allow them to stand, and should instead hold that the constitutional guarantee of unanimous jury verdicts in felony criminal cases applies equally across the Nation.

ARGUMENT

In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), five Justices concluded that the Trial by Jury Clause of the Sixth Amendment, as incorporated against the States through the Due Process Clause of the Fourteenth Amendment, did not require unanimous jury verdicts in criminal cases—but those five Justices disagreed with and indeed contradicted each other on the rationale for that conclusion.[6] Four Justices concluded that the Sixth Amendment does not require unanimous verdicts in criminal cases. *Id.* at 410-411 (White, J., plurality opinion). Justice Powell, concurring only in the judgment, concluded that the Sixth Amendment does require jury unanimity in *federal* court—and thus disagreed with the plurality, which believed that the Sixth Amendment did not require unanimous verdicts at all. *Johnson* v. *Louisiana*, 406 U.S. 356, 369-371 (1972) (Powell, J.). But Justice Powell also concluded that that particular aspect of the Sixth Amendment's jury trial guarantee was not incorporated against the States by the Fourteenth Amendment. *Id.* at 371-380.[7]

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[6] *Apodaca* was decided in tandem with *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), which held that the Due Process Clause of its own force does not require jury unanimity. Several of the separate opinions applicable to *Apodaca* appear in *Johnson*.

[7] Four dissenting Justices concluded that the Sixth Amendment applies equally in federal and state courts, and requires jury unanimity in both. *Johnson*, 406 U.S. at 380-394 (Douglas, J.); *Apodaca*, 406 U.S. at 414-15 (Stewart, J.). Ironically, then, eight Justices concluded that the Sixth Amendment has the same scope in federal and state courts, and five Justices concluded that the Sixth Amendment requires unanimous jury verdicts—yet a majority of the Justices nonetheless concluded that the Sixth Amendment does not require unanimous jury verdicts in state courts.

The outcome in *Apodaca* was not only unsatisfying; it proved to be unstable. Since that decision, the Court has reaffirmed what was clear from its previous decisions—that the Sixth Amendment does require unanimous jury verdicts, at least in federal court. *See Richardson* v. *United States*, 526 U.S. 813 (1999). The Court has thus rejected the rationale of the *Apodaca* plurality. Separately, the Court has also repudiated the approach to incorporation reflected in Justice Powell's concurrence, and has reaffirmed that, if a right secured by the Bill of Rights is incorporated in the Fourteenth Amendment, it applies in equal measure to the federal and state governments. *See Timbs* v. *Indiana*, 139 S. Ct. 682 (2019); *McDonald* v. *City of Chi.*, 561 U.S. 742, 766 n.14 (2010). Neither of the lead opinions in *Apodaca* thus reflects the Court's current jurisprudence (and both were inconsistent with prior decisions as well).

Given the incongruity in *Apodaca*, it is appropriate for the Court to reconsider that decision. The Court, quite rightly, does not often overrule its precedents, but the status of *Apodaca* as a precedent, other than the bare outcome, is doubtful. In addition, extending well established Sixth Amendment case law to the states would cause little disruption; as of now, every State other than Louisiana and Oregon requires unanimous jury verdicts in criminal cases.

Apodaca also did not have the benefit of significant information that undermines the reasoning of the lead opinions. First, the plurality believed that a requirement of unanimity would not "materially contribute to the exercise of [the jury's] commonsense judgment," 406 U.S. at 410, but cited no empirical research to support that conclusion. Similarly, Justice Powell suggested that a non-unanimous rule would not result in "the

exclusion of minority group viewpoints" in the jury room, 406 U.S. at 378, but also cited nothing in support. Since *Apodaca*, research in jury and other small-group dynamics has shown that a unanimity rule is important to ensure that the jury debates thoroughly and respects minority viewpoints. In addition, research has revealed that the non-unanimous rule was likely adopted in Louisiana and Oregon in part for racially discriminatory reasons—a grave defect that threatens to undermine public confidence in the criminal justice system. All of these reasons warrant the Court reconsidering *Apodaca* and holding that the Sixth Amendment, of its own force and as applied through the Fourteenth Amendment, requires unanimous jury verdicts in criminal cases.

I. THE SIXTH AMENDMENT'S GUARANTEE OF JURY UNANIMITY IS INCORPORATED IN THE FOURTEENTH AMENDMENT

A. The Sixth Amendment Guarantees Jury Unanimity

As explained above, the four plurality Justices in *Apodaca* would have held that the Sixth Amendment permits non-unanimous verdicts—but that position was expressly rejected by five other Justices, including Justice Powell, who provided the controlling vote. *See Johnson*, 406 U.S. at 366 (Powell, J., concurring) ("In 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 the federal jury trial."). Louisiana has urged the Court to conclude that the Sixth Amendment does not require a unanimous jury. *See* Opp. 6-12. But that argument has been rejected by the Court both before and after *Apodaca.*

Nearly 90 years ago, the Court stated it was "not open to question" that the Sixth Amendment mandates unanimous criminal jury verdicts. *Patton* v. *United States*, 281 U.S. 276, 288 (1930). *Patton* traced this Court's jurisprudence to 1897 to confirm that jury unanimity is "embedded" in the Sixth Amendment, "beyond the authority of the legislative department to destroy or abridge." *Id.* at 289-290 (citing *American Publ'g Co.* v. *Fisher*, 166 U.S. 464 (1897); *Springville* v. *Thomas*, 166 U.S. 707 (1897); *Maxwell* v. *Dow*, 176 U.S. 581 (1900)); *see also Thompson* v. *Utah*, 170 U.S. 343, 353 (1898) ("[The] wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.") And the requirement of unanimity dates to long before the nation's founding. *See Johnson*, 406 U.S. at 382 n.2 (Douglas, J., dissenting) (tracing requirement of unanimity to 1367).

The Court has reaffirmed the requirement of unanimity several times. In *Andres* v. *United States*, 333 U.S. 740, 748 (1948), for example, the Court stated without qualification: "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." And the Court cited with approval Justice Powell's *Apodaca/Johnson* concurrence in *Richardson*, 526 U.S. at 817, where it stated: "[A] jury in a federal criminal case cannot convict unless it unanimously finds the Government has proved each element." *See also Apprendi* v. *New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("[The defendant's] guilt of the crime … will be determined *beyond reasonable doubt by the unanimous vote of 12 of his fellow citizens*."); Fed. R. Crim. P. 31(a).

Given this unbroken case law, it must be regarded as settled that the Sixth Amendment requires unanimous jury verdicts. Although the *Apodaca* plurality suggested otherwise, that position has never commanded a majority of the Court. Respondent seeks to draw an analogy (Opp. 7-8, 11-12) to *Williams* v. *Florida*, 399 U.S. 78 (1970), but *Williams* does not permit split criminal verdicts. Rather, at issue in *Williams* was the constitutional propriety of a six-person jury in a non-capital criminal case. This Court determined that Florida's six-person jury did not offend the Sixth Amendment, reasoning that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system." 399 U.S. at 102. But the Court has never suggested that the unanimity requirement was a historical accident; quite the contrary, it has always viewed unanimity as fundamental to the very concept of a jury. And the Court in *Williams* "intimate[d] no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial." *Id.* at 100 n.46. Thus, whatever may be said of *Williams*, it does not speak to the non-unanimous verdict here under review.

B. The Sixth Amendment Should Be Wholly Incorporated In The Fourteenth Amendment

Since this Court has already held that the Sixth Amendment's Trial by Jury Clause requires a unanimous verdict, the next question is whether the Amendment's guarantee of jury trials—including its unanimity requirement—is wholly incorporated in the Fourteenth Amendment. The Court's precedents on the Sixth Amendment and on incorporation make clear that unanimity is required in state and federal courts alike.

The test for incorporation is whether the right in question is "fundamental to our scheme of ordered liberty, or deeply rooted in this Nation's history and tradition." *Timbs*, 139 S. Ct. at 687 (internal quotation marks and citations omitted). The Court has repeatedly held that the Sixth Amendment's protections meet this standard.

The general constitutional right to trial by jury was held to be incorporated in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). There, the Court, surveying historical practice and its own precedents, held unequivocally that "trial by jury in criminal cases is fundamental to the American system of justice," *id.* at 149, and "reflect[s] a profound judgment about the way in which law should be enforced and justice administered," *id.* at 155. "Our conclusion," the Court explained, "is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.* at 157-158.

The jury trial right thus stands on equal footing with other aspects of the Sixth Amendment that are fully incorporated in the Fourteenth Amendment. For example, the Sixth Amendment's guarantee that trials be public was found embedded in the Fourteenth Amendment's Due Process Clause. *See In re Oliver*, 333 U.S. 257, 266-273 (1948) (tracing "distrust" for "secret" trials to "English common law heritage" and to "notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *letter de cachet*."). Likewise, "the assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights and liberty." *Gideon*

v. *Wainwright*, 372 U.S. 335, 343 (1963) (internal quotation marks omitted). The "Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment," *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965), as is its guarantee of compulsory process, *Washington* v. *Texas*, 388 U.S. 14, 18-19 (1967), and a speedy trial, *Klopfer* v. *North Carolina*, 386 U.S. 213, 223-226 (1967).

Because the Sixth Amendment's Trial by Jury Clause requires jury unanimity, and because that Clause has been incorporated into the Fourteenth Amendment, the only way to conclude that the States are not bound by the unanimity requirement would be to hold that *one particular aspect* of the Sixth Amendment jury trial right has not been incorporated—essentially, the rationale for Justice Powell's separate opinion in *Apodaca*. But this Court has rejected that approach to incorporation. As the Court explained in *Timbs*, "[i]ncorporated Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect [federal] rights against federal encroachment.' Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it … requires." 139 S. Ct. at 687 (quoting *McDonald*, 561 U.S. at 765).[8]

Moreover, jury unanimity bears every hallmark of "fundamental" importance as each of the other incorpo-

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[8] In *Timbs*, the Court noted that the "sole exception" to this rule is "that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings," which it ascribed to the "'unusual division among the Justices'" in *Apodaca*. *Timbs*, 139 S. Ct. at 687 n.1.

rated Sixth Amendment rights. *See Patton*, 281 U.S. at 290 (unanimity right is "substantial and essential"); *Johnson*, 406 U.S. at 369 (Powell J.) ("[U]nanimity is one of the indispensable features of federal jury trial.") Like the reasonable doubt standard, it is of ancient vintage and touches upon the jury's core function. *Johnson*, 406 U.S. at 381-383 (Douglas, J., dissenting). It is therefore peculiar to estrange jury unanimity from its related rights within the Sixth Amendment. Justice Douglas observed the anomaly when it first arose, asking how an incorporated Sixth Amendment could nonetheless secure a right to unanimity *only* in federal trials. *Id.; see also id.* at 395 (Brennan, J., dissenting) ("Readers of today's opinions may be understandably puzzled ….").

Today it is clear there is no reason for such an exception. As explained in Part II.A, *infra*, the American Bar Association's survey of research since the 1972 *Apodaca* decision shows that jury unanimity serves a crucial function in the criminal justice system, by fostering effective group decision making, protecting minority jury votes, and reducing inconsistencies. Moreover, professed concerns about "efficiency" have long been a pretextual justification for a policy at least partly rooted in a racially discriminatory purpose. For these reasons the ABA's Criminal Justice Standards have now for decades called for unanimous jury verdicts. *See* pp. 2-3, *supra*.

C. ***Stare Decisis*** **Is Insufficient Reason To Preserve** ***Apodaca***

Given the weight of both this Court's case law and the research militating in favor of a fully incorporated Sixth Amendment, the sole justification for continuing to permit non-unanimous jury verdicts is *stare decisis*. But in this highly unusual context, *stare decisis* does not warrant adherence to *Apodaca*.

"Overruling precedent is never a small matter." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Time and again this Court has explained that *stare decisis* is a "foundation stone of the rule of law," *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 798 (2014), necessary to "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). But *stare decisis* has never been an absolute rule in this Court, and the Court has been more willing to reconsider its prior decisions when it "interpret[s] the Constitution because [that] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions." *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997).

The ABA respectfully submits that "special justification" exists to overrule *Apodaca*. As an initial matter, as this Court recently observed, the *Apodaca* plurality opinion was "'the result of an unusual division among the Justices,'" *Timbs*, 139 S. Ct. at 687 n.1, with the concurring opinion of Justice Powell effectively producing precedent with which eight other Justices differed. Overruling *Apodaca* is thus not to succumb to a temptation for later courts to overrule earlier, well-reasoned decisions with which they simply disagree. Rather, here there is effectively no prior "decision" by the Court at all, so much as the opinion of one Justice advancing a theory of partial incorporation that the other eight Justices rejected—and a quirk of arithmetic.

Moreover, developments in the Court's case law and empirical research have eroded support for the two (competing) rationales for *Apodaca*. As explained above, the *Apodaca* plurality's rationale—that the

Sixth Amendment does not require jury unanimity, period—has been repudiated by this Court, as has the concurrence's rationale—that the Sixth Amendment need not be incorporated *in toto*. *See* pp. 6-7, *supra*. Moreover, the two States that have allowed non-unanimous juries, Louisiana and Oregon, do not have a substantial reliance interest in the perpetuation of this plainly erroneous legal rule.[9] A ruling for petitioner here would not threaten any upheaval of their judicial administration. Rather, those two States would merely become aligned with the 48 other States and the entire federal system by dint of minor adjustment of criminal procedure. *See Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases … involving procedural and evidentiary rules.") (internal citations omitted).

Indeed, it is the State's position that would disturb the law in the way that *stare decisis* seeks to prevent. Louisiana has argued (Opp. 6-12) that the Sixth Amendment does not require unanimity *at all*. Such a ruling would expose all potential criminal defendants to the possibility of conviction by split verdict—a practice that virtually every jurisdiction in the nation has rejected. It would be ironic indeed were *stare decisis* used to justify such a result.

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[9] This case does not require the Court to consider whether a decision that the Sixth and Fourteenth Amendments require unanimous verdicts would apply retroactively to cases that are already final. *See Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) ("New rules of procedure … generally do not apply retroactively.").

II. A UNANIMITY REQUIREMENT PROMOTES THE RELIABILITY OF JURY VERDICTS AND PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM

A. A Unanimity Rule Promotes Better Decision Making By Juries

When the Court last considered the issue of jury unanimity in *Apodaca* and *Johnson*, every Justice agreed on the basic principle that the Sixth Amendment should be construed to promote thorough jury deliberations, attention to minority viewpoints, and community confidence in the criminal justice system, but they disagreed on whether unanimity was necessary to those constitutional objectives. The Justices disagreed, in particular, on the effect that non-unanimous decision rules would have on the jury's deliberative process. *Compare Johnson*, 406 U.S. at 361 (suggesting that jury members would not automatically and prematurely "cease discussion and outvote a minority" under a non-unanimous decision rule) *and id.* at 374 & n.12 (Powell, J.) (predicting that community confidence in jury verdicts would not diminish under a rule permitting non-unanimous verdicts) *with id.* at 388 (Douglas, J.) (non-unanimous verdicts "diminish[] the reliability of a jury") *and id.* at 398 (Stewart, J.) (non-unanimous verdicts suppress consideration of minority viewpoints and undermine "community confidence in the administration of justice").

At the time of the Court's decisions in *Apodaca* and *Johnson*, there was little empirical research that might have confirmed or disproved those competing predictions.[10] Since that time, extensive studies have been

[10] The Court did have empirical evidence that a non-unanimity rule makes it easier in some cases for the prosecution to obtain a conviction. As Justice Douglas related, the influential

conducted into the way juries make decisions and have reached conclusions that support a unanimity rule.[11] Several of those studies were reviewed by the ABA when it adopted its 2005 *Principles for Juries and Jury Trials*, which reconfirmed the ABA's support for unanimous jury verdicts.[12]

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study of juries by Professors Kalven and Zeisel concluded that, in States with a unanimity requirement, 56% of deadlocked juries contained either one, two, or three dissenters, and the majority favored the prosecution in 44% of those cases (*i.e.*, of the 56%) but the defendant in only 12%. Thus, although a non-unanimity rule may reduce the number of hung juries, it likely does so in a way that systematically favors the prosecution. *See Johnson*, 406 U.S. at 390-391 (Douglas, J., dissenting) (discussing Kalven & Zeisel, *The American Jury* 461, 488 (1966)). Subsequent research supports that insight. *See* Buckhout et al., *Jury Verdicts: Comparison of 6- vs. 12-Person Juries and Unanimous vs. Majority Decision Rule in a Murder Trial*, 10 Bull. Psychonomic Soc'y 175, 178 (1977) (in mock-jury study, "the majority … verdict rule clearly [resulted in] more convictions").

[11] This Court has previously considered empirical evidence when assessing the constitutional contours of the jury trial right. *See Ballew* v. *Georgia*, 435 U.S. 223, 231 n.10 (1978) (Blackmun, J.) (social science research supported a conclusion that a jury smaller than six persons could not fulfill its constitutional role).

[12] Given the difficulties (and in many situations the impermissibility) of observing live jury deliberations, many studies of jury dynamics have necessarily involved controlled experiments with mock juries. *See, e.g.*, Hastie et al., *Inside the Jury* (1983); Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule* (1977). Professor Hastie's research team culled representative jury pools from an actual Massachusetts venire, conducted voir dire, and selected juries of twelve. Each jury was shown an identical (pre-taped) murder trial and was given identical instructions, except that one third of the panels were told that unanimity was required, one third were told that ten votes were needed for a verdict, and one third were told that eight votes were needed. *See* Hastie, *supra*, at 60. Professor Saks's team selected 451 former

Unanimous juries are not flawless, of course. But research does indicate that a unanimity rule fosters more thorough, careful, and reliable deliberations because it requires minority viewpoints to be considered and, where possible, accepted or rejected by the entire jury. Where unanimity is required, jurors tend to evaluate evidence more thoroughly, spend more time deliberating, and take more ballots. By contrast, where unanimity is not required, jurors tend to end deliberations once the minimum number for a verdict is reached. ABA, *Principles for Juries and Jury Trials*, Principle 4.B Commentary 24 (2005); *see* Hastie et al., *Inside the Jury* 60 tbl. 4.1 (1983) (finding that 12-person juries required to reach unanimous verdicts deliberated for 138 minutes on average, whereas those required to reach an 8-member majority deliberated for only an average of 75 minutes); Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule* 94 (1977) (finding that once jurors reach the threshold for a majority-rule verdict, they regard that as "psychologically binding" and do not thereafter change their views toward the minority position); Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych. Pub. Pol'y & L. 622, 669 (2001); Davis et al., *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psychol. 1, 12 (1975) (finding

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jurors from Franklin County, Ohio, to serve on 58 mock juries, which were shown a one-hour videotape of a staged felony burglary trial. The 58 juries were randomly allocated six- or twelve-member compositions and unanimous or two-thirds (4/6 or 8/12) decision rules. Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule* 62-66 (1977); *see also* Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. Appl. Soc. Psych. 38 (1977) (mock juries composed of University of Virginia undergraduates).

that unanimity requirement increased deliberation and "conscientious" consideration of dissenting views); Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1262, 1273 (2000) (citing empirical research showing that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable").

In particular, a unanimity rule protects dissenting voices in the jury room, because it requires that every point of view be considered and all jurors be persuaded. Researchers have found that, "[c]ompared to unanimous rule juries, quorum rule juries have been found to deliberate less equitably (that is, the distribution of talking is skewed more extremely, with the talkative jurors talking more and the untalkative talking less than in unanimous rule juries." Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions*?, 6 S. Cal. Interdisc. L.J. 1, 40 (1997). On majority-rule juries, "large factions … adopt a more forceful, bullying, persuasive style," possibly because "their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." Hastie et al., *supra*, at 112; Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. Applied Soc. Psych. 38, 55 (1977) (concluding that unanimity-rule juries were more likely to reach consensus and more likely to change their opinions); Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Juries*, 34 J. Personality & Soc. Psychol. 282, 290 (1976) (although non-unanimous rules produce faster verdicts and fewer hung juries, a majority of non-unanimous ju-

ries immediately ceased deliberation upon hitting the required majority-rule threshold).

As Professor Hastie summarized the differences between unanimity-rule and majority-rule jurors:

> [B]ehavior in unanimous rule juries contrasts with typical behavior in majority rule juries in six respects: deliberation time (majority rule juries take less time to render verdicts), small faction participation (members of small factions are less likely to speak under majority rules), faction growth rates (large factions attract members more rapidly under majority rules); holdouts (jurors are more apt to be holdouts at the end of deliberation under majority rules), time of voting (majority rule juries tend to vote sooner) and deliberation style (majority rule juries are slightly likelier to adopt a verdict-driven deliberation style in contrast to the evidence-driven style)….
>
> Verdict driven juries vote early and organize discussion in an adversarial manner around verdict-favoring factions, as opposed to evidence-driven juries which defer voting and start with a relatively united discussion of evidence, turning to verdict categories later in deliberation.

Hastie et al., *supra*, at 173-174.

Research also indicates that individual jurors are themselves less satisfied with the decisions they reach under non-unanimity rules. *See* Nemeth, *supra*, at 47 ("Individuals under unanimity requirements also tended more to agree that justice had been administered than individuals required to deliberate to 2/3 majori-

ty… ."); Kerr et al., 34 J. Personality & Soc. Psychol. at 290 (finding that a non-unanimous decision rule results in decreased "'satisfaction with the way decisions were made in the jury'" and diminished "'satisfaction with the final verdict'").

And perhaps most crucially, the same is true of the public at large. Citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer. *See* ABA, *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 24-26; MacCoun & Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 Law & Hum. Behav. 333, 337-338 & tbl. 1 (1988). As then-Circuit Judge Anthony Kennedy observed in 1978, "[b]oth the defendant and society can place special confidence in a unanimous verdict." *United States* v. *Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978).[13]

Many of the findings cited in the ABA's 2005 *Principles* were confirmed by a subsequent study of actual civil jury deliberations in Arizona, which allows non-unanimous (six of eight) verdicts in civil trials. *See* Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100

[13] The actual results of Louisiana's system support Justice Kennedy's concern about confidence in non-unanimous verdicts. Louisiana is second in the rate of wrongful convictions in the nation, and there is reason to believe Louisiana's non-unanimous jury system is a contributing factor. "In 2017, the Innocence Project-New Orleans reported that [11] of [25] Louisiana exonerations resulted from trials where non-unanimous juries were used." *See* ABA Resolution 100B, Report at 4 (May 1, 2018).

Nw. U. L. Rev. 201, 205 (2006).[14] The authors of that study concluded that the jurors were "quite conscious" that they did not need unanimity, which in some cases translated into "dismissive treatment of minority jurors ('holdouts')," and that "both outvoted holdouts and majority jurors are less positive about their juries than jurors who reach unanimous verdicts, giving lower assessments of their jury's thoroughness and then open-mindedness of their fellow jurors." *Id.* at 205.

The conclusions by social scientists that juries operating under non-unanimous rules may ignore dissenting or distinctive viewpoints is particularly troubling for confidence in the administration of justice. As Justice Stewart warned in *Apodaca* and *Johnson*, "nine jurors can simply ignore the views of their fellow panel members of a different race or class." 406 U.S. at 397 (Stewart, J., dissenting). This Court has repeatedly emphasized that "[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government," and that if a jury is to fulfill that function, it must "be a body truly representative of the community … and not the organ of any special group or class." *Taylor* v. *Louisiana*, 419 U.S. 522, 527 (1975) (citations and internal quotation marks omitted); *see Carter* v. *Jury Commission*, 396 U.S. 320, 330 (1970).

A rule that would allow racial or gender bias to take root in the jury room thus warrants particularly close scrutiny. *Cf. Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 868 (2017) ("[R]acial bias [is] a familiar and re-

[14] The authors of this study were permitted by the Arizona Supreme Court to videotape 50 civil jury trials and deliberations between 1998 and 2001 and to administer questionnaires to the jurors and judges.

curring evil that, if left unaddressed, would risk systemic injury to the administration of justice."). To be sure, a criminal defendant is not entitled to a jury of any particular demographic composition. But just as confidence in the jury system suffers when potential jurors of particular categories (such as race and sex) are excluded from serving, *see Powers* v. *Ohio*, 499 U.S. 400, 413-414 (1991); *Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986), so too does it suffer when the jury operates under rules that would allow a majority to treat the criminal justice system as its exclusive province.

B. The Non-Unanimity Rule In Louisiana And Oregon Has Roots In Racial Discrimination

As social science research shows, concerns that non-unanimous juries result in disenfranchisement of minority jurors and easier convictions of minority defendants are well-founded. And those concerns are all the more troubling because that is not only the effect, but also the original purpose, of the non-unanimous rule in Louisiana and Oregon—reason enough to render it constitutionally suspect. *See Hunter* v. *Underwood*, 471 U.S. 222, 229 (1985).

Louisiana and Oregon both initially required unanimous juries in all felony cases. The non-unanimous verdict arrived in Louisiana only after Reconstruction, as the white majority sought to perpetuate its supremacy in the State. Non-unanimous verdicts were first introduced in 1880, allowing defendants to be convicted by nine of twelve jurors. Split-verdict convictions were written into the Louisiana Constitution at the 1898 Constitutional Convention, which was deeply mired in racism. Indeed, the Convention's support for white supremacy was not a hidden fact, but a proclaimed truth. At the Convention's conclusion, the Chairman of the

Committee on the Judiciary spoke amid applause and announced the Convention's accomplished purpose: "Now then, what have we done? is the question. Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done." *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 375 (1898) ("Louisiana Journal").

Non-unanimous convictions were part of that design. State officials announced, when discussing the proposed Article 116 allowing non-unanimous verdicts: "We need a system better adapted to the peculiar condition of our State." Louisiana Journal at 76. The more "efficient" system allowed the State to obtain quick convictions that facilitated the use of free prisoner labor under Louisiana's convict-leasing system and ensured that African-American jurors could not use their voting power on the jury to block convictions of other African Americans. *See generally* Aiello, *Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana* (2015); 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 (2016).[15]

Non-unanimous jury verdicts in Oregon have a similarly tainted racial origin. "Oregon adopted nonunanimous juries in the wake of a 1933 murder prosecution of a

[15] The State's 1973 constitutional conviction changed the law to require the vote of at least ten jurors. As in 1898, "efficiency" was a stated reason for retaining split verdicts. Although race was not discussed as openly as at the 1898 convention, the rule of non-unanimous verdicts was reaffirmed despite expressed concerns that mostly "poor, illiterate, and mostly minority groups" were affected. *See* ABA Resolution 100B, Report, *supra*, at 5.

Jewish defendant, which controversially ended in a manslaughter verdict—a compromise resulting from a lone holdout juror." Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1598 n.21 (2018). The backdrop of that trial was a rising Ku Klux Klan and "[a] society where racism, religious bigotry, and anti-immigrant sentiments were deeply entrenched in the laws, culture, and social life." Kaplan & Saack, *Overturning* Apodaca v. Oregon *Should be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 Or. L. Rev. 1, 3 (2016) (quotation marks omitted). An Oregon circuit court recently surveyed the origins of Oregon's non-unanimous jury system and found that "race and ethnicity was a motivating factor" in its adoption. Opinion 12-16, *State* v. *Williams*, No. 15CR58698 (Or. Cir. Ct. Multnomah Cty. Dec. 15, 2016).

Even if the historical origins of Louisiana's split-verdict system were not enough to condemn it, there is evidence that even today that system continues to exacerbate severe racial disparities in Louisiana's criminal justice system. African-Americans constitute approximately one third of the population of Louisiana, but they make up two thirds of state prisoners and three fourths of inmates serving life imprisonment without parole. An analysis showed that 40 percent of trial convictions came over the objection of one or two holdouts, and that when the defendant was African-American, the proportion went up to 43 percent, versus 33 percent for white defendants.[16]

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[16] *See* Adelson et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, The Advocate (Apr. 1, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

All of the above reasons—the incongruity of the *Apodaca* decision with the rest of this Court's Sixth Amendment and incorporation jurisprudence; social science research demonstrating the flaws of non-unanimous verdicts; and the racial origins and implications of that system—are enough to make this the extraordinary case in which the Court should overrule a prior decision. The ABA therefore respectfully submits that the Court should bring to an end this unusual and unfortunate aspect of our criminal justice system.

CONCLUSION

The judgment of the Louisiana Court of Appeal should be reversed.

Respectfully submitted.

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