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 COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

BRIEF FOR STATES OF NEW YORK, CALIFORNIA, ILLINOIS, MICHIGAN, MINNESOTA, NEVADA, VERMONT, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Sixth Amendment guarantees a criminal defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." In *Apodaca v. Oregon*, 406 U.S. 404 (1972), an unusual alignment of votes led a single justice's concurrence to become the controlling opinion. That concurrence, joined by no other justice, concluded that the Sixth Amendment requires a jury's guilty verdict to be unanimous in a federal criminal trial, but that this unanimity requirement was not incorporated against the States by the Fourteenth Amendment.

Amici States address the following question:

Whether this Court should revisit the rule established by the *Apodaca* concurrence and hold that the Fourteenth Amendment incorporates against the States the Sixth Amendment's requirement that a jury verdict be unanimous in order to convict.

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INTEREST OF THE AMICI STATES

Forty-nine States—including amici States of New York, California, Illinois, Michigan, Minnesota, Nevada, Vermont, and Virginia, and the District of Columbia—currently require a jury verdict to be unanimous in order to convict a defendant of a felony. Many of these laws date to the colonial era and have long been enshrined in state constitutions. While this Court's 1972 decision in *Apodaca v. Oregon* held that the federal Constitution requires unanimous jury verdicts only in federal felony trials and not in state felony trials, not a single State abandoned its commitment to the unanimity requirement in the forty-seven years since *Apodaca* was decided. To the contrary, numerous States have in that time amended their constitutions to protect or (in the case of respondent Louisiana) to reinstate the unanimity requirement, and Oregon, the one remaining outlier, appears poised to do the same in the near future.

Amici's long experience demonstrates that the unanimity requirement in felony trials advances, rather than hinders, the States' strong interest in fair and impartial criminal law enforcement. Mandatory unanimity also improves the quality of deliberations, ensures consideration of minority viewpoints in the jury, promotes public confidence in the accuracy of verdicts, and underscores the importance of jury service as a fundamental civic duty. Extending the Sixth Amendment's unanimity requirement to the States recognizes the important role that unanimity plays in enabling juries to perform these functions and reinforces the efforts made by amici States to expand and diversify their jury pools.

STATEMENT

A. The States' Long Experience with the Unanimity Requirement

The right to trial by jury has been an indispensable feature of the Anglo-American legal system for centuries. *See Duncan v. Louisiana*, 391 U.S. 145, 151-156 (1968). Early American colonists enshrined the common law right to a jury trial in foundational documents, *see, e.g.*, Mass. Body of Liberties 29 (1641), with the First Congress of the American Colonies declaring that a jury trial "is the inherent and invaluable right of every British subject in these colonies," Resolutions of the Continental Congress (Oct. 19, 1765). *See generally* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 421-26 (1996). The Declaration of Independence cited the deprivation of "the benefits of trial by jury" as one of the chief grievances against King George III. And every state constitution adopted prior to the ratification of the federal Constitution guaranteed the jury trial right for criminal defendants—the only right recognized in every pre-ratification state constitution. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870 (1994). The Sixth Amendment continued this long-standing tradition by safeguarding the right to a jury trial in the United States Constitution. *See* U.S. Const. amend. VI. "[T]he constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases." *Duncan*, 391 U.S. at 153.

Jury unanimity has long been seen as an indispensable part of the right to trial by jury. "[T]he

requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century." *Apodaca v. Oregon*, 406 U.S. 404, 407-08 (1972) (plurality op.); *see also American Publ'g Co. v. Fisher*, 166 U.S. 464, 468 (1897). The unanimity requirement granted "a great weight, value and credit" to a verdict. Matthew Hale, *The History of the Common Law* 293 (4th ed. 1792). "The jury was to pronounce the truth, and there was only one truth. If all jurors did not agree to a verdict, then a truth was not being declared." Randolph N. Jonakait, *The American Jury System* 94 (2003). As William Blackstone observed, "it is the most transcendent privilege which any subject can enjoy . . . that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 William Blackstone, *Commentaries on the Laws of England* 379 (1st ed. 1768).

Although several American colonies allowed for non-unanimous jury verdicts in the late 1600s, "unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems." *Apodaca*, 406 U.S. at 407 n.3 (plurality op.) (citing John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in *Colonial America: Essays in Politics and Social Development* 415 (S. Katz ed. 1971)). Following the American Revolution, States incorporated the unanimity requirement into their constitutions either expressly or by reference to the common law right, and new States continued to do so as they joined the Union. *See, e.g.*, N.C. Const. of 1776, art. I, § 9; Pa. Const. of 1776, art.

I, § 9; N.Y. Const. of 1777, § 41; Utah Const. of 1895, art. I, § 10. In his commentary on constitutional history, Justice Joseph Story explained what Americans have long understood to be true: a jury "must *unanimously* concur in the guilt of the accused before a legal conviction can be had." 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 n.2 (5th ed. 1891) (emphasis in original).

In *Apodaca*, this Court confronted two related questions: whether the Sixth Amendment requires jury unanimity to convict a defendant of a serious offense; and, if so, whether that specific constitutional requirement is incorporated against the States by the Fourteenth Amendment. *See Apodaca*, 406 U.S. at 406 (plurality op.).[1] An unusual distribution of votes between these two questions resulted in a single justice's concurrence, joined by no other member of this Court, becoming the controlling opinion. Four justices (Justices Stewart, Brennan, Marshall, and Douglas) concluded that the Sixth Amendment requires unanimity in light of the overwhelming historical record and centuries of unbroken precedent and practice. Four justices (Chief Justice Burger and Justices White, Blackmun, and Rehnquist) disagreed,

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[1] *Apodaca* was heard and decided together with *Johnson v. Louisiana*, a case involving due process and equal protection challenges to a conviction rendered by a nine-to-three verdict. *See* 406 U.S. 356, 358-59 (1972). In *Johnson*, a majority of the Court held that the "disagreement of three jurors does not alone establish reasonable doubt" so as to violate due process or equal protection. *Id.* at 362. *Johnson* did not involve a Sixth Amendment challenge because the defendant's trial occurred before this Court incorporated the jury trial right against the States in *Duncan v. Louisiana*, 391 U.S. 145.

concluding that jury unanimity was not required by the Sixth Amendment. While these justices disagreed on the substance of the Sixth Amendment, all eight of them agreed that the Sixth Amendment was incorporated against the States in its entirety.[2]

Only Justice Powell took a narrower view of incorporation, but as the dispositive vote his sole concurrence became the controlling opinion for the Court. Justice Powell concluded that the Sixth Amendment requires jury unanimity in federal criminal jury trials, but that this aspect of the Sixth Amendment was not incorporated against the States. *See Johnson*, 406 U.S. at 369-80 (Powell, J., concurring).

At the time this Court decided *Apodaca*, only two States—Louisiana and Oregon—permitted non-unanimous verdicts in felony criminal cases. Neither State had permitted non-unanimous verdicts in its original constitution, but each adopted that approach in subsequent amendments. In 1898, Louisiana amended its constitution to provide that "cases in which the punishment is necessarily at hard labor [shall be tried] by a jury of twelve, nine of whom concurring may render a verdict," except in capital cases where a verdict must be unanimous. La. Const.

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[2] Many of the concurring and dissenting opinions in *Apodaca* and *Johnson* were published separately, and several of these opinions overlapped between the two cases. The following citations collect the opinions regarding the Sixth Amendment issue. *Apodaca*, 406 U.S. at 410-14 (plurality op.); *id.* at 414-15 (Stewart, J., dissenting); *Johnson v. Louisiana*, 406 U.S. 366, 369-80 (1972) (Powell, J., concurring); *Johnson v. Louisiana*, 406 U.S. 380, 382 (1972) (Douglas, J., dissenting); *Johnson v. Louisiana,* 406 U.S. 395, 396 (1972) (Brennan, J. dissenting); *Johnson v. Louisiana*, 406 U.S. 399, 400 (1972) (Marshall, J., dissenting).

of 1898, art. 116. In 1974, Louisiana again amended its constitution, this time to require ten of twelve jurors to concur in a verdict. La. Const. of 1974, art. I, § 17. Similarly, in 1934, Oregon amended its constitution to provide that "ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict." Or. Const., art. I, § 11 (amended May 18, 1934).

Although *Apodaca* made clear that other States were not barred by the federal Constitution from joining Louisiana and Oregon, not a single additional State has departed from its commitment to the unanimity requirement since this Court's decision. To the contrary, Arizona, Montana, and North Dakota responded by amending their constitutions to expressly mandate unanimity in felony criminal cases. *See* Ariz. Const., art. II, § 23 (ratified Nov. 7, 1972); Mont. Const. of 1972, art. II, § 26; N.D. Const., art. I, § 13 (ratified as § 7, Sept. 3, 1974). And both Louisiana and Oregon have themselves recently moved to join this nationwide consensus. In 2018, Louisiana voters overwhelmingly approved a constitutional amendment to require unanimous verdicts in felony cases where the offense was committed on or after January 1, 2019. *See* Act No. 722, 2018 La. Reg. Sess. (ratified Nov. 6, 2018). And Oregon is currently considering a proposal for a similar ballot measure. *See* House Joint Res. 10, 2019 Or. Reg. Sess. (introduced Jan,. 14, 2019); H.B. 2615, 2019 Or. Reg. Sess. (introduced Jan. 14, 2019). Accordingly, forty-nine States and the federal government currently require unanimous jury verdicts in all felony criminal cases, and the last remaining State may adopt such a requirement soon.

B. The States' Efforts to Improve Their Jury Systems

Juries are integral to the American criminal justice system, and jury service is one of the most important civic duties in American life. *See Powers v. Ohio*, 499 U.S. 400, 402, 406-07 (1991). States have accordingly devoted substantial resources to improving state and local jury systems.

First, States have employed various measures to increase the size and representativeness of jury pools. New York, for example, utilizes five different source lists to compile a master list of prospective jurors, including voter rolls, Department of Motor Vehicle records, tax records, and records of recipients of unemployment and family assistance benefits. *See* N.Y. Chief Admin. Judge, *First Annual Report Pursuant to Section 528 of the Judiciary Law* 3 (2012). At least thirty States require the use of two or more source lists to compile the jury pool, and many jurisdictions permit local courts to supplement with additional lists. *See* Hon. Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* 13-14 (Nat'l Ctr. for State Cts. & State Justice Inst. 2007). Moreover, at least twenty-nine States provide direct assistance to under-resourced local courts by compiling master jury lists at the state level and making them available to local courts. *Id.* at 14.

Second, States have sought to eliminate financial barriers to jury service by, among other things, shortening the terms of service and increasing the rates of juror compensation. For example, Arizona, California, Colorado, Connecticut, the District of

Columbia, Florida, Hawai'i, Indiana, Massachusetts, and Oklahoma employ a "one day or one trial" system, in which citizens are either empaneled as a trial juror on the day they report for service or are released from service at the end of the day. *See id.* at 10-11. All but two counties in New York utilize a similar system. N.Y. Chief Admin. Judge, *supra*, at 4. A number of States offer juror compensation of more than $40 per day, and at least eight States and the District of Columbia require employers to provide compensation to employees for time spent in jury service. *See* Mize et al., *supra*, at 11-12. In addition, States and localities have created internet and telephone systems to allow prospective jurors to request postponement or complete qualification questionnaires prior to appearing for service. *See, e.g.*, Court Statistics Project, Nat'l Ctr. for State Cts., *National Jury Improvement Efforts* 6-7 (Feb. 2008). Collectively, these measures promote broader participation in jury service. *See id.* at 1-5.

Finally, States have expended considerable resources on studying and implementing in-court procedures and trial innovations to improve juror comprehension and performance. For example, New York commissioned a two-year study involving 51 judges from 16 counties to evaluate and propose statewide measures such as making written charges available to deliberating juries and permitting jurors to take notes and submit written questions to witnesses. *See* N.Y. State Unified Ct. Sys., *Final Report of the Committees of the Jury Trial Project* (2005). The Judicial Council of California has spent more than two decades studying and implementing various jury reforms, including measures aimed at improving juror performance in complex and lengthy trials. *See* Judicial Council of Cal., *Fact Sheet: History*

of the Jury Improvement Program (Aug. 2018). Massachusetts, Ohio, and Tennessee, among others, have also commissioned studies of measures to assist jurors in trials. *See* B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, Court Review 12, 14 (Spring 2004). These ongoing efforts reflect the States' commitment to ensuring that juries advance the fairness and reliability of the criminal justice system.

SUMMARY OF ARGUMENT

I. Amici States have required unanimous jury verdicts for felony convictions for hundreds of years. Amici's experience, confirmed by the overwhelming weight of social science research, demonstrates that the unanimity requirement improves the quality of jury deliberations and ensures that jury verdicts reflect the collected wisdom, experience, and perspective of every juror. Juries subject to a unanimity requirement deliberate longer, evaluate evidence more thoroughly, and grapple with the viewpoints of every member of the jury. This improved deliberative process contributes to more fair and reliable verdicts, which in turn reinforce public confidence in the legitimacy of the criminal justice system. The unanimity requirement is therefore a critical component of the States' constitutional obligation to administer fair and impartial criminal jury trials.

II. Amici agree that as a general matter the principle of *stare decisis* is an important feature of our legal system, ensuring both respect for the rule of law and evenhanded application of the law to all similarly situated people. *Stare decisis* thus requires an exceptionally strong reason to depart from long-standing

precedents. But two unique features of *Apodaca* justify departing from its holding here. First, only one justice actually endorsed the reasoning behind the holding of *Apodaca*—namely that the Sixth Amendment jury trial right required unanimity in federal criminal trials but not in state criminal trials. Eight justices believed that the Sixth Amendment jury trial right should mean the same thing in both federal and state trials, but four of them thought unanimity was required and four of them thought it was not. As a result, Justice Powell's view constituted a majority with one group of four for unanimity in federal trials, and a different majority with the other group of four for non-unanimity in state trials. The resulting rule, based on an analysis with only one adherent, has less claim to *stare decisis* than an analysis adopted by a majority or even a plurality of the Court.

Second, since *Apodaca*, this Court has repeatedly held that an incorporated constitutional right should apply in the same way to the States as it does to the federal government. The Court thus has already repudiated Justice Powell's bifurcated analysis, leaving it with even less claim to *stare decisis* than it had at the outset.

In short, Justice Powell's concurrence always represented a singular view, and its doctrinal underpinnings have subsequently been dismantled by this Court. Under these unique circumstances, *stare decisis* does not require this Court to adhere to Justice Powell's already-superseded view of incorporation.

ARGUMENT

I. The Unanimity Requirement Promotes a Fair and Impartial Criminal Justice System.

The States are committed to administering a criminal justice system that effectively enforces the law while respecting the constitutional rights of defendants. "Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017). A unanimity requirement ensures the vigorous deliberative process critical to the proper functioning of criminal juries. After all, "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen v. United States*, 164 U.S. 492, 501 (1896).

The unanimity requirement also guarantees that minority viewpoints of all sorts are not only present in the jury room, but reflected in the jury's verdict. As Justice Marshall has observed, "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (opinion of Marshall, J.), *quoted approvingly in Taylor v. Louisiana*, 419 U.S. 522, 532 n.12 (1975); *see also Ballard v. United States*, 329 U.S. 187, 193-94 (1946). That "exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters,*

407 U.S. at 503-04. But if a jury can reach a verdict without unanimity, it is free to ignore the distinctive perspective brought by some jurors, and the benefit of including them in the jury room may be lost. The critical advantage of a jury composed of individuals with varied backgrounds, experiences, and perspectives is that the group as a whole may draw from a base of knowledge and experience that no single person can possess. The unanimity requirement ensures that a criminal jury takes full advantage of the collected knowledge of all of its members.

By contrast, the absence of unanimity improperly allows minority views to be silenced or ignored by a voting majority—undermining the representativeness of juries, forgoing the many benefits of a diverse jury, and raising the risk of inaccurate verdicts. Non-unanimous verdicts also significantly erode public faith in the legitimacy of the legal system by raising serious doubts about the validity of both convictions and acquittals. These doubts are especially damaging to public confidence when they affect trials for the most serious offenses, such as murder and rape. The unanimity requirement that nearly every State has adopted is thus critical to promoting a fair and impartial criminal justice system.

A. The Unanimity Requirement Improves the Quality of Jury Deliberations and Verdicts.

1. The unanimity requirement results in longer and more careful deliberations.

"[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970). "The performance of this role" depends on the jury's ability to meaningfully deliberate. *Id.* The outcome in *Apodaca* therefore turned in large part on an assumption that the unanimity requirement has no bearing on the jury's ability to effectively deliberate. *See Apodaca*, 406 U.S. at 410-11 (plurality op.); *Johnson*, 406 U.S. at 378-79 (Powell, J.)(concurring); *see also Johnson*, 406 U.S. at 361-62. The States' experience and the weight of empirical evidence rebut this assumption.

First, the unanimity requirement typically results in longer deliberations. In the absence of a unanimity requirement, "once a vote indicates that the required majority has formed, deliberations halt in a matter of minutes." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000). Indeed, research shows that deliberation time often corresponds to the number of jurors required to reach a verdict. *See, e.g.*, Reid Hastie et al., *Inside the Jury* 173-74 (1983); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001).

For example, one mock-jury study found that twelve-member juries required to reach unanimous verdicts in a murder case deliberated for an average of 135 minutes, whereas those required to reach eight- or ten-member majorities deliberated for an average of 75 minutes and 103 minutes, respectively. Hastie et al., *supra*, at 60. This pattern is also visible in real-world trials. As one Louisiana juror noted after rendering a split verdict in a high-profile murder case, "[w]e knew that we only needed 10 jurors to convict, so we set out for that goal rather than the full 12." John Simerman, *Split Verdict in Cardell Hayes' Trial Shines Light on How Louisiana's Unusual Law Affects Jury Deliberations*, New Orleans Advocate (May 1, 2018).

Second, non-unanimous juries are substantially more likely to adopt a "verdict-driven," rather than an "evidence-driven," approach to deliberation. Hastie et al., *supra*, at 165. "Verdict-driven" deliberations typically begin with a preliminary vote, focus on each juror's preferred verdict, and discuss evidence to the extent it supports a specific verdict position. *Id.* at 163. By contrast, "evidence-driven" deliberations focus on a review of the evidence "without reference to the verdict categories, in an effort to agree upon the single most credible story that summarizes the events at the time of the alleged crime." *Id*. Unsurprisingly, the jury's review of evidence is "more disjointed and fragmentary in verdict-driven than evidence-driven" deliberations. *Id.* at 164. Other studies show that juries operating under non-unanimous rules "discuss both the law and evidence less, recall less evidence, and were less likely to correct their own mistakes about the evidence or the jury instructions." Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J. L.

Reform 569, 580 (2007) (quotation marks omitted). This research suggests that a non-unanimous rule "discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable." Taylor-Thompson, *supra*, at 1273.

Both defendants and prosecutors are harmed when juries pursue a shorter and less evidence-driven deliberative process because such a process results in less reliable convictions *and* acquittals. *Cf.* Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 Geo. L.J. 775, 787 (1992) (finding that a majority verdict rule increased the probability of conviction by 641% and the probability of acquittal by 833%). By contrast, meaningful deliberation is dynamic and encourages the reexamination of evidence and reconsideration of jurors' initial views. *See Blueford v. Arkansas*, 566 U.S. 599, 607-08 (2012).

In *Blueford*, for example, the jury was charged with determining whether the defendant committed capital murder or one of the lesser offenses of first-degree murder, manslaughter, and negligent homicide. Before the jury concluded its deliberations, it reported that it was unanimous against guilt on capital and first-degree murder, deadlocked with nine votes in favor of conviction on manslaughter, and had not yet voted on negligent homicide. *See id.* at 603. After receiving multiple *Allen* charges, the jury continued to deliberate but ultimately announced that it could not reach a final verdict. *Id.* at 604. On appeal, Blueford argued that the Double Jeopardy Clause prohibited his retrial on the capital and first-degree murder counts because the jury had disclosed that it was unanimously in favor of acquittal. This Court rejected

the argument, noting that the jury had never reached a final verdict of acquittal on those charges and was thus "free to reconsider a greater offense, even after considering a lesser one," at any time during deliberations. *Id.* at 607.

As this Court explained, juries often take a preliminary vote prior to deliberation but then "engage in a discussion about the circumstances of the crime" after they are unable to reach unanimous agreement on a verdict. *Id.* In the course of these discussions, a juror that initially voted in favor of acquittal or conviction might "start[] rethinking his own stance" and, "[a]fter reflecting on the evidence," change his vote. *Id.* But these deliberations—and carefully considered changes of initial positions—occur only if jurors in the voting majority are required to "consider[] the arguments of the other jurors." *Id.* By contrast, if Blueford had been tried in a jurisdiction that permitted conviction by nine votes—as this Court has found to be permissible, *see Johnson*, 406 U.S. at 364—deliberations would likely have ceased after the initial vote count, and the jury would have delivered a final verdict of acquittal on the higher counts and conviction only on manslaughter. Such a precipitous verdict may well have prevented further (and more reasoned) deliberations that could have convinced at least some jurors that acquittal on the higher counts was inappropriate, as this Court correctly noted. *Blueford*, 566 U.S. at 608. The jury's deliberations in *Blueford* thus highlight how the unanimity requirement can encourage longer deliberations and more comprehensive consideration of the evidence—often resulting in fairer and more carefully considered decisions in individual cases.

2. The unanimity requirement ensures that juries consider the opinions, experiences, and perspectives of all community members.

The unanimity requirement also ensures that juries evaluate and respond to the viewpoints of every individual juror prior to rendering a verdict. As then-Circuit Judge Anthony Kennedy observed, "[t]he dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations." *United States v. Lopez*, 581 F.2d 1338, 1341 (1978). "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined, and if possible, accepted or rejected by the entire jury." *Id.* For example, a veteran may have a unique perspective on a defendant's assertion that he committed a crime because of post-traumatic stress disorder. A young woman might have insight about the testimony of a rape victim. And a game hunter may evaluate a defendant's claim of accidental discharge differently than a person who has never held a weapon.

Apodaca rested on the assumption that the unanimity requirement was not necessary to ensure the consideration of minority views. *Johnson*, 406 U.S. at 361; *see also Apodaca*, 406 U.S. at 413 (plurality op.), *Johnson*, 406 U.S. at 379 (Powell, J. concurring). But subsequent research and experience cast serious doubt on this view.

As the American Bar Association has noted, "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." Am. Bar Ass'n, *Principles for*

Juries & Jury Trials, Principle 4 at 22 (2005). Researchers found that "larger factions in majority rule juries adopt a more forceful, bullying, persuasive style 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. By contrast, "[j]urors working towards unanimity were more effective in actually persuading their members that the final verdict was the appropriate one, [and] engaged in more robust argument." Reichelt, *supra*, at 580-81.

The unanimity requirement also ensures that the representative nature of the jury is reflected in its deliberations. "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *see also Johnson*, 406 U.S. at 402 (Marshall, J. dissenting) (jury's "fundamental characteristic is its capacity to render a commonsense, laymen's judgment, as a representative body drawn from the community"). Indeed, the States' exhaustive efforts to increase the size of the jury pool, eliminate financial barriers to jury service, and improve the rate of responses to summonses have all been aimed at promoting this important constitutional value. See *supra* at 7-9. The goal of fair representation is not cosmetic; instead, its function is to ensure that the decisions of juries as a whole reflect "every stratum of society." *Thiel*, 328 U.S. at 220. And the unanimity requirement ensures that a jury which is drawn from a fair cross-section of the community actually considers the diverse views of its members, rather than subordinating the views of minority jurors to those of the majority. By contrast, a

deliberative process that allows juries to ignore or silence minority views undermines the fairness of legal proceedings and "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers*, 499 U.S. at 412.

Respecting the views of all jurors benefits both parties in a criminal case. When a jury is drawn from a representative cross-section of the community and is given the opportunity to meaningfully deliberate, "neither the defendant nor the State should be favored." *Holland v. Illinois*, 493 U.S. 474, 483 (1990). Jurors "neither act nor tend to act as a class," but they do have distinct perspectives that are often affected by, among other things, their race, gender, religion, and personal background. *Ballard*, 329 U.S. at 193. "[J]urors' assumptions and beliefs about the world inevitably frame their judgments and perceptions of evidence" to the benefit of the truth-seeking process. Taylor-Thompson, *supra*, at 1278. And a jury necessarily benefits from the collected knowledge, experience, and wisdom of its individual members to reach informed and objective decisions. A member of a voting minority may or may not be able to persuade her fellow jurors of her view of the evidence. But at minimum, the fact that each individual juror's vote is necessary for the jury to speak as a united body means that every perspective must be considered and debated before the jury can reach a verdict. "[A] flavor, a distinct quality is lost" when the jury system excludes voices that can make substantial contributions to the deliberative process. *Ballard*, 329 U.S. at 194. It is equally lost when the voices are present, but need not be considered, because the jury can reach a non-unanimous verdict without them.

3. The unanimity requirement bolsters public confidence in the fairness and reliability of the jury system.

One of the essential purposes of the jury trial right is to promote "public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). In the States' experience, the unanimity requirement supports positive public perceptions of the fairness, accuracy, and reliability of the criminal justice system.

First, the unanimity requirement ensures public confidence that the verdict was rendered by a jury that is representative of the community. The "jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Id.* at 86; *see also Duncan*, 391 U.S. at 156. "[T]he exclusion from jury service of a substantial and identifiable class of citizens" disregards the constitutional requirement of representativeness and thereby undermines the fairness and legitimacy of the criminal justice system. *Peters*, 407 U.S. at 503 (opinion of Marshall, J.). Such exclusion also wrongly deprives individuals of the "equal opportunity to participate in the fair administration of justice," a value that "is fundamental to our democratic system." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145-45 (1994). Because jury unanimity ensures that the viewpoints of all jurors are considered during deliberations, a unanimity requirement promotes public confidence in the values embodied by the representativeness requirement by ensuring that no juror's vote can be ignored by a voting majority.

Second, the unanimity requirement "impress[es] upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair," *Powers*, 499 U.S. at 413. In unanimous-verdict systems, jurors cannot outvote each other, but must come to an agreed-upon verdict that "persuade[s] across the normal demographic divides of race, class, education, and the like." Jeffrey Abramson, *Four Models of Jury Democracy*, 90 Chi.-Kent L. Rev. 861, 872 (2015). The public is more likely to believe in the fairness and legitimacy of a verdict rendered by the collected judgment of jurors from diverse backgrounds than a verdict rendered over the unanswered objection of dissenters. *See id.* at 884.

Third, the unanimity requirement gives juries more confidence in the accuracy of their verdicts. Juries that render verdicts over the objection of dissenters have "less confidence that they were correct" than those juries deciding unanimously. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?,* 6 S. Cal. Interdisciplinary L.J. 1, 41 (1997). That is because dissenters often maintain a contrary view due to "ambiguity in the evidence, or plausible alternative interpretations of the evidence." *Id.* While unanimous juries must debate and reach consensus about those ambiguities to convict or acquit, majority-rule juries can and do render verdicts without resolving lingering concerns. Public confidence in the reliability of the criminal justice system is diminished when jurors return from jury service with doubts about the accuracy of their verdicts.

Finally, the unanimity requirement reinforces many other civic and social values embodied by the

jury system. "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." *Powers*, 499 U.S. at 402. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Id.* at 407. By encouraging jurors to engage with the views of all of their peers in the jury room, the unanimity requirement "help[s] to inculcate in jurors traits necessary to good citizenship, specifically, the willingness to compromise, to see another person's perspective, and to accept the need for change." Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 Geo. L. J. 1589, 1619 (2006).

B. The Substantial Benefits of the Unanimity Requirement Outweigh the Costs Attributable to Hung Juries.

The most frequently cited practical benefit of eliminating the unanimity requirement is a reduction in hung juries and the costs of associated mistrials. *See, e.g.*, *Apodaca*, 405 U.S. at 411 (plurality op.); *Johnson*, 406 U.S. at 377 (Powell, J., concurring); *see also* Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 Fla. St. U. L. Rev. 659, 676-78 (1997). Retrials do, of course, inflict costs when they occur, including by burdening prosecutorial and judicial resources, as well as imposing on victims, witnesses, defendants, and their families. Adopting a non-unanimous jury rule might reduce these costs because non-unanimous juries are more likely to reach a

verdict than to hang. *See* William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 Int'l Rev. L. & Econ. 1, 17 (2005); Robert Buckhout et al., *Jury Verdicts: Comparison of 6- vs. 12-Person Juries and Unanimous vs. Majority Decision Rule in a Murder Trial*, 10 Bulletin of the Psychonomic Soc'y 175, 178 (1977). But even if a unanimity requirement were to marginally increase the number of hung juries, that cost would be justified by the many benefits of unanimity, including its "valued assurance of integrity." Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 453 (1966).

Amici States have no interest in reducing the number of hung juries and subsequent retrials if doing so would come at the expense of the accuracy, reliability, and legitimacy of verdicts. While non-unanimous juries are more likely to reach a verdict, they are also far more likely to reach an *incorrect* verdict. Indeed, research demonstrates that a non-unanimous rule leads to more wrongful convictions and wrongful acquittals. *See* Neilson & Winter, *supra*, at 3, 17. And such inaccurate verdicts bear their own costs. Wrongful convictions exact an enormous toll on defendants and their families as well as on public confidence in the criminal justice system. Wrongful convictions also impose a significant fiscal burden on the States through lawsuits and claims on compensation funds established for individuals who have been wrongly convicted. And wrongful acquittals undermine public safety by failing to protect the public from persons who have committed crimes.

Non-unanimous juries are also more likely to deliver verdicts where the jury disregarded the legitimate views or objections of one or more of its members. See *supra* at 14-15. Most hung juries result

from genuine disagreements about the evidence. *See* Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?* 73-74 (Nat'l Ctr. for State Cts. 2002). In such cases, allowing a majority of the jury to override the legitimate concerns of the minority impermissibly increases the likelihood that the majority will overlook or simply disregard evidence weighing against guilt or innocence. A "dissenter who has an honest disagreement with the rest of the jury regarding the existence or absence of reasonable doubt deserves as much respect and deference as any member of the overwhelming majority." Reichelt, *supra*, at 622.

Moreover, the rate of hung juries and resulting mistrials in criminal proceedings is very low even in jurisdictions that require unanimous verdicts: according to a 2002 study, the rate of hung juries in federal trials is only 2.5 percent, while the rate of hung juries in state trials is 6.2 percent. *See* Nat'l Ctr. for State Cts., *A Profile of Hung Juries* (May 2003); *see also* Hannaford-Agor et al., *supra*, at 25. And a substantial percentage of cases in which a jury deadlocks are ultimately resolved through guilty pleas or dropped charges rather than a burdensome retrial. *See* Leo J. Flynn, *Does Justice Fail When the Jury is Deadlocked?*, 61 Judicature 129, 133 (1977). The substantial benefits of the unanimity requirement outweigh the costs associated with the already rare occurrence of hung juries.

Finally, States have many tools at their disposal to reduce the number of hung juries without abandoning the unanimity requirement. For example, States have devoted extraordinary resources to improving jurors' comprehension of the evidence and relevant law, including by providing written copies of instructions, permitting juror notetaking, and authorizing

jurors to submit written questions to witnesses. See *supra* at 7-9. States have also experimented with various deadlock instructions and procedures to help juries work through genuine impasses. *See* Note, Emil J. Bove III, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 Geo. L. J. 251, 275-86 (2008). States could also permit more extensive questioning by judges and counsel during jury selection to identify and strike potential jurors who would irrationally refuse to apply the law and consider the evidence. In extraordinary cases, a court may well have the discretion to remove a juror that refuses to deliberate in good faith. *See United States v. Geffrard*, 87 F.3d 448, 451-52 (11th Cir. 1996). These measures are more appropriately tailored to address the factors that lead to avoidable hung juries, while protecting the integrity of the deliberative process that, in rare instances, may result in legitimate and irreconcilable jury divisions.

II. *Stare Decisis* Does Not Compel Adherence to Justice Powell's Concurrence in *Apodaca*.

Amici do not lightly invite the Court to depart from prior precedent. But two unique features of *Apodaca* substantially reduce the force of *stare decisis* here.

First, while Justice Powell's sole concurrence represents *Apodaca*'s formal holding—under this Court's rule that the dispositive opinion is the one that "concurred in the judgment[] on the narrowest grounds," *Marks v. United States*, 430 U.S. 188, 193 (1977)—that holding represents the incorporation analysis of a single justice that was not endorsed by any other member of the Court. Indeed, the *Apodaca* rule represents the views of a majority only to the

extent Justice Powell agreed with the four dissenting justices that the Sixth Amendment requires a unanimous verdict in criminal prosecutions for serious offenses.[3] *Johnson*, 406 U.S. at 369 (Powell, J., concurring); *see also* 406 U.S. at 382-83 (Douglas, J., dissenting); 406 U.S. at 395-96 (Brennan, J., dissenting) 406 U.S. at 400 (Marshall, J., dissenting); *Apodaca*, 406 U.S. at 414-15 (Stewart, J., dissenting). Justice Powell's determination that the Sixth Amendment's right to a unanimous jury verdict does not extend to the States—although decisive in the formal disposition of the case—was embraced by no other justice. A constitutional rule that represents the analysis of a single justice, and that relies on a legal theory expressly rejected by all other justices, is entitled to less *stare decisis* deference than a rule that results from the views of a majority or even a plurality of the Court.

Second, while there may be circumstances where *stare decisis* would counsel in favor of preserving a similarly split decision, this Court has already recently rejected the premise behind Justice Powell's approach to incorporation. "*[S]tare decisis* does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." *Hurst v. Florida*, 136 S. Ct. 616, 623-24 (2016) (quotation marks omitted). After *Apodaca*, this Court "decisively held that incorporated

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[3] That principle has been confirmed by this Court's subsequent decisions, which have consistently reiterated that the Sixth Amendment requires "the truth of every accusation . . . [to] be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quotation marks omitted); *see also Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

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." *McDonald v. City of Chicago*, 561 U.S. 742, 766 (2010) (quotation marks omitted). "[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

In both *McDonald* and *Timbs*, this Court acknowledged that *Apodaca* represented an anomaly in the Court's otherwise well-established rules requiring symmetry between federal and incorporated state rights. And rather than defend the anomaly as a principled distinction based in law, this Court has repeatedly characterized *Apodaca* as "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation." *McDonald*, 561 U.S. at 765 n.14; *see also Timbs*, 139 S. Ct. at 687 n.1. Justice Powell's concurrence therefore represents "a solitary departure from established law," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996). Overruling Justice Powell's approach to incorporation in *Apodaca* would not represent a radical departure for this Court, but rather a natural extension of the Court's otherwise uniform incorporation doctrine to the Sixth Amendment's jury trial right.

Finally, reliance interests do not warrant upholding *Apodaca*'s incorporation ruling. While *Apodaca* is now nearly fifty years old, not a single State changed its practices to allow non-unanimous jury verdicts for felony convictions following that decision. Moreover, the only two States that allowed non-unanimous verdicts at the time of *Apodaca*—Louisiana and Oregon—have recently moved to join

the overwhelming state and federal consensus in favor of a unanimity requirement: Louisiana amended its constitution to require unanimity in trials for felonies committed after January 1, 2019; Oregon seems likely to do the same in the near future. See *supra* at 6.

To be sure, because these developments apply only prospectively, Louisiana and Oregon will continue to have a substantial interest in defending the validity of felony convictions for past crimes that were reached by a non-unanimous jury. But those reliance interests can be largely protected without reaffirming the holding from Justice Powell's concurrence in *Apodaca*. In particular, this Court's retroactivity jurisprudence imposes substantial barriers on the retroactive application of new procedural rules and amply protects the States' interests in the finality of criminal judgments. *See Teague v. Lane*, 489 U.S. 288, 307 (1989) (plurality op.); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). This Court has never applied its decisions expanding the jury trial right retroactively to reopen final convictions.[4] And while new constitutional rules generally do apply retroactively to cases pending on direct review, *Griffith*, 479 U.S. at 327-28, preservation and waiver doctrines may preclude the application of a new rule in any number of individual cases. *See Shea v. Louisiana*, 470 U.S. 51, 59 n.4 (1985).

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[4] *See, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 355-58 (2004) (rule requiring jury to decide a defendant's eligibility for the death penalty does not apply retroactively); *Teague*, 489 U.S. at 314 (plurality op.) (rule prohibiting racial discrimination in the use of peremptory challenges does not apply retroactively); *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975) (per curiam) (rule prohibiting exclusion of women from jury venire does not apply retroactively); *DeStefano v. Woods*, 392 U.S. 631, 634 (1968) (incorporation of jury trial right does not apply retroactively).

Because other doctrines would thus more directly address the legitimate reliance interests that Louisiana or Oregon have in defending the validity of final convictions, those interests should not compel this Court to adhere to the controlling view of a single justice from *Apodaca* in light of the important constitutional values served by a unanimity requirement.

CONCLUSION

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

Respectfully submitted,

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