No. 18-5942

IN THE

EVANGELISTO RAMOS,

Petitioner,

—v.—

STATE OF LOUISIANA,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU FOUNDATION OF LOUISIANA, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with almost 2 million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Louisiana is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict. The question before the Court is of substantial importance to the ACLU and its members.

SUMMARY OF ARGUMENT

By the late eighteenth century, the right to be tried by a jury of one's peers had long incorporated the principle that a criminal conviction must rest on a unanimous jury verdict. In fact, the right had been an established part of English common law for centuries. A careful review of the historical understanding at that time of the Constitution's framing makes clear that the text of the Sixth Amendment does not specifically articulate a unanimity requirement only because everyone at the time understood unanimity to be so inextricable from the right itself as to make its mention redundant.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than *amici*, its members, and its counsel.

The unanimity requirement dates to the Middle Ages, has long been a core feature of the common-law right to a jury trial, and was considered part and parcel of the right by the Framers. Justice Wilson, a Framer, spoke eloquently and passionately about the importance of unanimity in lectures around the time of the framing, and he never even suggested that the right was not protected by the Constitution. Contemporaneous court decisions, grand jury charges, and the writings of commentators all agreed that unanimity was inherent in the right to a jury trial. Indeed, there does not appear to be *any* evidence to the contrary. Had the Framers intended to depart from the common-law definition of jury trial as encompassing unanimity, surely *someone* would have said so. That silence speaks volumes.

In addition, the history of non-unanimous juries in Louisiana demonstrates that this rule was adopted during a state constitutional convention whose avowed mission was to establish a system of white supremacy in the state—the very evil that the Fourteenth Amendment sought to eradicate. Eliminating unanimity was designed to render irrelevant Black jurors, whose participation on juries had recently been required by federal law. By allowing a conviction upon nine votes, the small number of Black jurors likely to be on any given jury could be ignored, as convictions could be obtained without their assent. This shameful history reinforces why the Sixth Amendment, as incorporated to the states through the Fourteenth Amendment, must include the full rights promised by that Amendment, including the right to a unanimous verdict in a criminal case.

ARGUMENT

I. THE RIGHT TO A UNANIMOUS JURY VERDICT IN CRIMINAL CASES WAS WELL-ESTABLISHED WHEN THE SIXTH AMENDMENT WAS ADOPTED AND WIDELY UNDERSTOOD TO BE PART OF ITS JURY TRIAL GUARANTEE.

Long before the Sixth Amendment was drafted and ratified, the English common law had incorporated the requirement of jury unanimity in criminal cases. *See*, *e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769) (hereafter Blackstone *Commentaries*). Thus, when American Justice James Wilson gave a founding-era lecture on the right to a jury trial, he traced the requirement to the Middle Ages, when:

> "[The King] hanged [Judge] Cadwine, because he judged Hackwy to death without the assent of all the jurors in a case where he [Hackwy] had put himself upon a jury of twelve men; and because *three were for saving him against nine*, Cadwine removed the three for others upon whom Hackwy did not put himself."[2]

[2] *See* Lectures of Justice James Wilson (1791) in 2 *Collected Works of James Wilson* 970 (K. Hall & M. Hall eds., 2007) (hereafter *Wilson*) (quoting Andrew Horne, *The Mirror of Justices* (William Joseph Whittaker, ed. 1895) (emphasis added)). The internal cite is to a currently available edition of this book, as Justice Wilson provided no year of publication in his citation.

Given the unanimity requirement's long history, those who came to this country from England regarded the right to a jury trial as part of "their birthright and inheritance." *Duncan v. Louisiana*, 391 U.S. 145, 154 n.21 (1968) (quoting *Thompson v. Utah*, 170 U.S. 343, 350 (1898) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 (Melville M. Bigelow ed., William S. Hein & Co., Inc., ed., 1994) (1891) (hereafter Story *Commentaries*))). They understood that inheritance to include what it had embraced in England. The importance of unanimity is a consistent theme in English common law; discussions of the jury right during the founding era; early interpretations of the right in state and federal courts, including this Court; and the writings of commentators interpreting the jury right and/or the Sixth Amendment throughout the antebellum era.

A. Unanimity was Part of the English Common-Law Jury Right.

By the founding of our Nation, unanimity had been integral to the English jury right for centuries. *See*, *e.g.*, 4 Blackstone *Commentaries* 343; Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 18 (1985); Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 72 (BasicBooks 1994); John Guinther, *The Jury in America* 12 (1988) (reviewing English foundation).

Blackstone explained that "the founders of English law have with excellent forecast contrived" that no man should be convicted except upon an indictment "confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently

chosen, and superior to all suspicion." 4 Blackstone *Commentaries* 343. The protection of unanimous juries had life-and-death consequences in founding-era England, where "more than 200 offenses [were] then punishable by death[.]" *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion).

As the Court recognized in *Apodaca v. Oregon,* "the requirement of unanimity . . . arose in the Middle Ages[.]" 406 U.S. 404, 407 (1972). Historians record the first "instance of a unanimous verdict . . . in 1367, when an English Court refused to accept an 11-1 guilty vote after the lone holdout stated he would rather die in prison than consent to convict." Abramson, *supra*, at 179.

In 1670, the Crown tried William Penn in the Old Bailey on charges of speaking and preaching on a street and thereby causing "a great concourse and tumult of people in the street [who] . . . a long time did remain and continue, in contempt of . . . the King, and of his law, to great disturbance of his peace."[3] After one and a half hours, the twelve jurors deadlocked. Abramson, *supra*, at 71. Eight voted for conviction, but four would agree to nothing more than that Penn had "preached to an assembly of persons[.]" Green, *supra*, at 224.

The bench "berated the four and sent the jury away to reconsider its decision." *Id.* at 224-25. The formerly divided jury next united around a "verdict" that Penn merely spoke on the street, which the

[3] Green, *supra*, at 222-25; *see also* Abramson, *supra,* at 72; Guinther, *supra,* at 24-25.

court rejected. *Id.* at 225. The jury ultimately reached a unanimous verdict of not guilty. *Id.*[4] The course of history for this early colonial leader thus may well have turned on the English protection of a unanimous jury verdict.

B. The Founders Claimed for this Nation the English Common-Law Jury Right, which Included Unanimity.

The jury trial right our Founders claimed was the same as the English common-law right. Indeed, one of the grievances listed in the Declaration of Independence was the Crown's increasing violations of the colonists' common-law jury right. *See Duncan*, 391 U.S. at 151-52 (recounting this history).

Our Founders specifically "claim[ed] all the benefits secured to the subject by the English constitution, and particularly that inestimable one of trial by jury." Continental Congress Resolution 5, in 1 *J. of Continental Congress*, 1774-1789, 69 (1904). Moreover, the Founders made clear in their writings that integral to the "great right [of] trial by jury" was unanimity. In a letter to inhabitants of Quebec, listing the "rights . . . we are, with one mind, resolved never to resign but with our lives," the Continental Congress described the jury right as follows: "This

[4] A perhaps better-known part of the story is that the Crown fined the dissenting jurors, including Edward Bushel, for their verdict. Abramson, *supra*, at 72. The jurors refused to pay, were imprisoned, and later successfully petitioned for their release, creating the precedent that jurors may never be fined or imprisoned for their verdicts. *Id.*

provides that neither life, liberty, nor property, may be taken from its possessor, until twelve of his unexceptionable countryman and peers . . . shall pass their sentence upon oath against him . . . ."[5]

Even the British soldiers accused of the Boston Massacre received the benefit of a unanimous jury – and they were acquitted.[6] Early published grand jury addresses provide further evidence that those indicted on criminal charges were guaranteed the right to a unanimous jury. *See generally Gentlemen of the Grand Jury: The Surviving Grand Jury Charges from Colonial, State, and Lower Federal Courts before 1801*, vol. 1-2 109 (Stanton D. Krauss ed. 2012). *Id.* at 317 (MA, 1765, charge of Thomas Hutchinson), 665 (NY, 1768, Robert Livingston), 1108 (SC, 1703, Nicholas Trott), 1181 (SC, 1774, William Henry Drayton), 1204 (same in 1776).

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[5] *See* Continental Congress, Letter to the Inhabitants of Quebec, in 1 *Journals of Continental Congress*, 1774-1789, 105, 106, 107 (Worthington Chauncey Ford ed., 1904).

[6] *The Trial of William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew, Killroy, William Warren, John Carrol, and High Montgomery, Soldiers in his Majesty's 29th Regiment of Foot, for the Murder of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr, on Monday-Evening* 207 (Boston: J. Fleeming 1770) (contemporaneous record of the trial of the soldiers accused in the Boston Massacre).

C. Madison's Original Draft of the Sixth Amendment Required Jury Unanimity, and its Subsequent Omission from the Text Did Not Reflect Any Substantive Disagreement with the Requirement.

In the original draft of the Sixth Amendment that James Madison submitted to Congress, he proposed a right to an "impartial jury of freeholders of the vicinage, with the *requisite of unanimity of conviction*, of the right of challenge, and other accustomed requisites." Cong. Reg. June 8, 1789, vol. 1, pp. 427-29 (emphasis added), in Neil Cogan, *The Complete Bill of Rights* 385 (1997).

The Senate revised Madison's language, and sent it to a conference committee, which in turn drafted the familiar text that became the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

U.S. Const. amend VI (emphasis added). *See Apodaca*, 406 at 407-10 (recounting this history and similar discussion of it in *Williams v. Florida,* 399 U.S. 78, 95 (1970)).

But this revision was not understood as eliminating the unanimity requirement, which was widely accepted as part and parcel of the jury right itself. Not a single participant even suggested that

the revision was so intended. And given how central the unanimity requirement had been for centuries, if the Senate had intended to abandon it, someone surely would have said so.

At the time Congress was debating the proposed Bill of Rights, Madison wrote contemporaneous letters about the Senate's rejection of the language he proposed concerning the jury right. *Apodaca*, 406 U.S. at 409 (citing one of Madison's letters). Two letters to Edmund Pendleton, a Virginia representative to the Continental Congress, are particularly noteworthy.

On September 14, 1789, Madison wrote Pendleton that the Senate had "sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles." Cogan, *supra,* at 480 (1997). The alterations he went on to discuss related to the vicinage (vicinity) requirement in his original text, opposed because states drew their pools from disparate geographical subdivisions. *Id.* By contrast, Madison did not mention any opposition to the unanimity requirement in his original proposal.

His second letter to Pendleton on September 23, 1789, two days before Congress approved the Bill of Rights, also focused on the Senate's "inflexib[ility] in opposing a definition of the locality of Juries." *Id.* at 480-81. Again, Madison made no mention of any Congressional objection to the unanimity requirement. *Id.; see also Apodaca,* 406 U.S. at 409 *(*noting the "considerable opposition in the Senate, particularly with regard to the vicinage requirement").

The reason Madison's letters to Pendleton did not complain about the elimination of his unanimity language from his proposal is that he and others understood unanimity to be an inherent part of the jury right set forth in the final text of the Sixth Amendment. This included Justice Wilson, a Founder who held strong views on the importance of unanimity and surely would have objected had anyone suggested that the revision was intended to remove this fundamental protection. No one did.

The ratification debate surrounding the original Constitution reflects a similar understanding. When North Carolina, Pennsylvania, Rhode Island, and Virginia separately suggested amending Article III, § 2 to make clear that the criminally accused has a right to a jury "without whose unanimous consent he cannot be found guilty," Cogan, *supra*, at 401-02, The Foreign Spectator, whose commentaries on the Constitution and amendment processes were widely read, described the amendments as unnecessary because "these particulars are included in the *usual trial by jury*."[7]

A year before Madison submitted his proposed language, Pennsylvania Supreme Court Chief Justice M'Kean made a similar comment in an opinion about the provision in Pennsylvania's original Declaration of Rights expressly requiring unanimity.[8] In

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[7] Foreign Spectator, *Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions . . . by a Foreign Spectator*, The Fed. Gaz. & Philadelphia Evening Post, Dec. 2, 1788, at 2 (emphasis added).

[8] *See* Pa. Const. of 1776, art. IX.

Respublica v. Oswald, 1 Dall. 319, 323 (Pa. 1788), Chief Justice M'Kean wrote, "I have always understood it to be the law, independent of this section, that the twelve jurors must be unanimous in their verdict, and yet this section makes this express provision." *Id.*

Thus, it was widely understood that the requirement of a criminal trial by jury necessarily included a requirement that the jury verdicts be unanimous.

D. The Contemporaneous Teachings of Justice Wilson Reinforce the View that Unanimity was Part of the Jury Right.

Lecturing on the Constitution as the Bill of Rights was still being ratified, Justice Wilson spoke at length on the role of juries.[9] Wilson, *supra*, at 954-1011. He repeatedly stated that unanimity was "indispensable" in criminal cases. *Id.* at 962-78, 984-989, 991-92, 1010-11. Justice Wilson, deeply committed to unanimity, surely would have objected had he thought that Congress intended the omission of an explicit unanimity requirement from the Sixth Amendment's final text as a substantive change.[10]

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[9] Before President Washington appointed him to this Court, Justice Wilson helped to shape both the Declaration of Independence and the original Constitution. He was one of few to sign both documents. *See* 1 Wilson, *supra*, xi. He is widely recognized as an architect of our republic. *Id.* His Philadelphia lectures on the Constitution were attended by the Nation's founders, including the President. *Id.* at 403.

But he did not. Quite the opposite, he extolled unanimity's ongoing significance.

Justice Wilson described unanimity as an answer to society's dilemma of how to determine whether one of its members has committed a crime. He recognized that society as a *whole* cannot make that determination. *Id.* at 960. If society as a whole *were* available to make the determination, he posited, then the accused's "fate must, from the very nature of society, be decided by the voice of the majority[.]" *Id.* But, since only *representatives* of society are available it is "reasonable" to demand that "the unanimous voice of those who represent parties . . . should be necessary to warrant a sentence of condemnation." *Id.*[11]

As Justice Wilson wrote:

> When they are exercised by the people themselves, a majority, by the very constitution of society, is sufficient for

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[10] Justice Wilson also rewrote the Pennsylvania Constitution in 1790, excising the previous explicit unanimity requirement and stating simply, "That trial by jury shall be as heretofore, and the right thereof remain inviolate." Pa. Const. art. IX, § VI. *See* Leonard W. Levy, *Seasoned Judgments: The American Constitution, Rights, and History* 52 (1995). It is inconceivable that Justice Wilson, while lecturing on the importance of unanimity, intended to strip the protection from the Pennsylvania Constitution. The only reasonable interpretation is that he believed its mention would have been redundant.

[11] By contrast, Justice Wilson found the history in support of unanimity in civil cases much more clouded, and he believed unanimity was not required in such cases. He reasoned that a majority vote would suffice for resolution of a conflict between two private parties. *Id.* at 987.

> the purpose. When they are exercised by a *delegation* from the people, in the case of an individual, it would be difficult to suggest, for his security, any provision more efficacious than one, that nothing shall be suffered to operate against him without the *unanimous* consent of the delegated body.

Id. at 961 (emphasis added). Referring back to these principles, Wilson then declared, "*It cannot have escaped you, that I have been describing the principles of our well known trial by jury*." *Id.* at 962 (emphasis added). For Justice Wilson, unanimity was not an optional addendum to the right to a jury, but a necessary part of its very definition.

Justice Wilson repeatedly made clear that the jury protection would be anemic if it did not require unanimity:

- "Can the voice of the state be indicated more strongly, than by the unanimous voice of this selected jury?" *Id.* at 985.
- "How stands the other party to a criminal prosecution? He stands single and unconnected. He is accused of a crime. . . . The greatest security is provided by declaring, and by reducing to practice the declaration, that he shall not suffer, unless the selected body who act for his country say unanimously and without hesitation—he deserves to suffer." *Id.* at 986.

Justice Wilson argued that by interposing itself between the accused and the zealous prosecutor, the jury speaks with authority precisely because it

speaks with a single, unified, unanimous voice. Given his evident regard for the unanimity requirement, the fact that his speech *explains* its basis rather than argues for its inclusion underscores the public understanding that unanimity was already required by the Sixth Amendment.

E. Early Practices, Rulings, and Scholars Confirmed the Universal Understanding that Unanimity was Inherent in the Jury Right.

The Founders shared a common understanding of the English jury right, the same right British soldiers and William Penn enjoyed in high-profile trials an ocean and a century apart. As seen further in founding-era case law, grand jury instructions, and statements of scholars, this understanding was universally held.

1. Early court decisions (from the founding era to the middle of the nineteenth century) confirm the role of unanimity as an integral part of the jury right inherited from the English.

Neither New Hampshire nor Ohio nor Georgia's state constitutions explicitly mentioned unanimity as part of the jury right,[12] but their high courts found it integral.

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[12] Ga. Const. of 1798, § 6 ("Freedom of the press, and trial by jury, as heretofore used in this State, shall remain inviolate"); N.H. Const. of 1783 (barring deprivation of "life, liberty, or estate, but by the judgment of his peers or the law of the land"); Ohio Const. of 1851, art. 1, § 5 ("The right of trial by jury shall be inviolate").

In New Hampshire, the legislature asked the high court whether it could permit non-unanimous jury verdicts or juries of less than twelve. *Opinion of Justices*, 41 N.H. 550, 550 (1860). The court's answer was no, on both counts. The court noted that no right was "more strenuously insisted upon" by the Founders than the jury-trial right, which had a well-settled single meaning, described in "[a]ll the books of the law," and "always to be understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Id.* at 551. Because "no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices had ever been known, or ever been the subject of discussion in any country of the common law," the court held that the legislature had no power to enact legislation along these lines. *Id.* at 551-52.

The Ohio Supreme Court reached the same conclusion, with virtually identical reasoning. The court observed that the jury-trial right is "sufficiently understood, and referred to as a matter already familiar[,] definite as any other in the whole range of legal learning." *Work v. State*, 2 Ohio St. 296, 302 (1853). Extolling this "bulwark of the liberties of Englishmen," the court found it "beyond controversy" that its "number must be twelve, they must be impartially selected, and must unanimously concur. . . ." *Id.* at 304. The court therefore concluded that the legislature could not authorize non-unanimous criminal juries. *Id.* at 304.

The Georgia Supreme Court likewise concluded that the "sum and substance of this trial by jury" is that every accusation must be "confirmed

by the unanimous suffrage of twelve of the prisoner's equals and neighbors . . . ." *Rouse v. State*, 4 Ga. 136, 147 (1848). After quoting at length the Blackstone common-law jury definition (which includes unanimity), the court found it "obvious that the framers of [Georgia's 1798] Constitution, instead of incorporating the whole of this passage in that instrument, simply declare that the trial by jury, as therein delineated, shall remain inviolate." *Id.*; *see also Inhabitants of Mendon v. Worcester Cty.*, 27 Mass. 235, 246-47 (1830) (calling unanimity "one of the known incidents of a jury trial"); *State v. Christmas,* 20 N.C. 545, 411-12 (1839) (noting that unanimity required in state constitution based on common-law jury right).

Other early decisions noted the requirement of unanimity more or less in passing, taking for granted its application, including in states whose constitutions did not explicitly reference it. *See State v. Porter*, 4 Del. 556, 557 (1 Harr. 1844); *Root v. Sherwood*, 6 Johns. 68, 69 (N.Y. Sup. Ct. 1810); *State v. Hall*, 9 N.J.L. 256, 262-63 (N.J. Sup. Ct. 1827); *State v. Baldwin*, 5 S.C.L. 309, 306-07 (S.C. Const. App. 1813); *Commonwealth v. Cawood*, 4 Va. 527, 533 (Va. Gen. Ct. 1826) (referring to unanimity as "Law of the land" and citing Blackstone rather than Virginia Constitution).[13] Federal courts, interpreting

[13] Only the constitutions of North Carolina (1776), Pennsylvania (1776), Virginia (1776), and Vermont (1786) explicitly mentioned unanimity. *See* Cogan, *supra*, at 410-13 (collecting state provisions). As noted above, Pennsylvania later eliminated its explicit requirement, with no effect on the unanimity requirement. *See supra* note 10.

the non-explicit federal constitutional jury right, did the same. *See United States v. Lawrence*, 26 F. Cas. 886, 887 (C.C.D.D.C. 1835).

2. In early grand-jury addresses, judges instructed on the particular charges sought by the government, but also frequently expounded upon the legal system under which the accused (if indicted) would be tried. The charges were often published in the newspapers and widely read. *See generally Krauss, supra* (collecting grand-jury addresses). And they frequently included paeans to the jury right inherited from England. From shortly after Independence to after ratification of the Bill of Rights, they consistently referred to unanimity as part and parcel of that right.

For example, in 1779, a Georgia judge instructed:

> The trial by juries, [is] one of the most valuable rights we enjoy . . . That no person can be subjected to the punishment consequent to the infringement of the laws, but on the verdict of twelve men, his equals in rank and condition of life, is of itself a most valuable privilege, and one of the best safeguards for [] life, liberty and fortune . . . .

Id. at 35. In 1784, a Kentucky judge channeled Blackstone and emphasized the jury right, its role as a protector of the people's liberties, and as a "sacred" and "inviolate" "palladium." *Id.* at 281. He explained that the accused could not be convicted but upon a unanimous verdict. *Id.; see also id.* at 285 (similar).

In 1790, U.S. District Judge David Sewell instructed a grand jury regarding a felony alleged on the high seas. *Id.* at 1392. He stated that before the Revolution, a bare majority in a court of admiralty could convict. Now, however, "no man's life is brought into hazzard until . . . twelve . . . good and lawful men shall unanimously determine the charge to be true." *Id.* In 1792, U.S. District Judge Harry Innes instructed on the time-honored jury right and stated that the jury's "unanimous voice is necessary to find [the accused] guilty." *Id.* at 1433.

Instructions that unanimity was part of the jury right were entirely commonplace. *See id. at* 39 (Ga., 1779, Chief-Justice Anthony Stokes and Justice Martin Jollie), 109 (Ga., 1792, John Houstoun), 207 (Ga., 1798, Thomas Carnes), 297 (Md., 1781, Robert Hanson), 531 (Mass., Robert Treat Paine, undated), 570 (N.H,, 1790, John Pickering), 731 (NW Territory, now Ohio, 1795, William Goforth) 773 (Pa., 1785, Henry Slagle), 783 (Pa., 1791, Enoch Edwards), 814 (Pa., 1792, Alexander Addison), 1069 (Pa., 1800, Edward Shippen), 1098 (Pa., 1788, McKean), 1259 (S.C., 1791, Elihu Hall Bay). Justices of this Court riding circuit gave similar addresses. *See, e.g.,* 3 *The Documentary History of the Supreme Court of the United States*, *1789-1800*, 31 (Blair, J., 1795), 410 (Chase, J., 1800), 460-62 (Paterson, undated) (Maeva Marcus ed., 1992); 2 *id.* at 485 (Blair, J., 1794).

3. The early scholars interpreting the Sixth Amendment jury right also agreed that it included a unanimity requirement. In 1803, shortly after passage of the Bill of Rights, St. George Tucker wrote that the Sixth Amendment secured the trial by jury described by Blackstone, and stated that

therefore no person could be "condemned of any crime" without a jury's "unanimous verdict, or consent." 1 St. George Tucker, *Blackstone's Commentaries App.* 34 (Birch & Small eds. 1803); *id.* at Vol. 5, at 348-49 n.2 (citing 4 Blackstone *Commentaries* 349-50).

Two decades later, in his influential treatise on American law, Nathan Dane took the same view. 6 Nathan Dane, *General Abridgement and Digest of American Law* 226 (Boston: Cummings, Hilliard & Co. eds. 1823) (Bill of Rights provides that "the jury in criminal matters must be unanimous"). So, too, did Justice Story, who explained that the phrase "trial by jury" meant "twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had." 2 Story *Commentaries* 559; *see also id.* (stating that "any law dispensing with any of these requisites may be considered unconstitutional").

After ratification of the Fourteenth Amendment, Joel Prentiss Bishop published his criminal law treatise, which also agreed that the jury trial requires that guilt be determined "by the unanimous finding of twelve impartial men, termed jurors," and that a "statute providing otherwise is void." 1 Joel Prentiss Bishop, *Criminal Procedure; or, Commentaries on the Law of Pleading and Evidence and The Practice in Criminal Cases* 531-32 (1880); *see also* John Norton Pomeroy, *An Introduction to Municipal Law* 78 (1864) (observing that the principle of unanimity "once adopted has continued as an essential part of the jury trial"); Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States*

of the American Union 319-320 (1868) (explaining that "common law incidents to a jury trial" that were "preserved by the constitution" included unanimity requirement).

Moreover, there is no contrary evidence. No one appears to have even suggested in the founding era that the Sixth Amendment permitted a criminal conviction on less than a unanimous verdict. This silence is telling.

The courts, judges and scholars of the era, then, shared in the understanding that the right to a jury meant the right to a unanimous jury. This was so before the founding and through the ratification of the Fourteenth Amendment.[14] As those who ratified the Constitution understood, nothing in these authorities permitted bare majority jury decisions in criminal cases.

F. This Court's Precedents Confirm Unanimity's Integral Role.

The above history is consistent with an "unbroken line of cases," beginning in the late 1800's, in which "the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of the federal jury trial." *Johnson v. Louisiana,* 406 U.S. 366, 369 (1972) (Powell, J., concurring); *see also Apodaca*, 406 U.S. at 415-16 (Stewart, J., dissenting) (collecting cases).

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[14] As the plurality in *Apodaca* noted, while the Carolinas, Connecticut, and Pennsylvania had previously allowed non-unanimous verdicts in the early seventeenth century, they no longer did by the time of the framing of the Constitution. 406 U.S. at 408 n.3.

Albeit in federal trials, these decisions interpret the same Sixth Amendment jury right at issue here.

The first of these cases is *Thompson v. Utah*, 170 U.S. 343, 355 (1898), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37, 38 (1990), which interpreted the jury right set forth in the Sixth Amendment and in Article III, § 2. Despite the lack of explicit reference to unanimity in either provision, this Court had no trouble finding that it is required. The Court held that the "United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury." *Id.* at 355; *see also Am. Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897) (noting in civil case that "unanimity" was essential to the common-law jury right); *Swain v. Alabama*, 380 U.S. 202, 211 (1965) (noting that "an impartial jury of 12 men who must unanimously agree on a verdict" is the common law system that is "followed in the federal courts by virtue of the Sixth Amendment"), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986); *Allen v. United States*, 164 U.S. 492, 501 (1896) (noting "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves"); *Duncan*, 391 U.S. at 151-52 (referring to Blackstone's description when incorporating the Sixth Amendment).

The historical record thus overwhelmingly supports what the Court assumed in dicta in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), namely, that unanimity is a central aspect of the jury trial right. *See Apprendi* , 530 U.S. at 477 (noting

requirement of facts "confirmed by the unanimous suffrage of twelve of [accused's] equals and neighbours" and quoting Blackstone); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (quoting *Apprendi* and Blackstone); *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012) (same); *see also Ring*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

The Court should now make that assumption explicit and recognize the fundamental character of the unanimity requirement to the American conception of the criminal jury-trial right.

II. LOUISIANA'S NON-UNANIMOUS JURY PROVISION WAS ENACTED WITH THE MISSION TO "ESTABLISH THE SUPREMACY OF THE WHITE RACE."

The history of non-unanimous jury verdicts in Louisiana shows that those who conceived of it did so to deny Black citizens equality and establish white supremacy—the very evils the Fourteenth Amendment was designed to prevent. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 775 (2010) ("Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks."). As the Court has explained, "the Fourteenth Amendment was . . . designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." *Strauder v. West Virginia*, 100 U.S. 303,

306 (1879). Louisiana's shameful history underscores the importance of holding that the Sixth Amendment as incorporated by the Fourteenth Amendment includes the right to a unanimous verdict for all.

Louisiana adopted a constitutional provision permitting non-unanimous convictions during the state's 1898 constitutional convention, whose avowed purpose was to suppress the civic participation of African Americans in Louisiana. *See State v. Maxie*, 13-CR-72522, slip op. at 28 (La. 11th Judicial Dist. Ct. Oct. 11, 2018),[15] J.A. 57[16] (finding that the delegates to the 1898 constitutional convention "adopted a facially race-neutral law that was designed to ensure that African-American jury service would be meaningless by constructing a non-unanimous jury verdict system based on relative demographics of the population"). Prior versions of the Louisiana constitution contained no such rule. *See* La. Const. art. 7 (1879); La. Const. tit. I, art. 6 (1868); La. Const. tit. VII, art. 105 (1864); La. Const. tit. VI, art. 103 (1852); La. Const. tit. VI, art. 107 (1845); La. Const. art. VI, § 18 (1812).

The 1898 conventioneers who added the non-unanimous jury made no secret of their designs. In closing the convention, the Chairman of the Committee on the Judiciary, Judge Thomas J.

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[15] After the Louisiana District Court held an evidentiary hearing and wrote a detailed opinion analyzing the origins of Louisiana's non-unanimous verdict rule, the parties reached a plea agreement, mooting any appeal.

[16] Because the *Maxie* opinion is not readily available online, and thus is included in the J.A., *amici* provide parallel pin-citations to the J.A.

Seemes, explained, "Our mission was, in the first place, to establish the supremacy of the white race in this State." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 374 (H.J. Hearsey ed., 1898) (hereinafter *Journal*). The President of the constitutional convention, E. B. Kruttschnitt, in his closing speech, celebrated "the system which we have reared in order to protect the purity of the ballot box, and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana." *Id.* at 381. The Convention of 1898 "interpreted its mandate from the people to be, to disfranchise as many Negroes and as few whites as possible." *United States v. Louisiana*, 225 F. Supp. 353, 371 (E.D. La. 1963) (Wisdom, J.) (internal quotation marks omitted), *aff'd*, 380 U.S. 145 (1965). The 1898 delegates drafted against a legal backdrop that prohibited excluding jurors because of their race. *Strauder*, 100 U.S. at 306 (holding that a "defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color"); *see* Civil Rights Act of 1875 § 4, ch. 114, 18 Stat. 335, 336-37 ("That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude").

The conventioneers understood the federal Constitution as a "restriction placed upon [their] powers." *Journal* at 381. For example, Kruttschnitt lamented that, because of the Fifteenth Amendment, "we have not drafted the exact Constitution that we should like to have drafted; otherwise we should

have inscribed in it . . . universal white manhood suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins." *Id.* at 380. But he assured his fellow conventioneers that they did "what we have done in order to keep the negro from exercising the suffrage." *Id.*; *see also id.* at 375 (Conventioner: Seemes: "[W]hat is section 5? It is a declaration . . . that no white man in this State – that's the effect but not the language – that no white man in this State who has heretofore exercised the right of suffrage shall be deprived of it, whether or not he can read or write, or whether he possesses the property qualification.")).

Much of the Louisiana conventioneers' focus was on preventing African Americans from voting. But through the non-unanimous jury provision, the delegates also successfully sought to dilute the influence of African Americans in the jury box.

Contemporaneous accounts demonstrate that there was great hostility towards the inclusion of African Americans on juries in Louisiana during the years leading up to the convention. *See Maxie*, 13-CR-72522, slip op. at 28, J.A. 56 ("There is ample evidence in the form of news articles, the main source of societal beliefs in this era, that white supremacists saw African-American jury service as counterproductive"). African American jurors were said to be less likely to convict generally, and particularly unwilling to convict an African American defendant. "Louisiana papers bemoaned how a single 'obstreperous colored juror' could hold out for a compromise verdict, or how 'the decent members of their race shield [the savages]' rendering '[a] law trial of . . . negro jurors . . . a farce.'" Thomas Ward

Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1603 (2018) (quoting Louisiana newspaper articles from the 1890s); *id.* at 1617 (quoting Louisiana newspaper's statement that "it is unfortunately too true that too many negroes serve on juries in this State and the interests of justice are not subserved thereby"). A newspaper article from St. Martinville, Louisiana stated:

> We live in the midst of an alien race who far outnumbers us. A certain portion of them are savages. They have a gloss of civilization, but in all the relations of religion, morality and respect for law they are no better than cannibals. . . . [T]he decent members of their race shield them and protect them. A law trial of one of them with negro witnesses and negro jurors would be a farce. Must we permit our woman and even female children to live in constant peril of outrage?

Lynch Law, Weekly Messenger 1 (Oct. 7, 1893). Five years after the Fourteenth Amendment was ratified, the Daily Picayune lamented:

> He [the freed slave] does not appear to much advantage in any capacity in the courts of law . . . . As a juror, he will follow the lead of his white fellows in causes involving distinctive white interests; but if a negro be on trial for any crime, he becomes at once his earnest champion, and a hung jury is the usual result.

Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 375-76 (2012) (bracketed language added by Smith & Sarma). Newspapers in other southern states expressed the same concern. *See* Frampton, *supra* at 1614 (quoting a North Carolina newspaper's statement that "You can put one negro on a jury in such a case and he will tie the jury every time and prevent a verdict" and a Mississippi newspaper's statement that "with two races to select from, it is next to impossible to get twelve men to convict").

In the face of this hostility, Black activists, in Louisiana and across the South, were forcefully organizing to protect their rights to serve on juries. *See* Frampton, *supra* at 1605-11 (2018). In fact, as a result of this activism, about a week before the constitutional convention began, a Senate resolution passed directing the U.S. Attorney General "to inform the Senate whether or not . . . in the State of Louisiana there have been recent violations of the Constitution of the United States by the exclusion from service on juries in the United States court of duly qualified citizens on account of color." *Id.* at 1616-14 (quoting 31 Cong. Rec. 1019 (1898) ("Service on Juries in Louisiana")).

At the convention, delegates requested and were provided the "[t]abulated statement of registered voters" from 1897 and 1898, which showed the "[n]umber of white voters" and the "[n]umber of colored voters." *Journal* at 15, 41-42. About 14.7 percent of the citizens eligible to vote in Louisiana in

1898 (and therefore presumably eligible to sit on juries) were Black.[17] Thus, by adopting a rule that allowed conviction by nine jurors' votes, the conventioneers ensured that three jurors' votes could be ignored. "[I]t would be highly unlikely that any jury would ever have more than three African-Americans and therefore their service would be silenced." *Maxie*, 13-CR-72522, slip op. at 28, J.A. 57.

In defending the 1898 Louisiana constitution to the United States Congress just eighteen months later in 1900, Senator Samuel McEnery of Louisiana described the amended constitution as an effort from "the best intellects of the South" to prevent "ignorant blacks" from "getting control of the State and inaugurating the era of terrorism and corruption which prevailed under this Government from 1868 to 1877[.]" During that period, "[t]he courts as a rule were corrupt. Negro jurors were impaneled, and no white man had an opportunity in criminal cases for a fair trial." 33 Cong. Rec. 1063-64 (1900).

In short, the drafters of the non-unanimity provision sought an end run around the Fourteenth Amendment in order to "establish the supremacy of the white race." *Journal* at 374. The provision permitting non-unanimous verdicts allowed Louisiana's convention delegates to render largely irrelevant Black jurors when, under federal law, they could not be formally excluded. This history underscores the importance of incorporating the

[17] *See* Ex. 21 at 27, Mot.in Arrest of J. and Mot. for a New Trial, State v. Maxie, 13-CR-72522 (La. 11th Judicial Dist. Ct. Oct. 11, 2018) (Testimony of Prof. Lawrence Powell).

Sixth Amendment's unanimity requirement through the Fourteenth Amendment, and thereby helping ensure that all defendants have equal constitutional rights in state and federal criminal trials.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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