No. 18-9463

In the Supreme Court of the United States

MICHAEL J. BROOKS,
Petitioner

vs.

THE STATE OF LOUISIANA,
Respondent

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner has posed the following question:

Whether Petitioner was constitutionally entitled to a unanimous jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

Based upon the issues raised (and abandoned) below and Mr. Brooks' Petition filed with this Court, the State of Louisiana believes the only question properly before the Court is the question presented in *Evangelisto Ramos v. Louisiana*:

Whether this Court should overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), and hold that the Sixth Amendment right to an impartial jury, as incorporated through the Fourteenth Amendment, guarantees State criminal defendants the right to a unanimous jury verdict.

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CONSTITUTIONAL AND STATUTORY AUTHORITY[1]

Petitioner misrepresents the Louisiana statutory law on jury verdicts. Article 782 of the Louisiana Code of Criminal Procedure was amended in 2018. The text of the statute that existed at the time of Mr. Brooks' trial is correctly stated in the petition; however, Louisiana Code of Criminal Procedure article 782 now provides, in pertinent part:

> A case for an offense committed prior to January 1, 2019, in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict.

Petitioner does not provide the Louisiana Constitutional authority for jury verdicts. The text of Louisiana Constitution article I, § 17(A) that existed at the time of the trial provides, in pertinent part:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict.

That article was also amended and currently reads, in pertinent part:

> A case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve

[1] Respondent notes that, although Petitioner mentions the Fifth Amendment in his statement of the Question Presented, he does not list the Fifth Amendment as a constitutional provision involved in his petition for certiorari.

persons, all of whom must concur to render a verdict.

STATEMENT OF THE CASE[2]

Facts of the Crime. According to the victim of this crime, when she was in first grade, Petitioner, who was the victim's mother's boyfriend, put his finger in her vagina after checking her out of school and requiring that she take a bath. Several years later, after her mother and Petitioner married, the now eleven-year-old victim and Petitioner were in a large walk-in closet at their home where he vaginally raped her. Two years later, in junior high school, she told her guidance counselor what had happened, police were contacted, and legal proceedings began.

Facts of the Procedures. Petitioner was charged by grand jury indictment with one count of molestation of a juvenile, a violation of Louisiana Revised Statutes 14:81.2, and two counts of aggravated rape, a violation of Louisiana Revised Statutes 14:42 (now designated as first degree rape). Both crimes require confinement at hard labor. He filed no pretrial motion challenging the constitutionality of Louisiana's jury verdict system, proposed no alternatives to the standard jury instructions on the vote required to convict, and made no objections to the instructions given. Eleven members of a 12-person jury found him guilty of molestation of a juvenile and of aggravated rape. Ten found him not guilty of the second count of aggravated rape. Petitioner did not object to the verdict. Although he filed a motion for post-verdict judgment of acquittal, he did not complain of the jury verdict. He was sentenced to twenty-five years for the molestation and life in

[2] These facts are taken from the lower court opinion in *State v. Brooks*, 2017-1755, *2-6 (La. App. 1 Cir. 9/24/18), 258 So.3d 944, 947-48, 949-950, Pet. App. A5-7.

prison without parole for the rape. These sentences ran concurrently.[3]

Petitioner appealed. His sole counseled assignment of error was that the State did not prove beyond a reasonable doubt that he committed these crimes and, as such, the evidence was insufficient to support either conviction. Petitioner also filed a pro se appeal. In that appeal he raised two issues, including insufficiency of evidence. The First Circuit Court of Appeals in Louisiana held that Petitioner's arguments attacked the credibility of the victim, something that did not render the evidence insufficient. *State v. Brooks*, Pet. App. A7-9.

On his second issue, Petitioner raised an issue he had never raised before: that Louisiana's jury verdict laws "violate Equal Protection under the Fourteenth Amendment and Article I, Section Three (3) of the Louisiana Constitution of 1974, because the constitutional provision's enactment was motivated by an express and overt desire to discriminate against blacks on account of race and because the provision has had a racially discriminatory impact since its adoption." Resp. App. at 2. Mr. Brooks did *not* raise a due process claim; in fact, he specifically *rejected* it. *Id.* ("Unlike the familiar Sixth Amendment challenge to this State's non-unanimous jury regime . . . the Equal Protection challenge presented in this case has not been addressed on merits by any court.").

The court held—as it has in hundreds of other cases—that a constitutional challenge in Louisiana may not be considered by an appellate court unless it was raised and properly pleaded in the trial court. And such a claim is not properly pleaded unless the specific grounds outlining the basis of the unconstitutionality are

[3] Petitioner is incorrect when he says at page 3 of his petition that he was sentenced to life *plus* 25 years.

particularized. Because this was not done, the issue was not properly before the state appellate court.[4]

The court of appeal, in dicta, "nevertheless address[ed] the issue." *Id.* at 953. The court found that "[u]nder both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment." *Id.* As to the equal protection challenge specifically, the court relied on *State v. Bertrand*, 08-2215, 08-2311 (La. 3/17/09), 6 So.3d 738, which found that the issue had already been decided as meritless by the United States Supreme Court. *Brooks*, 266 So.3d at 953-54.[5]

Mr. Brooks petitioned for a writ of certiorari from the Louisiana Supreme Court, but was denied. Pet. App. A12. He now requests review from this Court, apparently raising only a Sixth Amendment incorporation claim—something he has never raised, much less argued or briefed to any court below.

REASONS FOR DENYING THE WRIT

Even if this Court determined that a unanimous verdict is required in trials in the States, *this* petition should be denied because the sole issue raised in the petition was never raised at trial and, thus, is procedurally barred. Petitioner should not be allowed to resurrect this claim at this late juncture.

This petition is a long-shot attempt to obtain relief on an issue he expressly abandoned. His Question Presented lists three constitutional provisions. But he never explains which constitutional right in those provisions applies to him or how

[4] By omission, Petitioner misleads the Court on this point.

[5] This holding was also misrepresented by Petitioner in his petition.

those provisions generate a question for this Court. In other words, he does not actually pose any question at all.

This Court has repeatedly said that it disapproves of a petitioner "smuggling additional questions into a case" that were not presented in his petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. 27, 32 (1993). And yet, that is precisely what he attempts to do by carrying a smuggler's bag big enough to hold nearly *every* issue related to a criminal trial. Many books line the shelves of law school libraries on each one of the amendments he has listed, and many trees were felled to publish reams of law review articles on subsidiary clause and related questions. The only criminal procedure issues *not* encompassed by Petitioner's Question Presented would be those found in the Eighth Amendment: bail, fines, and punishment. His question is so broad that it amounts to no question at all. Instead, it presents only a vague appeal to general constitutional principles. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). Put simply, "[a] generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights." *Taylor v. Illinois*, 484 U.S. 400, 407 n.9 (1988).

To further obfuscate his reasoning, he proceeds, *in one paragraph*, to state no more reason to grant his petition than the fact that this Court has granted a petition for a writ of certiorari in *Evangelisto Ramos v. Louisiana*, 139 S. Ct. 1318 (2019), and, "for the reasons stated in that petition, as well as reasons stated in *similar petitions filed over the last 45 years*," *Apodaca v. Oregon*, 406 U.S. 404 (1972), should be "re-examin[ed] and disavow[ed]." Then, with no argument or

supporting evidence, he simply states, "Given the racial origins of the non-unanimous jury provision, full incorporation by the Fourteenth Amendment of the Sixth Amendment's guarantee of a unanimous jury is required."

To be clear, if sufficiently raised at all (and Louisiana submits it was not), the *only* issue raised is an *unstated*, *unproved* claim that the Sixth Amendment's impartial jury clause requires a unanimous verdict and that such a requirement should be applied to the States through the Fourteenth Amendment. Despite referencing "racial origins," *Petitioner makes no equal protection claim*. Therefore, the due process claim having not been raised, argued, or ruled upon by any court below, his application should be dismissed.

That said, the Louisiana appellate courts were correct in upholding this verdict. They relied upon this Court's precedent, as did the Louisiana legislature in enacting the jury verdict law in place at the time of Petitioner's conviction. That precedent, including *Apodaca v. Oregon*, was decided correctly and should not be overruled. Nowhere in the Constitution, including Article III and the Sixth Amendment, is a unanimous jury verdict required. In fact, the Framers of the Constitution considered such a provision and purposefully left it out. Thus, neither the text of the Constitution, including the Sixth Amendment, nor its history, provide for a right to a unanimous jury verdict. Furthermore, such a right is not fundamental to ordered liberty. It has never been found to be essential to due process—whether in the Fifth or the Fourteenth Amendment. Additionally, the vast majority of other countries who use juries—including England, from whom we inherited the concept of a jury trial—do not provide for unanimous jury verdicts.

Moreover, Petitioner has offered *no* evidence, at trial or in his petition, that Louisiana's non-unanimous jury verdict rule had racial origins or was motivated by racial animus. That's because the jury trial provisions under which Petitioner was tried were adopted by the people in 1973, after a Constitutional Convention, in which the Delegates specifically relied on this Court's precedent but nevertheless increased the required vote to 10-2 to convict. The 1974 Constitution was voted on by the people, as was the new provision adopting unanimity going forward with trials for crimes committed after January 1, 2019. Thus, any change the Court might wish to actuate has already been realized—and without the collateral consequences a ruling by this Court might cause.

Alternatively, if the Court is inclined to grant the petition, Louisiana requests that it be held for further action pending this Court's decision in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019).

I. A GENERIC REFERENCE TO MULTIPLE PROVISIONS OF THE UNITED STATES CONSTITUTION DOES NOT PRESERVE A CONSTITUTIONAL CLAIM

A. Constitutional Issues Cannot Be Smuggled into Court

In his Question Presented, Petitioner claims that he is "constitutionally entitled to a unanimous jury under the Fifth, Sixth, and Fourteenth Amendments." There are five separate constitutional rights set forth in the Fifth Amendment; at least eight different constitutional rights set forth in the Sixth Amendment; and at least twelve separate constitutional rights set forth in the Fourteenth Amendment. *Petitioner specifies none of them.*

To further muddle his reasoning, he proceeds, *in one paragraph*, to simply state that this Court has granted a petition for a writ of certiorari in *Evangelisto*

Ramos v. Louisiana and that, "for the reasons stated in that petition, as well as reasons stated in *similar petitions filed over the last 45 years*," *Apodaca v. Oregon* should be "re-examin[ed] and disavow[ed]." Then, *with absolutely no argument or supporting evidence*, simply states, "Given the racial origins of the non-unanimous jury provision, full incorporation by the Fourteenth Amendment of the Sixth Amendment's guarantee of a unanimous jury is required."

A vague appeal to constitutional principles does not preserve constitutional claims. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (noting, for example, that the petition in the lower court did not identify the Excessive Fines Clause of the Eighth Amendment as the source of the claim). In particular, "[a] generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights." *Taylor v. Illinois*, 484 U.S. 400, 407 n.9 (1988). Furthermore, Supreme Court Rule 14.4 provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny the petition." Regarding the Question Presented, as noted in the treatise, SUPREME COURT PRACTICE, "it is not enough to ask whether, in light of stated circumstances, the petitioner's constitutional or statutory rights were violated." The precise provision of the Constitution, such as the Due Process Clause of the Fourteenth Amendment, must be cited. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, D. Himmelfarb, SUPREME COURT PRACTICE 463 (10th Ed. 2013). Finally, the fact that Petitioner may have discussed an issue in the text of his petition for certiorari does not bring it

before Court. As this Court has noted, "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [the Court's] review." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. 27, 31-32 & n.5 (1993).

Supreme Court Rule 14.1 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." As the Court has noted, "faithful application of Rule 14.1(a) thus helps ensure that [the Court] is not tempted to engage in ill-considered decisions of questions not presented in the petition. Faithful application will also inform those who seek review here that [the Court] continue[s] to strongly 'disapprove the practice of smuggling additional questions into a case after [it] grant[s] certiorari." *Izumi,* 510 U.S. at 30-34 (refusing to take up certain questions because they were not raised in the petition (citing *Irvine v. California*, 347 U.S. 128, 129 (1954))). In *Yee v. City of Escondido,* the Court also discussed the two important purposes for the Rule:

> First, it provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari and enables the respondent to sharpen the arguments as to why certiorari should not be granted. Were [the Court] routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review. Where, as is not unusual, the decision below involves issues on which the petitioner does *not* seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions.
>
> Second, Rule 14.1(a) assists the Court in selecting the cases in which certiorari will be granted. . . . Were [it] routinely to entertain questions not presented in the petition for certiorari, . . . parties who feared an inability to prevail on the question presented would be encouraged to

> fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling [it] to make efficient use of [its] resources. 503 U.S. 519, 535-36 (1992).

Petitioner has not accurately and clearly stated his claim or its constitutional basis. Broadly and generically referencing constitutional provisions without identifying the specific rights guaranteed therein, in addition to violating this Court's rules, sets up a situation where Petitioner can "smuggle" in all sorts of "disguised" claims. Furthermore, it leaves Respondent with the "formidable task of opposing certiorari on every issue the Court might conceivably find present" in the Fifth, Sixth, and Fourteenth Amendments. Furthermore, if the Court grants this application for the purpose of reconsidering its decision in *Apodaca v. Oregon*, the parties briefing on other issues would be a waste of this Court's resources and time. Petitioner's application for a writ should be denied.

B. Petitioner is Foreclosed from Raising an Equal Protection Claim

If, possibly, Petitioner sufficiently raised a Sixth Amendment claim by reference in the text of his petition, he certainly has not raised an equal protection claim. A general reference to the Fourteenth Amendment in the Question Presented cannot suffice. Petitioner's reasons for granting the petition include *only* the re-examination of *Apodaca v. Oregon* and the incorporation of the Sixth Amendment. The words "equal protection" are mentioned nowhere in the petition, including *any* reference to his pro se equal protection argument in the court below. Thus, Petitioner waived this claim. An argument withheld from the petition has been waived and will not be considered when made for the first time in briefing the

merits. *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.,* 522 U.S. 192, 205 (1997). Thus, this issue does not merit review by the Court.

II. THE LONGSTANDING RULE THAT THIS COURT WILL NOT CONSIDER CLAIMS THAT WERE NOT PRESSED IN THE STATE COURTS BELOW CREATES A WEIGHTY PRESUMPTION AGAINST REVIEW

A. Failure to Object to the Non-Unanimous Jury Verdict Instruction At Trial Is A State Procedural Default That Bars Federal Review

In considering Petitioner's pro se assignment of error regarding the jury verdict, the Louisiana Circuit Court held

> It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. A party must raise the unconstitutionality in the trial court, the unconstitutionality must be specially pleaded, and the ground outlining the basis of unconstitutionality must be particularized. *See State v. Hatton*, 07-2377 (La. 7/1/078), 985 So.2d 709, 718-19. In the instant case, defendant failed to raise his challenge to Louisiana Constitutional Article I, § 17(A) in the trial court. *Accordingly, the issue is not properly before this court.*

This holding is based upon two premises:

First, Louisiana law generally requires that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." La. Code Crim. Proc. art. 841. "It is sufficient that a party, *at the time the ruling or order of the court is made* or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, *and the grounds therefor*." *Id* (emphasis added).

More specifically, an objection to a claimed improper jury instruction is procedurally required in order to raise the issue on appeal. *See State v. Rubens*,

2010-1114 (La. App. 4 Cir. 11/30/11), 83 So.3d 30, *writ denied* 2012-0399 (La. 10/12/12), 99 So.3d 37, *cert. denied Rubens v. Louisiana*, 568 U.S. 1236 (2013). The purpose of this rule is to allow a trial court to consider the argument and make a correction at the time of the error. It also serves to create a full record on the issue raised for subsequent reviewing courts. Federal law also provides that a party may not assign error to a jury instruction if he fails to object before the jury retires or to "state distinctly the matter to which that party objects and the grounds of that objection." *Jones v. United States*, 527 U.S. 373, 387-88 (1999) (citing Fed. Rule Crim. Proc. Art. 30).

Petitioner did not complain of the 10-2 verdict instruction prior to trial, when it was given, during deliberations, or at any time before the jury was dismissed and, thus, waived that claim.[6] He cannot resurrect it now.

Second, the party challenging the constitutionality of any provision of Louisiana law bears the burden of proving it is unconstitutional. *State v. Fleury,* 2001–0871 (La. 10/16/01), 799 So.2d 468, 472. It has long been held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. *State v. Schoening,* 2000–0903, p. 3 (La. 10/17/00), 770 So.2d 762, 764. The Louisiana Supreme Court "has expressed the challenger's burden as a three step analysis. First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be

[6] Defendant's post-verdict motion also did not state an objection to the non-unanimous jury verdict. *See State v. Fasola*, 2004-902 (La. App. 5 Cir. 3/29/05), 901 So.2d 533 *writ denied* 2005-1069 (La. 12/9/05), 916 So.2d 1055 (Defendant's constitutional claim was clearly not the focus of any hearing and the record contained no argument on the topic.)

particularized." *State v. Hatton*, 2007-2377 (La. 7/1/08); 985 So.2d 709, 719. The purpose of this rule is "to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute." *Id.* (citing *Schoening,* 770 So.2d at 764). Knowing with specificity what constitutional provisions are allegedly being violated gives the opposing parties the opportunity to fully brief and argue the facts and law surrounding the issue and "provides the trial court with thoughtful and complete arguments relating to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to consider the constitutionality of the statute." *Id.* This basic principle dictates that the party challenging the constitutionality of a statute must cite to the *specific* provisions of the constitution that prohibits the action. *Id.* at 720 (citing *Fleury,* 799 So.2d at 472 ("It is elementary that he who urges the unconstitutionality of a law must especially plead its unconstitutionality and show specifically wherein it is unconstitutional. . . .")).

This was simply not done in this case. The State had no opportunity at trial to present evidence, brief, or make argument on the constitutionality of its jury verdict laws. This could be particularly damaging, in this case, given the Petitioner's unsupported claim that the non-unanimous jury provision has racial origins. Thus, the reviewing court had no record on this issue to review, much less an adequate one, and held that the issue was not properly before the Court.

B. Petitioner Did Not Present a Sixth Amendment Incorporation Claim to the Louisiana Courts Below and They Did Not Address the Issue

This Court has "almost unfailingly refused to consider any federal-law

challenge to a state-court decision unless the federal claim [raised in the challenge] 'was either addressed by[7] or properly presented to the state court that rendered the decision [it was] asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam); *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (tracing this principle back to *Crowell v. Randell*, 35 U.S. 368 (1836))). The principle of comity stands behind this "properly-raised-federal-question" doctrine. *See Webb v. Webb*, 451 U.S. 493, 496-97 (1981) citing *Picard v. Connor*, 404 U.S. 270 (1971). The doctrine's function reflects

> an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights. We have consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal [] court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'

Id. (citations omitted).

Despite the changes to this Court's jurisdictional coverage in 1970 and 1988, *see* 28 U.S.C.A. § 1257, this Court has continued to recognize the importance of comity and the "properly-raised-federal-question" doctrine and, with "very rare exceptions" has "adhered to the rule in reviewing state court judgments" that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it] has been asked to review." *Adams v. Robertson*, 520 U.S. at 86 (citations omitted). While this Court has, admittedly, since the wording of the rule was changed in 1988,

[7] Although the First Circuit "address[ed] the issue," after determining the case was not properly before it, its discussion is purely dicta. The Sixth Amendment issue had not even been presented to it and it spent no more than three sentences discussing it, one of which was just restating the state law provisions and the other just string-listing cases upholding those provisions. *See* Pet. App. A9.

"expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts," it has noted that, *in federal cases* the rule is prudential only. *Id.*

Furthermore, those exceptional cases where the Court has granted review involved situations where the issue could *not* have been raised below. *See, e.g.*, *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981) (conflicted counsel would not have raised conflict); *Carlson v. Green*, 446 U.S. 14, 16 n.2 (1980) (both parties consented to the waiver of the procedural default). The issue of the constitutionality of Louisiana's jury verdict system is not a new issue. It has been raised in hundreds of cases in Louisiana, even since the Louisiana Supreme Court definitively upheld the laws in 2009. *See Bertrand*, 6 So. 3d at 742. It has been raised before this Court numerous times in the last fifty years. Defendant did not raise a claim that non-unanimous juries violate the Sixth Amendment, as applied to the States through the Fourteenth Amendment, in any state court. It could have easily been raised below but Petitioner explicitly chose *not* to raise it. And, obviously, the State is not willing to waive Petitioner's procedural default in this matter. He should not be able to raise it now.

III. THE JUDGMENT OF THE LOUISIANA CIRCUIT COURT WAS CORRECT

The Louisiana First Circuit Court of Appeals denied Petitioner's appeal because he did not properly raise the issue in the trial court. However, to the extent it "addressed" the issue raised by the petition, it spoke of nearly fifty years of this

Court's jurisprudence upon which Louisiana Courts have faithfully relied.[8] Just ten years ago, the Louisiana Supreme Court wrote: "Although the *Apodaca* decision was, indeed, a plurality decision rather than a majority one, the Court has cited or discussed the opinion *not less than sixteen times* since its issuance. On each of these occasions, it is apparent that the Court considered that *Apodaca's* holding as to non-unanimous jury verdicts represents well-settled law." *Bertrand*, 6 So. 3d at 742. There have also been dozens of cases, some as recently as last year, where this Court has denied *certiorari* review on this issue further evidencing that non-unanimous jury verdicts did not violate the United States Constitution. How can a state appellate court, following and relying upon fifty years of this Court's rulings, have been wrong? For the same reasons the State presents in its brief on the merits in *Ramos*, it was not.

A. Apodaca Was Decided Correctly and Should Not Be Overruled

There is no reason to overrule *Apodaca*. As the Court recently explained, "even in constitutional cases, a departure from precedent demands special justification." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (cleaned up); *see also id.* at 1989 (explaining that the Court "should not invoke stare decisis to uphold precedents that are demonstrably erroneous"). *Apodaca* was not a summary affirmance that was decided without briefing and argument. Whether or not it has "questionable precedential value," *Seminole Tribe of Fla. v. Fla.,* 517 U.S. 44, 66 (1996), it warrants respect.

[8] Indeed, Louisiana *expressly* relied on *Apodaca* in 1974 when it readopted its rule and revised the minimum vote to 10-2. *See* Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Vol. 7, pp. 1184-1189 (La. Constitutional Convention Records Commission 1977).

Even under these circumstances, the Court demands a "special justification when departing from precedent." *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring) (cleaned up). That makes sense. The doctrine of *stare decisis* is about "maintaining settled law" or abandoning it for a different legal rule. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). Here, the "settled law" is the prevailing rule that States may allow criminal convictions based on jury verdicts that are not unanimous. *Accord Alleyne*, 570 U.S. at 134 n* (Alito, J., dissenting). Unlike the excessive fines clause of the Eighth Amendment held to apply to the States in *Timbs v. Indiana,* 139 S. Ct. 682, 687 (2019), that has been the rule since the Founding and has been explicit in this Court's precedent for nearly 50 years. It has been relied on by Louisiana, in enacting its constitution and its statutes, as well as in interpretations of that constitution and those statutes, for fifty years. It *should* take a special justification, such as a showing of demonstrable error, to reverse course at this point.

Overturning *Apodaca*, moreover, would lead to significant practical problems and would unsettle related areas of the law. The ink will not even be dry on this Court's opinion before the lower courts begin receiving thousands of petitions for habeas relief seeking to apply a mandatory unanimity rule retroactively to long-final convictions in Louisiana and Oregon. Indeed, such petitions are already being filed. And, given that unanimity and a 12-person jury share similar historical and common-law roots, this Court should be prepared to reconsider the constitutionality of less-than-12-person juries if it endorses Brooks' approach to the Sixth Amendment. Although just two States have allowed convictions by a non-

unanimous vote, at least 40 States allow juries smaller than 12 in some types of criminal cases.[9] In short, overturning *Apodaca* has little to recommend it but could have serious negative consequences for both the criminal justice system and this Court's jurisprudence.

B. The Sixth Amendment Does Not Require Unanimity.

In his Reasons for Granting the Petition, Petitioner assumes that the Sixth Amendment's Jury Trial Clause requires criminal convictions by a unanimous jury. It does not. Not "every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'" *Williams v. Florida*, 399 U.S. 78, 91 (1970). In holding that the Sixth Amendment did not implicitly adopt the common-law rule mandating twelve jurors, this Court rejected "the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Id.* at 92. Thus, the proper

[9] And what of the peremptory challenge? Also mentioned in Madison's original draft of the Sixth Amendment and thought to have existed for over seven hundred years, *see* Christopher M. Ferdico, Note, The Death of the Peremptory Challenge: J.E.B. v. Alabama, 28 Creighton L. Rev. 1177, 1177 (1995), it, too, was well established at the time of Blackstone. *See J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 147 (1994) (O'Connor, J., concurring). Nevertheless, this Court has determined that "[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress." *Stilson v. United States*, 250 U.S. 583, 587 (1919). It continues to exist today, although in many varied forms, none exactly like the federal rule (Fed. R. Cr. Proc. 24(b)). At its inception, only a defendant was entitled to use a peremptory challenge. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES 148 (1977). The prosecution developed a practice of standing jurors aside until twelve jurors could be agreed to and those jurors "stood aside" were no longer needed. *Id*. at 148-49. This practice was controversial but, eventually, upheld by this Court in dicta in dicta in *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483 (1827). *Id*. at 149. By the mid-nineteenth century, most states had adopted laws allowing for peremptory challenges to be used by the prosecution; this effectively ended the need for standing aside. *See id*. at 150. By the beginning of the twentieth century, the government's right to exercise peremptory challenges was firmly established. *Id*. Must we go back to the Founding Era and allow only defendants the right to challenge jurors? Must that right be identical to the federal right—twenty challenges in a capital case, six for the government and ten for the defendant in a felony case?

starting point to determine whether the Sixth Amendment requires unanimous jury verdicts is not the English common law, but the U.S. Constitution's text. Neither Article III nor the Sixth Amendment—the two provisions of the Constitution that address juries in criminal cases—mentions a unanimity requirement. That omission is telling because those provisions *do* expressly mention other attributes of the jury system. For example, Article III requires that a jury trial take place in the "state where the said crimes shall have been committed," and the Sixth Amendment further restricts the location of the trial to the "State and district" where the crime occurred.

Furthermore, the legislative history of the Sixth Amendment eliminates any doubt that the *omission* of a unanimity requirement was intentional. Madison's original draft of the Sixth Amendment expressly guaranteed a jury trial that included "the requisite of unanimity" and the "other accustomed requisites" of the jury. *Id.* at 94. But the Senate *rejected* that proposal and the Conference Committee adopted a modified proposal—minus any mention of unanimity or "other accustomed requisites"—that ultimately became the Sixth Amendment. *Id.* at 95-96. Those omissions are especially notable given that State constitutions at the time—which were often drafted by the Framers of the U.S. Constitution—took a variety of approaches to the jury right. Some expressly required unanimity; some expressly incorporated the English common law; and others merely preserved an unadorned right to a "jury trial." *Id.* at 98 n. 45 (quoting Reinsch, *The English Common Law in the Early American Colonies*, in 1 Select Essays in Anglo-American Legal History 367, 412 (1907)).

In short, the *Apodaca* plurality, and, therefore, the Louisiana First Circuit, correctly applied settled law in concluding that the Sixth Amendment does not mandate unanimity. Whether the Framers codified the common-law understanding in the Sixth Amendment was not up for debate. *Williams* had already held that the Sixth Amendment inquiry does not turn on whether a "'given feature existed in a jury at common law in 1789.'" *Apodaca* 406 U.S. at 409 (quoting *Williams*, 399 U.S. at 92-93). The issue in *Apodaca* was whether unanimity, "a feature commonly associated with" the common law, "is constitutionally required." *Id*. at 410. Unless the Court is willing to overturn *Williams*, the answer should be the same here.

C. A Unanimous Jury Verdict is Not Fundamental to Ordered Liberty

The question as to whether the right to a unanimous jury verdict, as part of the Sixth Amendment, is incorporated into the Fourteenth Amendment's due process clause is to be answered by deciding whether the right to a unanimous jury verdict is "fundamental to our scheme of ordered liberty, *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968), or whether this right is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (internal quotation marks omitted); *McDonald v. City of Chicago,* 561 U.S. 742, 767 (2010). As noted above, it is not deeply rooted in this Nation's history and tradition.

It is also not fundamental to our scheme of ordered liberty. The core purpose of a jury trial "obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination

of guilt or innocence." *Williams*, 399 U.S. at 100; *see also Duncan*, 391 U.S. at 156 ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

However, unanimity is not essential to those core purposes. Regardless of whether the jury's final vote is 12-0, 11-1, or 10-2, no defendant can be convicted and deprived of his liberty until a body of his peers has independently reviewed the evidence against him and found him guilty.

Indeed, recognizing that unanimity is not essential to the purposes underlying the jury right, a large majority of countries that provide for jury trials do not require unanimity, including several (such as England and Ireland) that share common-law roots. In fact, "among the class of countries that embraces the jury, the unanimous decision rule for guilt and acquittal generally enforced by the American system is very much an anomaly." Ethan J. Lieb, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio St. J. Crim. L. 629, 642 (2008). Instead, "more relaxed majoritarian and super-majoritarian rules clearly dominate the global jury system landscape." *Id.* at 642. Notably, English law—upon which we based our right to trial by jury and, specifically, any right to a unanimous jury verdict—no longer requires juries to render verdicts unanimously. It adopted non-unanimity over fifty years ago—at about the same time that this Court upheld Oregon and Louisiana's decision to do so. "In England . . . the requirement of a unanimous verdict was dropped in 1967 by the Criminal Justice Act, which permitted verdicts of ten to two." Sally Lloyd-Bostock & Cheryl Thomas, Decline of

the "Little Parliament": Juries and Jury Reform in England and Wales, 62-SPG Law & Contemp. Probs. 7, 36 (1999).

D. Louisiana's Non-unanimous Jury Verdict Rule Is Not the Product of Racial Animus.

Petitioner suggests that the right to a unanimous jury verdict should be incorporated into the Fourteenth Amendment's due process clause because it has "racial origins." He does not attempt to raise this claim as an equal protection challenge and did not raise it in the trial court—where evidence of this allegation should have been offered and rebutted. The record does not even disclose his race or the racial makeup of the jury or its vote in this case, so he certainly cannot show that the alleged "racial origins" prejudiced him in any way.

Moreover, although the non-unanimity rule was originally adopted in Louisiana's 1898 Constitution—which did include several provisions that were the unfortunate product of racial animus—all available evidence suggests that the non-unanimity rule was motivated by concerns for judicial efficiency rather than an improper racial purpose. More importantly, Defendant was not tried pursuant to any provision in the 1898 Constitution, which is long defunct, having been superseded by constitutions enacted in 1913, 1921, and 1974. Specifically, Defendant was tried under a provision in the 1974 Constitution and the companion jury trial article in the Code of Criminal Procedure.

Records from the 1973 Constitutional Convention show that racial animus was *not* a consideration or motivation.[10] As the Louisiana Fourth Circuit Court of

[10] The official records and transcripts from the 1973 Constitutional Convention can be accessed online at http://house.louisiana.gov/cc73/. The discussions of the Committee on Bill of Rights and

Appeals found, "[t]he revision of a less-than-unanimous jury requirement in the 1974 Constitution [from a vote of 9 jurors to a vote of 10] was not by routine incorporation of the previous Constitution's provisions; the new article was the subject of a fair amount of debate." *Hankton*, 122 So. 3d at 1038; *see also State v. Webb*, 2013-0146 (La. App. 4th Cir. 01/30/14), 133 So. 3d 258, 286-87, *writ denied sub nom*, 2014-0436 (La. 10/03/14); 149 So. 3d 793, *cert. denied*, *Webb v. Louisiana*, 135 S. Ct. 1719 (2015). In fact, the stated purpose was judicial efficiency. There was no mention of race at any time during the Convention, whether in the Committee on Bill of Rights—where the provision originated—or on the floor. The Committee was chaired by Rep. Alphonse Jackson, Jr., charter member of the Louisiana Legislative Black Caucus.[11] As stated in Rep. Jackson's obituary, the 1974 Constitution "became a blueprint for equal opportunity, fair labor relations, expanded voter participation and greater protections for the individual."[12] Moreover, the 1974 Louisiana Constitution, unlike prior constitutions, "was adopted by a vote of the people." *Id.* There is no indication that there was any appeal to people based on race as a reason for the passage of the 10-2 verdict provision of the 1974 Constitution.

The decision below was correct and should be affirmed.

Elections is particularly relevant and is found in Vol. 10 of the Records.

[11] *See* Official Records of the 1973 Constitutional Convention. *Id.*; *see also* Rep. Jackson's obituary at https://www.legacy.com/obituaries/shreveporttimes/obituary.aspx?n=AlphonseJackson,%20Jr.&pid=173611514&fhid=12384 (last visited February 28, 2019) ("As Chairman of the Committee on Bill of Rights and Elections at the Convention, he worked with other delegates to craft the Louisiana Constitution of 1974. It became a blueprint for equal opportunity, fair labor relations, expanded voter participation and greater protections for the individual. This constitution has been called the most significant achievement in Louisiana's history during the twentieth century.")

[12] *Id.*

IV. LOUISIANA HAS ALREADY CHANGED ITS JURY VERDICT LAWS TO PROVIDE FOR UNANIMOUS VERDICTS IN ALL CASES

Petitioner makes no effort in his petition to point out that Louisiana has already changed its laws on jury verdicts providing, in 2018, by amendment to its state constitution and its revised statutes, for a unanimous jury verdict in all trials. Oregon is attempting to do the same thing. Thus, a ruling incorporating a rule requiring unanimous jury verdicts into the due process clause of the Fourteenth Amendment would have minimal effect.

This Court has been hesitant to "suddenly constitutionalize" an issue via the Due Process Clause when "[t]he elected governments of the States are actively confronting" it, as in Louisiana and Oregon. *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 72-73 (2009). Brooks offers no compelling reason to short-circuit this robust democratic process. The legislative resolution of a long-debated policy issue, at least in the state of Louisiana, was a simple, direct, limited, and sufficient remedy to any perceived problem with non-unanimous juries. Perhaps more importantly, it also is not fraught with possible collateral consequences—such as requiring changes to the number of jurors who sit on a jury, the myriad of ways in which states handle challenges to the placement of jurors, the right to and procedure for waiving a jury trial, and other collateral issues surrounding a trial by jury.

There is no need for, nor is there any benefit in, this Court now "suddenly constitutionalizing" this issue when Louisiana's elected government has already actively confronted it.

V. ALTERNATIVELY, THIS COURT SHOULD HOLD DEFENDANT'S PETITION PENDING THIS COURT'S DECISION IN *RAMOS V. LOUISIANA*, NO. 18-5924.

Petitioner simply asks this Court to hold his petition pending its decision in *Ramos v. Louisiana.* Review was granted on March 18, 2019. It has been fully briefed and is being argued on October 5, 2019. To the extent Petitioner has properly and effectively raised the same claim raised in *Ramos*—that the Sixth Amendment requires unanimity in jury verdicts and such a requirement must be applied to the States as a fundamental right under the Due Process Clause—subject to the doctrine of procedural default, it should be disposed of as appropriate in light of the decision in *Ramos*.

Should this Court decide that either the Sixth Amendment does not require unanimous juries or that any such requirement is not applicable to the States, because Petitioner has not properly or effectively raised any other claim, his petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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