NO. 18-5924

IN THE
Supreme Court of the United States

EVANGELISTO RAMOS,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

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

REPLY TO THE STATE OF LOUISIANA'S BRIEF IN OPPOSITION

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REPLY BRIEF

Pursuant to Rule 15.6, Petitioner Evangelisto Ramos files this *Reply Brief* to the *State's Brief in Opposition*.

1. *The Brief in Opposition Erroneously Asserts that Louisiana's Amendment of the Constitution by the Electorate Provides a Basis for Denying Certiorari*

The State's Brief in Opposition ("BIO") asserts that the voters' decision on November 6, 2018, to eliminate non-unanimous juries vitiates the importance of this issue. In contrast, however, the decision by Louisiana voters to eliminate non-unanimous juries makes it more—rather than less—important to grant certiorari.

First, the Constitutional Amendment is limited in application to cases prospective—i.e. to offenses that occur after January 1, 2019. As such, the amendment does not apply to individuals like Petitioner.

Second, the Amendment reflects the considered belief that unanimous juries provide confidence in the justice system. John Simerman & Gordon Russell, LOUISIANA VOTERS SCRAP JIM CROW-ERA SPLIT JURY LAW; UNANIMOUS VERDICTS TO BE REQUIRED, *The Advocate*, November 6, 2018. Even prosecutors recognized the prospective benefit that unanimity had for the justice system. *See* Gordon Russell & John Simerman, HILLAR MOORE, OTHER LOUISIANA DAS DECLARE SUPPORT TO CHANGE UNANIMOUS JURY LAW THE ADVOCATE, *The Advocate*, October 17, 2018.

Third, it cannot be gainsaid, that the Legislature's decision to place the issue on the ballot, and the electorate's decision to adopt unanimous juries, reflected the

desire to remedy a constitutional transgression. *See* e.g. Gordon Russell, *Momentum Builds To Put Unanimous-Jury Issue On Ballot; Applause Erupts As Bill Advances*, The Advocate, April 25, 2018 (quoting Senator J.P. Morrell, author of legislation, "We can't say, 'This was born in racism, but it is the way it is,' " he said. "We have an opportunity to make history here. This is like the vestigial tail of some prehistoric creature that we should just chop off. This kind of thing just holds us back.").

However, unless this Court grants certiorari now, further percolation in the lower courts may be impossible. *See Tyler v. Cain*, 533 U.S. 656 (2001). And the BIO argues that "thousands" of individuals have been convicted under this rule. Oregon continues to operate under it. All of this warrants consideration, rather than avoidance, by this Court.

2. *The* Brief in Opposition *Offers No Argument for Denying Certiorari, Focusing On The Merits Question Of Whether The Sixth Amendment Requires A Unanimous Jury.*

The State's BIO does not argue that the issue was not preserved below, is not ripe for review, or that Petitioner was convicted by a unanimous jury. Rather, the State's BIO primarily addresses the merits question whether the Sixth Amendment requires a unanimous jury. *See* BIO at 6 ("Neither the text of the Sixth Amendment nor intent of the Founders suggests that the Sixth Amendment contains a requirement of unanimity."). For the ensuing six pages, the BIO argues that "'there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* at 12.

The BIO claims *Apodaca v. Oregon* was predicated on "the historical record" that "suggests the Founders did not intend the requirement to be contained within the Sixth Amendment." BIO at 7. The BIO argues "the Founders did not intend for the jury requirement in the Sixth Amendment to include common law features typical at the time." BIO at 9. Petitioner suggests that this is an inaccurate view of *Apodaca*, and more importantly an inaccurate view of history. The plurality in *Apodaca* plainly recognized, "Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century." *Apodaca v. Oregon*, 406 U.S. 404, 407 (1972). Five justices recognized that unanimity was an indispensable feature of the federal jury trial right, "mandated by history." *See Johnson v. Louisiana*, 406 U.S. 356, 370 (1972) (Powell, J., concurring) ("In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial."); *id.* at 383 (Brennan, J., dissenting) ("[I]n cases dealing with juries, it had always been assumed that a unanimous jury was required. . . . Today the bases of these cases are discarded and two centuries of American history are shunted aside."). And indeed, this is why a unanimous jury is required in federal court. *See Richardson v. United States*, 526 U.S. 813 (1999). Regardless, however, this is a debate that should be had with full briefing on the merits—not dispositive of the issue at the certiorari stage.

Similarly, on the merits, the State's BIO claims that the right to a conviction by a unanimous jury is not "personal and substantive," and thus not subject to

incorporation. BIO at 12. The BIO cites the *Johnson* opinion for the proposition that though a jury, trial court, and appellate judges may disagree, this does not amount to a lack of sufficient proof by the State. On the merits, Petitioner suggests that this argument is flawed.[1] But regardless of whether Petitioner or Respondent is correct—the debate reflects a merits question worthy of this Court's review.

3. *The* Brief in Opposition *Erroneously Claims that This Court's Recent Sixth Amendment Cases Do Not Cast Doubt Upon* Apodaca v. Oregon.

The BIO claims that "no recent development in this Court's Sixth Amendment jurisprudence justify upsetting longstanding precedent," BIO at 2, and this Court has not "questioned *Apodaca*" and cited *it* "without reservation." *Id.* at 5, citing *inter alia Burch v. Louisiana,* 441 U.S. 130, 136 (1979*), Brown v. Louisiana,* 447 U.S. 323, 330-31 (1980). However, a plain reading of *McDonald v. City of Chicago* reveals that *Apodaca* is far less definitive than the BIO would suggest. *McDonald* made clear that this Court has:

> abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court."

McDonald v. City of Chicago, 561 U.S. 742, 765 (2010).

Moreover, not only has the Court rejected the notion of a "watered down" Bill of Rights, it has forcefully rejected the premise of *Apodaca* that "[I]n determining what is meant by a jury we must turn to other than purely historical considerations.

[1] *See, e.g. Hurst v. Florida*, 136 S. Ct. 616 (2016); *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (requiring each fact to be decided by a jury as a Sixth Amendment right).

Our inquiry must focus upon the function served by the jury in contemporary society." *Apodaca* at 410. This Court has subsequently broadly rejected the idea that the Sixth Amendment derives its meaning from functional assessments, and has strictly adhered to historical origins of the amendment. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 554 U.S. 353 (2008).

4. *The* Brief in Opposition *Erroneously Argues that Louisiana's Racist History Is Irrelevant*

Racism defined the purpose of the 1898 Constitutional Convention. In the very opening speech by the President of the Convention, he stated that qualified men were barred from office by "ignorant and corrupt delegations of Southern negroes," and that the assembly was called to "eliminate…the mass of corrupt and illiterate voters." OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 9-10 (1898). This opening expressed the goals of the Convention.

The BIO cites *State v. Hankton*, 122 So. 3d 1028 (La. App. Ct. 2014) as basis for the claim that the Louisiana Constitution of 1974 cleansed the racism of the 1898 Louisiana Constitution. However, in *Hankton,* the Court of Appeals did not reach the issue because "we conclude that Mr. Hankton has failed to preserve the issue for appellate review by failing to request an evidentiary hearing on his allegations and therefore do not directly consider the merits of his argument." *Id.* at 1029. The BIO also argues that the racist origins of this law do not matter because the 1898 Constitutional Convention rule permitting 9-3 votes was watered down to a 10-2 rule in Louisiana's Constitutional Convention of 1974. But a change that reduces but does

not eliminate racism does not vindicate the statute. A provision converting the Three-Fifths Compromise into a Four-Fifths Compromise would offer no safe haven from criticism. Regardless, these are merits questions that clearly implicate whether full incorporation of the Sixth Amendment by the Fourteenth Amendment was warranted.

Finally, the BIO asserts "There is no compelling reason to revisit these issues because this Court considered the same arguments (and essentially the same evidence) in 1972." BIO at 18. A careful review of the briefs filed in *Johnson v. Louisiana*, reveals no concern with the racist origins of the 1898 Louisiana Constitution. Nor did the *Apodaca* briefing consider the anti-Semitic origins of the 1934 Oregon Constitution. While it is true that some scholars contemporaneously recognized that Louisiana's Constitution of 1898 was a racist calamity imposed on African-American citizens, *see* Amasa M. Eaton, *The Suffrage Clause of the New Louisiana Constitution*, 13 Harv. L. Rev. 279, 279 (1899), the history was elided for over one hundred years. *See* Thomas Aiello, *Jim Crow's Last Stand, Non-Unanimous Criminal Jury Verdicts in Louisiana*, Baton Rouge, LSU Press, 2015; Thomas Frampton, *The Jim Crow Jury* 71 Vanderbilt L. Rev. 1593 (2018); Aliza Kaplan, Amy Saack, *Overturning Apodaca V. Oregon Should Be Easy: Nonunanimous Verdicts In Criminal Cases Undermine The Credibility Of Our Justice System*, 95 Or. L. Rev. 1, 2016.

5. *The Doctrine of Stare Decisis Does Not Prevent Resolution of This Case*

The doctrine of *stare decisis* does not pose a significant impediment to reconsidering the question presented afresh. Principles of *stare decisis* are at their nadir where a case depends upon a plurality opinion because no five Justices are able to muster a controlling view concerning the law. As noted above, *Apodaca* was a deeply fractured decision that occurred as a result of an "unusual division among the justices—not an endorsement of the two track approach to incorporation."

Nine justices have essentially agreed that unanimity was required at the Founding. Eight justices agreed that the Fourteenth Amendment incorporated the full force of the Sixth Amendment. Five justices agreed that the Sixth Amendment currently required adherence to its historical origins. And yet the odd configuration of opinions resulted in a rule permitting non-unanimous verdicts in state courts. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overturning prior decision in part because a majority of the Court (the concurring opinion providing the fifth vote, as well as the dissent) had "expressly disagreed with the rationale of the plurality").

In defending the non-unanimity rule in Louisiana, the State's BIO essentially abandons Justice Powell's view of partial incorporation and the plurality's rule that "contemporary" "functionalism" determine whether unanimous juries are constitutionally required. Rather the argument in the State's BIO for upholding *Apodaca* would require overturning more recent case law. *See Richardson*, 526 U.S.

at 1710 ("[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.").

The State's BIO also references the reliance interests at stake, arguing that thousands of final convictions would be in question if this Court overruled *Apodaca* and applied this ruling retroactively. This argument is of no moment, as the question of retroactive application is not currently before this Court. Moreover, Louisiana was on notice from at least the time of this Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) that the "functional approach" to evaluating constitutional rights had been rejected.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 27th day of November, 2018, pursuant to Supreme Court Rule 29.5(b), the accompanying Reply to the State of Louisiana's Brief In Opposition was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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