No. 18-5924

In the Supreme Court of the United States

EVANGELISTO RAMOS, *Petitioner*,

v.

STATE OF LOUISIANA, *Respondent*.

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

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, NEBRASKA, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, TEXAS, WEST VIRGINIA, AND THE COMMONWEALTH OF PUERTO RICO SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*

Each State has unique procedures for charging and trying criminal defendants. Some file criminal complaints; some use grand juries; others, some mix of the two. Some States use twelve-person juries for all felonies, while some do so only for death cases; still others use six- or eight-person juries. Most relevant here, most States—but not all—require unanimous verdicts.

States have strong sovereign interests in shaping and adapting those aspects of their criminal justice systems to what each judges will best serve its citizens. *See Oregon v. Ice*, 555 U.S. 160, 170 (2009) ("Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status."); *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."). Ensuring continued flexibility for States to experiment with different approaches to the jury right will produce more successful models to deal with crime.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Louisiana that the result of *Apodaca v. Oregon*, 406 U.S. 404 (1972), was correct and that this Court should affirm. The historical record confirms that the Sixth Amendment was not meant to require unanimous verdicts. This Court's holding should adhere to *Apodaca*'s judgment, leaving the door open for States to experiment with non-unanimous

juries as they seek to respond to local concerns and better their criminal justice systems.

ARGUMENT

I. THE SIXTH AMENDMENT DOES NOT REQUIRE UNANIMOUS JURY VERDICTS IN THE STATES.

A. History shows that the Sixth Amendment was not meant to set in stone every common-law jury practice.

The vast historical record about who could serve as a juror, which issues juries decided, and how jurors reached their verdicts shows that each of those practices has varied widely over time.

1. Juries have ancient common-law origins.

Classical Greece, republican Rome, and medieval European countries all used forms of juries. Robert von Moschzisker, Trial by Jury 11-26 (2d ed. 1930). The number of jurors on a jury varied from five to five hundred or more. *Id.* Jurors consisted entirely of men, usually property owners, with votes sometimes weighted by class. *Id.* They judged both law and fact. *Id.* And they decided cases sometimes by unanimous vote, sometimes by majority, and sometimes by some other rule. *Id.*

From the beginning of the common era to the middle ages, England was ruled in turns by Celtic Britons, Romans, Germanic tribes (Angles and Saxons), Vikings, and French-Germans (Normans). *See generally* Encyclopædia Brittanica, *United Kingdom:*

History, available at https://www.br itannica.com/place/United-Kingdom/Roman-Britian, last visited August 15, 2019; *see also* Moschzisker at 21-22. Because so many different peoples with different legal traditions ruled England as the jury-trial right developed, its exact origins are unclear. Moschzisker at 60-61.

What is clear is that, like the common law itself, the jury-trial right in England varied over time. Between the end of Roman rule in the early fifth century and the Norman conquest in the late eleventh, England did not have a common law—rules that applied to all subjects generally—but was governed largely by local custom. *See* Arthur R. Hogue, Origins of the Common Law 188-90 (1986); *see also* Encyclopædia Brittanica, *Common law*, available at https://www.britannica.com/topic/common-law (last visited August 15, 2019). Those customs included trial by ordeal and combat. Moschzisker at 38-40, 388. They also included convening panels of freemen—sometimes nobility, sometimes not, and of various sizes—to settle legal disputes. *Id.* at 27-31.

The common law started to develop in earnest during the reign of Henry II—father of Kings Richard and John—in the mid-to-late twelfth century. Hogue at 34-35. Henry wanted more control over his subjects, and got it in part by requiring them to settle disputes in royal courts. *Id.* at 37-38. As trial by ordeal and combat waned, trial by jury in royal courts increased, and was "well established as a matter of right" by the end of the thirteenth century. *Id.* at 40-46; *see also* Magna Carta (1215) ("No free man shall be seized or imprisoned . . . except by the lawful judgement of his equals or by the law of the land.").

Early common-law jurors were witnesses chosen for their knowledge of the case facts. Hogue at 189; *see also* Moschzisker at 46, 51. They also both brought charges and decided the case. David Fellman, The Defendant's Rights Today 160 (1976). But over time, jurors came to be chosen for their ignorance, rather than knowledge, of a case. Moschzisker at 58. And the charging and trying functions were split between "grand" (large) juries and "petit" (small) juries. *Id.*

Petit-jury size varied over time, but eventually settled at twelve jurors. *Id.* at 160; *see also Williams v. Florida*, 399 U.S. 78, 89-90 (1970) (discussing theories of why twelve chosen). Those jurors had to be property-owning men. *See, e.g.,* English Bill of Rights (1689) ("That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders[.]"). The male and property requirements continued in the colonies. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 877 (1994) ("Every state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists.").

A vicinage requirement—that jurors had to be drawn from the area in which the crime occurred—appears to have been a holdover from the jurors-as-witnesses days and likely developed as a matter of convenience. *Cf.* Hogue at 163 (describing thirteenth-century efforts to make trials more convenient for litigants and jurors by providing for

local court hearings rather than requiring trial in London). It was later seen as preventing oppression by ensuring that defendants were spared travel to distant cities to make their case without easy access to evidence and witnesses. *See* Fellman at 200-01.

The unanimity rule, in turn, traces back to a 1367 case rejecting an 11-1 verdict. *Id.* at 160 (citing *Anon. Case*, 41 Lib. Assisarum 11 (1367)). The reasons for it are "shrouded in obscurity," but theories abound. *Apodaca*, 406 U.S. at 407 n.2 (lead opinion of White, J.). It could have existed to "compensate for a lack of other rules" ensuring a fair trial. *Id.* It might have been a holdover from the witness-juror trials in "assize" courts. This was an ancient analogue to frontier-era circuit-riding in which courts would periodically convene in areas outside London. *See generally* Encyclopædia Brittanica, *Assize*, available at https://www.britannica.com/topic/assize (last visited August 15, 2019). If the twelve jurors could not agree, the court would "afforce" (strengthen) the assize with more members until twelve of however many there were could agree. *Apodaca*, 406 U.S. at 407 n.2; *see also* Moschzisker at 50-51. When afforcement fell into disuse, the unity of twelve—so the theory goes—remained. *Apodaca*, 406 U.S. at 407 n.2. It might have been left over from the medieval concept that "there could be only one correct view of the facts" and the resulting practice of prosecuting dissenting witness/jurors for perjury. *Id.* Finally, the unanimity requirement might have stemmed from a concern that the verdict represented a voice of a community or the country, and that "just as a corporation can have but one will, so a country can have but one voice."

Moschzisker at 56 (cleaned up); *see also Apodaca*, 406 U.S. at 407 n.2 (similar).

Wherever it came from, the unanimity rule was a convenient "line of least resistance" for judges, who were spared "so much trouble" of finding facts, enduring public backlash over unpopular verdicts, or suffering cognitive dissonance over judging guilt at all. Moschzisker at 56; *see also* Kevin Crosby, *Bushell's Case and the Juror's Soul*, 33 J. Legal Hist. 251, 253-54 (2012) (discussing Christian prohibition on judging others and judicial efforts to pass the responsibility to juries).

Unanimity was not always achieved through thoughtful deliberation. Common-law courts "went to great lengths to ensure the jury reached a verdict." *Renico v. Lett*, 559 U.S. 766, 780 (2010) (Stevens, J., dissenting). These included loading hung juries "into oxcarts and carry[ing] them from town to town until a judgment bounced out," and holding jurors "de facto prisoners until they achieved unanimity." *Id.* (cleaned up); *see also* Moschzisker at 55 (explaining common law practice of locking up jurors and depriving them of food and drink until they reached a verdict). Deadlock-based mistrials probably did not exist. *Renico*, 559 U.S. at 780.

Though judges could coerce jurors into issuing verdicts, jurors could not be punished for delivering a verdict the judge did not like, so long as the verdict represented their honest convictions. *See Bushell's Case*, Vaughn 135, 124 Eng. Rep. 1006 (C.P. 1670). Edward Bushel was a juror in the trial of William Penn and William Mead, who were charged with unlawful

assembly and other offenses for holding a Quaker worship service on a London street. *See id.* at 1007; *see also* Crosby at 257. When the jury returned a verdict on a lesser offense, the judge sent them back to reconsider. *Id.* The jury then acquitted, but the judge was still not satisfied, issuing a warning: "Gentlemen, You shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; . . . we will have a verdict, by the help of God, or you shall starve for it." *Id.* at 257.

Starve they did, but convict they did not. After the court finally accepted the acquittal, the jurors were imprisoned for contempt until they could pay a fine. *Id.* Some of the jurors, including Bushel, refused to pay and filed for a writ of habeas corpus in the Court of Common Pleas. *Id.* The court granted the writ and vacated the fines and imprisonment, explaining that if judges could require juries to return a particular verdict, then "what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?" *Bushell's Case*, 124 Eng. Rep. at 1010.

Some cite *Bushell's Case* as evidence that jurors were free from coercion in reaching their verdicts. *See* Fellman at 160 & n.4. But *Bushell's Case* did not address the validity of underlying verdict; it addressed whether the jurors could suffer for issuing a verdict that the judge did not like. As shown, jurors were still subject to various forms of coercion. For far too long, to be sure—but the common law allowed it.

2. Britain's common-law jury-trial practice varied in some cases.

By the time he wrote his famous commentaries in the late 1760s, Blackstone summed up what he believed the common-law jury-trial right required: grand jury indictment, a petit jury of 12 property-owning men, who were drawn from the county in which the crime occurred, and who issued a unanimous verdict. William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769 (Chicago: University of Chicago Press, 1979), 4:298-307; 317-19; 342-50; 352-55; available at https://bit.ly/2XELYKM (last visited August 15, 2019).

But even then, those requirements did not all apply to all criminal cases. When the list of non-capital crimes began to expand starting in the fourteenth century, guaranteeing jury trials for all offenses became increasingly costly. Felix Frankfurter & Thomas Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 923-26 (1926). So Parliament permitted justices of the peace to decide non-capital cases without a jury. *Id.* This tradition carried over to the colonies. *Id.* at 932, 934-35; *see also Duncan v. Louisiana*, 391 U.S. 145, 159-60 & n.31 (1968). The Crown also could file an information rather than seek grand-jury indictment in misdemeanor cases. Blackstone, Commentaries at 4:253.

3. Jury practices in the colonies and early American States also varied from the common law.

While the colonies certainly adopted the common law, they did not do so wholesale, but instead adapted it to their own circumstances and preferences. Frankfurter & Corcoran at 935 ("Then followed the task of adapting English law to American soil; the old material had to be transformed, not merely transplanted."). For example, at common law, a defendant could not waive the right to jury trial or any other right meant to protect him. *Patton v. United States*, 281 U.S. 276, 306 (1930). But jury trial waiver "was by no means unknown" in the colonies. *Id.*

And the colonies' jury-trial practices sometimes varied from Blackstone's list. Frankfurter & Corcoran at 936 ("Different environments evolved different applications of trial by jury and its limits."). The Carolinas, Connecticut, and Pennsylvania allowed majority verdicts in the 1600s, though unanimity later "became the accepted rule." *Apodaca*, 406 U.S. at 408 n.3. But only six eighteenth century colonies/States explicitly provided for unanimity: Delaware, Maryland, North Carolina, Pennsylvania, Vermont, and Virginia. *See id.* (citing sources).[1] Georgia provided that the right

[1] The *Apodaca* court did not include Delaware as specifically requiring unanimity, likely because it cited to the 1792 version of Delaware's constitution, which replaced it with a "heretofore" provision. *See Apodaca*, 406 U.S. at 408 n.3. But as Louisiana points out, the 1776 Delaware Bill of Rights specifically required unanimity. Resp. Br. at 9-10. *Apodaca* also did not include Maryland, but Louisiana correctly points out that its 1776 constitution expressly required unanimity. Resp. Br. at 10.

would reflect the common law, and Kentucky and South Carolina similarly stated that the right would remain "as heretofore." *Id.*

Most appear to have used grand juries. Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, its Secrecy, and its Process*, 24 Fla. St. U. L. Rev. 1, 9-10 (1996). But others went their own way. For example, both before and after independence, the difficulties of summoning full grand juries led Connecticut to use individual grand jurors instead. Donald A. Dripps, *The Fourteenth Amendment, The Bill of Rights, and The (First) Criminal Procedure Revolution*, 18 J. Contemp. Legal Issues 469, 478 (2009). And Vermont often prosecuted felonies by filing informations. *Id.*

4. The Framers did not spell out all aspects of the jury-trial right because State practice varied so much—and anti-federalists targeted this ambiguity during the ratification debates.

During the 1787 Constitutional Convention, jury trial "took up a considerable time" of the discussion. Richard Dobbs Spaight, North Carolina Ratification Convention Debates (July 28, 1788), available at https://bit.ly/2XHBNVP (last accessed August 15, 2019). Toward the end of the convention, Hugh Williamson from North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." James Madison's Notes of the Constitutional Convention (Sep. 12, 1787), available at https://bit.ly/2KQpBZw (last visited August 15, 2019). Nathaniel Gorham from

Massachusetts said that because it would be impossible to describe which civil cases required juries and which did not, it should be left to the people's representatives. *Id.* Fellow Massachusetts delegate Elbridge Gerry disagreed, saying that juries were necessary to "guard ag[ainst] corrupt Judges." *Id.* George Mason of Virginia agreed that line-drawing would be a problem, but moved to draft a bill of rights that would protect the "general principle." *Id.* On Gerry's motion and Mason's second, the committee voted on appointing a committee to draft a bill of rights, but not a single state supported it. *Id.*[2]

Today, that sound rejection seems "extraordinary," but most of the delegates had a different view. Catherine Drinker Bowen, Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787 244 (1966). As they saw it, they were setting up a central government with limited powers by saying the few things that it could do, so enumerating what it could *not* do seemed not only unnecessary but impractical, even dangerous. *Id.* at 245-46.

Still, the proposed Constitution protected the jury-trial right in Article III, section 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."

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[2] Mason and Gerry would later refuse to sign the proposed constitution. James Madison's Notes of the Constitutional Convention (Sep. 17, 1787), available at https://bit.ly/30Cx0SR (last visited August 15, 2019).

As state conventions debated whether to adopt the proposed Constitution, anti-federalist calls for a bill of rights—and for better jury-trial protections in particular—grew. In the six ratifying conventions for which records are available,[3] two general criticisms arose on the jury trial right: (1) that the Article III criminal jury protection was not specific enough; and (2) that there was no bill of rights to protect the civil jury-trial right.

Pennsylvania. Two antifederalists—William Findley and Robert Whitehill—raised the civil-jury issue in the Pennsylvania convention. They quoted Blackstone, praising juries as necessary guardians against tyranny. Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 112-13 (2010). Federalist James Wilson responded that federal civil jury-trial protections should be left to Congress because "no particular mode of trial by jury could be discovered that would suit" all of the States. Thomas Lloyds Notes of the Pennsylvania Ratification Convention (Dec. 7, 1787), available at https://bit.ly/2KM1NGt (last visited August 15, 2019). "The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings are all different[.]" *Id.* It was thus "impracticable, by any general regulation,

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[3] Delaware, New Jersey, and Georgia quickly adopted the Constitution with little debate and no published proceedings. Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 122-24 (2010). The records from Connecticut, New Hampshire and South Carolina exist, but are too sparse to be helpful on this subject. *Id.* at 137-38, 218, 250. Rhode Island rejected the constitution (it appears) largely for economic reasons. *Id.* at 223-25.

to have given satisfaction to all." *Id.*; *see also* The Federalist No. 83, pp. 501-04 (C. Rossiter ed. 1961) (A. Hamilton) (discussing differences in State civil jury-trial practices).

Anti-federalist Samuel Bryan—under the pseudonym "Centinel"[4]—believed Wilson's response inadequate, and penned a response in a prominent Philadelphia newspaper. He said that failing to declare the common-law specifics or provide a bill of rights meant that the 12-man, vicinage, and unanimity requirements would not be protected in either civil or criminal cases. *Centinel II*, The Freeman's Journal, Oct. 24, 1787, available at https://bit.ly/2Y9VmFC (last visited August 15, 2019).

Virginia. Patrick Henry raised both arguments in the Virginia convention. After quoting Blackstone, he warned that if "a people lost their right to trial by jury … all others would follow." Maier at 289. The proposed Constitution failed not only to protect the civil jury-trial right, but "so vaguely and equivocally provided for" a criminal trial right that he "had rather it had been left out altogether"—in particular, because it did not permit challenges to partial jurors. Journal Notes of the Virginia Ratifying Convention (June 20, 1788), available at https://bit.ly/2Gavakj (last visited August 15, 2019). Henry "despise[ed] and abhor[ed]" a proposed government that "takes away the trial by jury

[4] *See* "Samuel Bryan" in The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification, Vol. 1: September 1787-February 1788 (Library of America 1993).

in civil cases, and does worse than take it away in criminal cases." *Id.*

Federalists Edmund Pendleton and John Marshall responded. Pendleton said that by saying "trial by jury," "every incident will go along with it," such as the vicinage requirement. *Id.* Marshall added that neither Magna Carta, the English Bill of Rights, nor the Virginia Constitution included the detail that Henry wanted, yet the right was still secure. *Id.*

Patrick's critique and Marshall's response typified debates about the scope of the right to jury trial under the Constitution. *See* Frankfurter & Corcoran at 970 (discussing debate between those who worried that federal right would not include common-law incidents such as unanimity, and those who "assured the country" that it would). Neither side appeared to convince the other.

New York. Melancton Smith objected to the proposed Constitution in the New York convention because it did not make "explicit security … for Trial by jury in common law [civil] cases, and the ancient and usual mode of trial in criminal matters is not secured." New York Ratification Convention Debates (July 17, 1788)—New York Advertiser (July 21, 1788), available at https://bit.ly/32hlZYy (last visited August 15, 2019). He proposed a conditional ratification, requiring additions to (among other things) the criminal jury trial right, such as the grand jury, unanimity, and vicinage requirements. *See* New York Ratification Convention Debates (July 17, 1788)—New York Advertiser (July 22, 1788), available at https://bit.ly/2JHl7Ux (last visited August 15, 2019).

Though his conditional-ratification proposal did not carry the day, the delegates ratified with the understanding that a bill of rights would be added soon after the new government was up and running. Maier at 385-93.

North Carolina. Joseph McDowell raised both the lack of civil jury-trial rights and the inadequate protection of the criminal right—in particular, the lack of an express vicinage requirement. North Carolina Ratification Convention Debates (July 28, 1788), available at https://bit.ly/2XHBNVP (last visited August 15, 2019). James Iredell replied generally with the idea that a government of limited rights did not require enumerated limitations, and specifically that it was "impracticable" to account for all the modes of civil jury trials in the States. *Id.*

Massachusetts. Eleazar Brooks raised the civil jury-trial issue, and Caleb Strong responded that "state practices were so different that the convention thought it best to let Congress find a way of settling the issue." Maier at 190. There appears to be no record of discussion on the criminal right.

Maryland. After the Maryland convention ratified, the dissenters published a list of proposed amendments, which included the right to jury trial. *Id.* at 245.

5. James Madison's first draft of the Sixth Amendment included the right to a unanimous jury, but the Senate deleted that right.

First in Massachusetts and then in New York and Virginia, the federalists began to win over some antifederalists by agreeing that a bill of rights would be appropriate—albeit after ratification. *See* Bowen at 288-89, 304-06.

Representative James Madison set out to fulfill this promise during the first Congress. Maier at 441, 443 (Madison's congressional campaign statements); *id.* at 446 (discussing Madison's difficulty of convincing others in the House to consider amendments). He eventually produced nine proposed amendments, the seventh of which addressed both criminal and civil jury trials. It would amend Article III section 2 to read that criminal trials "shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge," "presentment or indictment by a grand jury" in felony cases, "and other accustomed requisites." Madison's Resolution for Amendments to the Constitution (June 8, 1789), available at https://bit.ly/2XW9QsV (last visited August 15, 2019). And it provided that civil trials "ought to remain inviolate." *Id.*

Madison's proposal thus specifically addressed the antifederalist concerns voiced during ratification—protection for the civil right, and greater specific protections for the criminal right—and fulfilled the promise to rectify them. The House passed this language without amendment, and sent it to the

Senate. The Congressional Register (Aug. 18, 1789), available at https://bit.ly/2NT7046 (last visited August 15, 2019).

The Senate in those days kept its proceedings secret, so there is no record of its debates. Maier at 453. But what passed the Senate stripped almost all specifics from Madison's proposal. In what would eventually become the Sixth Amendment, criminal defendants were guaranteed the right to trial by "an impartial jury of the State and district wherein the crime shall have been committed." Bill of Rights as Proposed, available at https://bit.ly/2G7MndR (last visited August 15, 2019); *see also* Maier at 454 (describing conference committee changes).

Madison was disappointed that the Senate had removed so many of the details in the criminal jury-trial right. He aired his frustration in two letters to Edmund Pendleton. In the first, he lamented that the Senate "str[uck], in [his] opinion at the most salutary articles," including the vicinage requirement, "which has produced a negative on" his proposed jury trial right. James Madison to Edmund Pendleton (Sep. 14, 1789), available at https://bit.ly/2GaYneS (last visited August 15, 2019). His second letter largely echoed the first, but added that "[i]t was proposed to insert after the word juries—'with the accustomed requisites'—leaving the definition to be construed according to the judgment of professional men." But "[e]ven this could not be obtained" because State practice differed so much. James Madison to Edmund Pendleton (Sep. 23, 1789), available at https://bit.ly/2XDbMqK (last visited August 15, 2019).

Not all the senators were happy either. Senator Richard Henry Lee was "outraged at how the Senate had weakened the amendments proposed by the House," including the "much loosened" right to jury trial in criminal cases. Maier at 454; *see also* Richard Henry Lee to Patrick Henry (Sep. 14, 1789), available at https://bit.ly/2xINlc4 (last visited August 15, 2019). Senator William Grayson thought that the amendments so "mutilated & gutted" the original proposals as to be "good for nothing." Maier at 455. And at least one State Senate—Virginia's—when debating the proposed amendments thought several proposed rights, including that Sixth Amendment, fell "far short" of what was needed. *Id.* at 460.

B. In light of this history, the Sixth Amendment's omitting an express unanimity requirement means that the Framers and adopters did not view unanimity as constitutionally required.

The historical record confirms that the lack of an express unanimity requirement in the Sixth Amendment is significant.

The Sixth Amendment protects an array of rights for criminal defendants, including the right to trial in "all criminal prosecutions" by "an impartial jury." U.S. Const. amend. VI. Petitioner and some of his *amici* argue that "impartial jury" means "impartial *unanimous* jury" because "jury" carried the old common-law soil with it, which included unanimity. *See, e.g.,* Pet.Br. 18-25. By logical extension, this would mean "jury" also includes the grand-jury, 12-member, vicinage, property-owner, and male requirements.

"Jury" is not so capacious a term. As the history above shows, the lack of a uniform approach among the States at the time of ratification and the Senate's striking all the particulars in Madison's original list confirm that the ratifiers knew that the contours of the right would vary somewhat state-to-state.

This Court has approved this approach with other common-law requirements. In *Williams*, it held that "jury" does not invariably mean 12-person panel because the number was a historical accident that was "unrelated to the great purposes which gave rise to the jury in the first place." 399 U.S. at 89-90. While no less an authority than John Marshall believed that saying "jury" would necessarily carry on all of the common-law specifics, Journal Notes of the Virginia Ratifying Convention (June 20, 1788), available at https://bit.ly/2Gavakj (last visited August 15, 2019), this Court squarely rejected that reasoning in *Williams*. 399 U.S. at 91. Indeed, *Williams* went even further and found the Senate deletions significant. *Id.* at 96. Though this Court declined to "divine precisely what the word 'jury' imported to the" ratifying generation, it concluded that there was no evidence that they made an "explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* at 98.

Justice White's plurality *Apodaca* opinion used similar reasoning and history to conclude that unanimity was not likely part of the Sixth Amendment guarantee, but declined to hold it. 406 U.S. at 409-10.

This Court should take that step now and hold that the Senate's deleting the explicit common-law

requirements—and the people's adopting the non-specific right anyway—shows that the Sixth Amendment was designed to leave the jury-trial-right details to Congress and the States. The people knew how to provide more specific protections for the jury-trial right; they did so in several state constitutions. But they expressly declined to make the common-law practice of unanimity part of the Sixth Amendment.

Though the Senate proceedings are unavailable, its removing most of Madison's specific list shows that the Senate, and later the people, wanted the Sixth Amendment to depart from the common law. The desire to account for a wide variety of then-present and future practices is even more apparent when considering the different institutional role that the Senate played at the time. Before the ratification of the Seventeenth Amendment in 1913, State legislatures chose Senators. *See* U.S. Const. art. I, sec. 3, cl. 1-2. At the time it adopted the Sixth Amendment, the Senate represented the States as States, and would have had a strong interest in protecting a variety of State practices.

The Fourteenth Amendment did not alter any of this. To the extent that the people at that time wanted to alter State jury-trial practices, it would have been to allow blacks to participate. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2239-40 (2019).

Finally, given the historical practice of gaining unanimity by denying jurors food, drink, and other necessities, it was perfectly reasonable for Oregon and Louisiana to conclude that it would be better to permit

non-unanimous verdicts than to get unanimity by any means necessary.

II. FEDERALISM COUNSELS DEFERENCE TO STATE CONTROL OVER STATE CRIMINAL-JUSTICE SYSTEMS AND EXPERIMENTATION WITH JURY-DECISION RULES.

If history shows us anything, it's that the Framers did not reduce the right to a jury trial to an enumerated list precisely so the people could decide what the right should include. Rather than set particular features in stone, the drafters saw fit to construct it "by law, as that law when found injudicious can be easily repealed." James Iredell, North Carolina Ratification Convention Debates (July 28, 1788). Because "time and experience were not possessed by the Convention," they left the right "to be particularly organized by the legislature." Thomas Lloyds Notes, *supra* at 12.

The absence of explicit jury features in the Constitution meant Congress could experiment. And it has. For example, Congress has elected to permit 6-member juries in civil cases. Fed. R. Civil Pro. 48. And Congress approved a non-unanimous verdict rule for felony prosecutions in the Puerto Rico Constitution. *See* P.R. Const. art. II, § 11 (establishing "verdict by majority vote" of at least 9 of 12 jurors).[5] As co-equal

[5] Nothing in the laws governing Puerto Rico before its 1952 Constitution required unanimous verdicts, either. To take just one example, in 1917, Congress enacted the Jones Act, Pub. L. No. 64-368, 39 Stat. 951 (1917), which extended United States citizenship to Puerto Ricans and enacted a bill of rights establishing, among other things, the rights to assistance of counsel, a speedy and

sovereigns, the States should have the same opportunity as Congress to experiment with the jury-trial right in both civil and criminal cases.

This Court recognizes "numerous advantages" from deferring to States. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Reading the Sixth Amendment in light of the history above captures many of these benefits of federalism—specifically, preserving "the integrity, dignity, and residual sovereignty of the States," *Bond v. United States*, 564 U.S. 211, 221 (2011), and allowing "for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458.

A. The States' residual sovereignty lets them craft rules of criminal procedure.

Federalism pervades much of this Court's criminal jurisprudence. This Court long ago declared, and has frequently affirmed, that the Constitution "has never been thought" to "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 564 (1967); *see also Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009); *Smith v. Robbins*, 528 U.S. 259, 274 (2000). States have "historical dominion" over "the development of their penal systems." *Ice*, 555 U.S. at 170.

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public trial, and due process of law, along with protections from double jeopardy. Notably absent: the Jones Act did not impose a unanimity requirement. *See also Fournier v. Gonzalez*, 269 F.2d 26, 29 (1st Cir. 1959) ("If, as we hold, there was no constitutional guaranty of a unanimous jury verdict before 1952, it seems clear, a fortiori, that no such federal right arose in 1952 or thereafter.").

To be sure, federalism and incorporation sometimes conflict. While federalism generally recognizes a State's authority to act on behalf of its citizens, the Fourteenth Amendment imposes on States a minimum threshold of protection for individual rights. But even when the Fourteenth Amendment limits state action, it "by no means eliminates" the States' "ability to devise solutions to social problems that suit local needs and values." *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

In *Smith*, for example, this Court highlighted its "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." 528 U.S. at 273. It decried converting its suggested approach into a "straitjacket," and avoided "imposing a single solution on the States from the top down." *Smith*, 528 U.S. at 270, 273, 275 (cleaned up).

The right to an impartial jury should be no different. *Duncan* itself, which incorporated the right to a jury in criminal trials, recognized that its decision was "very unlikely" to "require widespread changes in state criminal processes." *Duncan*, 391 U.S. at 158 n.30. The Court continued this theme in *Williams* when it rejected as "blind formalism" the notion that the Sixth Amendment "forever codif[ies] a feature so incidental to the real purpose of the Amendment." *Williams*, 399 U.S. at 102-03. Instead, because "[l]egislatures may well have their own views about the relative value" of jury size, the Court saw fit to "leave these considerations to Congress and the States,

unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." *Id*. at 103. And in *Apodaca* and *Johnson*, Justice Powell, as the deciding vote, reasoned that States "should have the right to decide for themselves what shall be the form and character'" of trial procedures, including "'whether the verdict must be unanimous or not." *Johnson v. Louisiana*, 406 U.S. at 356, 372 (1972) (Powell, J., concurring) (cleaned up).

States, exercising this sovereignty, have relied on this Court's proclamation nearly a half-century ago that constitutional and common-law jury characteristics don't fully equate. *See Williams*, 399 U.S. at 99. They have secured thousands of convictions through systems that depart from the common-law jury. Some States permit non-unanimous jury verdicts. *See* Ore. Rev. Stat. §136.450. Other States empanel juries with fewer than 12 members. *See, e.g.,* Ariz. Rev. Stat. § 21-102; Conn. Gen. Stat. § 54-82; Fla. R. Crim. Pro. 3.270; Ind. Stat. § 35-37-1-1(b)(2); Utah Code § 78B-1-104. Half the States don't require grand juries for indictments, and almost two-thirds permit prosecution by either information or indictment. *See* John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L. Rev. 341, 354 (2005); Wayne R. LaFave, et al., 4 Crim. Proc. § 14.2(d) (4th ed.). Though many viewed all three of those common-law features as essential at the time of the Founding, *see* Part I, this Court has refused to require States to comply with all of them. *Apodaca*, 406 U.S. at 410-11 (unanimity); *Williams*, 399 U.S. at 102-03 (12-member jury); *Hurtado v. California*, 110 U.S.

516, 538 (1884) (grand jury). It would "inflict a serious blow upon the principle of federalism" to change course now. *Duncan*, 391 U.S. at 171 (Fortas, J., concurring).

Louisiana's own experience with unanimous verdicts highlights the advantages of preserving State control. A media and political campaign recently mounted to amend the state constitution to require unanimous verdicts in criminal trials. *See* John Simerman & Gordon Russell*, From ACLU to NRA: Campaign for unanimous juries targeted Louisiana voters across the spectrum*, The Advocate (Nov. 7, 2018), https://bit.ly/2KCTkXf (last visited August 16, 2019) (discussing PAC donations and bipartisan media and political campaign on ballot initiative). After a newspaper published research about Louisiana's non-unanimous verdicts, a measure was proposed to amend the state constitution, and gained support from some district attorneys. The measure passed the Senate and the House and voters overwhelmingly approved it. *Id.*

Reading juror unanimity into the Sixth Amendment would essentially make this democratic process hollow. It would remove decisionmaking authority from the public square and strip States of "the core of their sovereign status." *Ice*, 555 U.S. at 170. No longer could sides disagree about the value of a particular feature for jury trials and settle that difference by the will of the majority.

B. Shackling States to unanimous verdicts will hinder their ability to improve criminal justice through experimentation.

A significant reason deference to States is so important for criminal procedures is because States can serve as laboratories. And "it strains credulity to believe that [the Civil War Amendments] were intended to deprive the States of all freedom to experiment with variations of jury trial procedure." *Johnson*, 406 U.S. at 376 (Powell, J., concurring).

State experimentation is particularly appropriate for jury-decision rules. Experimentation works best when applied to areas that have "nationwide agreement as to general goals, though perhaps not as to the best means of achieving those goals." Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 Cal. L. Rev. 1541, 1542 (2002). And experimentation is the precise reason the Founders left the constitutional jury-trial right devoid of detail. *See* Part I.A.4.

This ability for each State to adopt its own system—and to change that system over time—has yielded tremendous benefits, as Justice Powell suggested in his decisive vote in *Apodaca* and *Johnson*. *Johnson*, 406 U.S. at 376 (Powell, J., concurring). Even though most States have, to this point, maintained a unanimity requirement, the fact that greater protections for criminal defendants exist today than 200 years ago undermines the traditional justification for unanimity and may open the door to greater experimentation going forward. *See* Ethan J. Leib,

Supermajoritarianism and the American Criminal Jury, 33 Hastings Const. L. Q. 141, 142 (2006).

As scholars continue to debate the merits of unanimity,[6] States could come to view a supermajority rule as an effective way to preserve a criminal defendant's rights while enhancing other important features of the jury trial.

1. State experimentation can alleviate nullification.

Unanimity gives tremendous veto power to a single holdout juror. And holdout jurors unabashedly wield that power: 42% of hung juries were deadlocked with only 1 or 2 jurors holding out. Paula L. Hannaford-Agor, et al., *Are Hung Juries a Problem?*, The National Center for State Courts, 67 (Sep. 30, 2002). But this statistical disparity should come as no surprise. Various groups openly advocate for jury nullification. *See, e.g.*, Fully Informed Jury Association, *About FIJA*, available at https://fija.org/about-fija/overview.html (last visited August 15, 2019).

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[6] *See, e.g.*, Leib, *supra*; Robert F. Holland, *Improving Criminal Jury Verdicts: Learning from the Court-Martial*, 97 J. Crim. L. & Criminology 101, 125-41 (2006); Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 Fla. St. U. L. Rev. 659 (1997); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1189-91 (1995); Edward P. Schwartz and Warren F. Schwartz, *Decisionmaking by Juries under Unanimity and Supermajority Voting Rules*, 80 Geo. L. J. 775 (1992); Gary J. Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 Wash. U. L. Q. 39.

Federal and State governments properly seek to curb such a "sabotage of justice." *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997) (cleaned up). For example, the federal rules authorize judges to dismiss for cause a juror who intends to nullify and permit the remaining jurors to return a verdict—essentially a non-unanimous verdict but-for the dismissal of the nullifying holdout. *Id*. at 616-17 (discussing Fed. R. Crim. Pro. 23(b)). Many States likewise authorize judges to dismiss would-be nullifiers, but courts must carefully avoid hampering deliberation secrecy and juror impartiality. *See, e.g.*, *People v. Williams*, 21 P.3d 1209, 1213 (Cal. 2001), *abrogated on other grounds*, *People v. Barnwell*, 162 P.3d 596, 605 (Cal. 2007).

The spillover from nullification isn't limited to blocking lawful convictions. Nullification vests a single juror motivated by extralegal considerations with the power to "overrule [ ] the majority's judgment as expressed through its chosen spokesman." Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex. L. Rev. 488, 513 n.111 (1975). "By passing judgment on the laws" rather than applying them, "juries usurp the rightful democratic authority of the legislature to determine public policy." Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 Geo. L.J. 191, 212-13 (1996) (cleaned up). A supermajority rule is a reasonable approach by a State hoping to prevent a juror from fighting in the courtroom what he has lost at the ballot box.

2. State experimentation can improve the efficiency of deliberations.

Unanimity puts tremendous strain on jurors to reach a verdict. An oft-cited benefit of unanimity is deliberation. *See, e.g.,* Shari Sidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006) (analyzing deliberations of civil juries in Arizona). But the Sixth Amendment doesn't guarantee deliberation at all, let alone a particular type of deliberation. *See Tanner v. United States*, 483 U.S. 107, 127 (1987).

And unanimity doesn't guarantee high-quality deliberation. A holdout juror may refuse to discuss the case and do crossword puzzles instead. *See Brewster v. Hetzel*, 913 F.3d 1042, 1054-56 (11th Cir. 2019).

In fact, the unanimity rule in many instances may cut against quality deliberation. Numerous accounts detail the "positively poison[ous]" atmosphere in some jury rooms as majorities intimidate holdouts into submission. William Glaberson, *For Judges, Lawyers and Fellow Jurors, the Challenges of Dealing With a Holdout*, N.Y. Times (Nov. 19, 2010), https://nyti.ms/2MaXmHk (last visited August 15, 2019); *see also* Anna Gorman, *Holdout Jurors Can Put Legal System to the Test*, L.A. Times (Jun. 18, 2004), https://lat.ms/2Y15e5w (last visited August 15, 2019). Some deliberations become so confrontational that jurors need to be broken up by marshals. *See, e.g.*, *United States v. Robinson*, 872 F.3d 760, 767 (6th Cir. 2017). Just like common-law courts obtained unanimity through coercion, *see supra* at 6-7, jurors often do the

same today–though to each other. *See, e.g.*, *United States v. Lakhani*, 480 F.3d 171, 185 (3d Cir. 2007) (foreman threatened to keep holdout from her new home). Unanimity doesn't change the verdict's outcome; it changes only how long it takes to get there, and the methods jurors must employ to obtain it. *See* Leib, *supra* at 144 & n.10 (listing studies).

Perhaps worse still, if holdouts hold out long enough, the jury is hung. Hung juries present enormous costs: monetary costs with retrying cases, emotional costs on victims and witnesses, safety costs by reducing prison time for criminal defendants, and political costs as mistrials sour the public toward the criminal justice system. Hannaford-Agor et al. at 67.[7] Wishing to redirect funds elsewhere, a State may reduce the frequency of mistrals by switching from unanimity to supermajority.

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The Sixth Amendment's history and text show that the people did not intend it to impose the unanimity requirement, and federalism counsels in favor of more State experimentation with criminal procedures, not less. Allowing the States to continue to frame the jury-

[7] While perhaps not a run-of-the-mill case, Bill Cosby's first trial cost $219,000. *The Cosby Trial That Ended in a Hung Jury Cost $219,000*, Associated Press (Jul. 13, 2017), https://tinyurl.com/y25fpztr (last visited August 15, 2019). It resulted in a hung jury, with reports that two holdouts prevented the jury from reaching a guilty verdict. Eric Levenson & Shachar Peled, *Bill Cosby Jurors Give Conflicting Accounts of Deadlock*, CNN (Jun. 22, 2017), https://tinyurl.com/y5wmknd6 (last visited August 15, 2019). He was retried and convicted on all counts.

trial right as they see fit accords them both the respect due them as sovereigns and the flexibility they need to effectively protect their citizens.

CONCLUSION

The Court should affirm the judgment of the Louisiana Court of Appeal.

Respectfully submitted.

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