No. 18-9787

In the Supreme Court of the United States

JACE CREHAN,
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

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

The text of the statute that existed at the time of Mr. Crehan's 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.

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

STATEMENT OF THE CASE[1]

Facts of the Crime. Petitioner and his eighteen-year-old girlfriend viciously

[1] Pet'r. Appx. 1A-4a.

murdered the man who had sexually abused the girlfriend when she was a child. The victim, with the girlfriend's consent, plead guilty to the crime, received a ten-year suspended sentence, and was placed on probation with conditions, including an order prohibiting contact with his victim. Petitioner and his girlfriend had no contact with the victim for three years prior to his murder.

Nevertheless, Petitioner and his girlfriend went to the victim's trailer in the middle of the night, awakened him in his bed, struggled with him to pull him out of the bed, put him in a chokehold, and punched him numerous times – all as he begged for forgiveness. After he passed out, Petitioner stabbed him in the head and neck numerous times. He then further choked him with a belt and put his body in a large barrel which they left in the kitchen of the trailer after clogging the sink and turning on the water to destroy evidence. They then went back to their house, threw their clothing and the knife away, and went to a family barbeque. They were arrested several days later.

Procedural background. A grand jury indicted Petitioner with second degree murder, a violation of Louisiana Revised Statutes 14:30.1.[2] He did not challenge the constitutionality of Louisiana's jury verdict system before trial, 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 twelve-person jury found him guilty of second degree murder. Petitioner did not object

[2] Co-defendant and girlfriend, Brittany Monk, also was charged with second degree murder but pled guilty to manslaughter in exchange for her testimony in defendant's trial. She was sentenced to thirty-five years and was parole eligible. *See State v. Monk*, 2018-0747 (La. App. 1 Cir. 11/6/18), 2018 WL 5817503 (unpublished) *writ denied State v. Monk*, 2018-1997 (La. 4/22/19), 268 So.3d 295.

to the verdict. He questioned the State rule permitting non-unanimous jury verdicts for the first time in a post-trial motion for new trial, arguing that his conviction deprived him of his right to a fair trial under the Sixth Amendment and his right to "full incorporation of that amendment's protections to him, via the due process and equal protection clauses of the Fourteenth Amendment."[3] His motion was denied and he was sentenced to life in prison without benefit of probation, parole, or suspension of sentence.

Petitioner appealed, raising three assignments of error: insufficiency of evidence,[4] denial of a motion to recuse the district attorney's office, and a "pro forma" challenge to the constitutionality of his non-unanimous verdict. As the court of appeals noted, "counsel concedes it is out of 'an abundance of caution' that the assignment of error is made, and submits no new jurisprudence lending support to his overall contention that non-unanimous jury verdicts are unconstitutional."[5]

After reviewing both federal and state law, the court held—as all levels of courts have—that *Apodaca v. Oregon*, 406 U.S. 404 (1972) represented well-settled law and that the two Louisiana provisions providing for non-unanimous jury verdicts were not a violation of defendant's constitutional rights. Pet. Appx. 9a.

Mr. Crehan filed a "Pro Se Application for Certiorari and/or Supervisory Writ of Review" with the Louisiana Supreme Court which was denied without opinion. Pet. Appx. 12a. He now requests review from this Court, raising only a Sixth Amendment

[3] U.S. Const. amend. 14.
[4] *See* Pet. Appx. 4a. In brief, Defendant did not deny killing the victim. He argued that the State merely proved manslaughter (sudden heat of blood) beyond a reasonable doubt, not second degree murder.
[5] *See* Pet. Appx. 9a.

incorporation claim.

REASONS FOR DENYING THE WRIT

Even if this Court determines that the Sixth Amendment requires unanimity to convict in criminal jury trials in the States, *this* petition should be denied because the sole issue raised in the petition was not raised at trial and is procedurally barred. Petitioner should not be allowed to resurrect this waived claim at this late juncture. Because an adequate and independent state-law basis exists for upholding his conviction, the Court should not hold his petition for this Court's decision in *Ramos v. Louisiana*, 139 S. Ct. 1318 (2019) (No. 18-5924). *See Hathorn v. Lovorn*, 457 U.S. 255, 262–63 (1982).

Additionally, Petitioner's writ application presents no question and makes no argument. His "Question Presented" *lists* three constitutional provisions. But he never explains which constitutional right in those provisions applies to him or how those provisions generate a question for this Court to resolve. In other words, he does not actually pose any question at all.

It is the Petitioner's duty to present a question for this Court to consider for review. And this Court has repeatedly disapproved 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). Yet that is precisely what he attempts to do by incorporating *any* possible viable question with a vague citation to certain constitutional amendments. Many books line the shelves of law school libraries on each one of the amendments he has listed and reams of law review articles exist on subsidiary clauses and related questions. His question

is so broad that it amounts to no question at all, leaving the specifics as guesswork for the State and this Court. Consequently, the Petition 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).

Further obfuscating his claim, he presents *no* legal argument to support or narrow it. In his reasons for granting the writ, he states, *in two paragraphs*, nothing more than the fact that this Court 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]." Louisiana submits that such a generalized grievance insufficiently presents even the issue presented in *Ramos*.

That said, the Louisiana appellate courts were correct in upholding this verdict. They relied upon this Court's precedent, as did the people of Louisiana in enacting the jury verdict law in place at the time of Petitioner's conviction. That precedent, including *Apodaca v. Oregon*, was decided correctly. 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 – as a requirement of stand-alone due process or in incorporation analysis. It has never been found to be essential to due process. 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.

Finally, current law requires unanimity for conviction of crimes committed after January 1, 2019. Thus, any change the Court may wish to actuate has already been realized and without any negative collateral consequences.

Alternatively, if the Court finds the Petitioner has adequately preserved or presented any claim, Louisiana requests that the petition be held pending this Court's decision in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019).

ARGUMENT

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

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 the matter, he contends, *in only two paragraphs*, 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]."

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 insufficient 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 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. "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [the Court's] review." *Izumi,* 510 U.S. at 31-32, n.5 (refusing to take up certain questions because they were not raised in the petition). 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.
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> 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).

Although the Court generally has expressed concern with "smuggling" after certiorari has been granted, the problem begins with vague questions presented in the petition itself. Petitioner has not clearly stated his constitutional claim. 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.

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

Petitioner did not raise his constitutional claim, if at all, until post-verdict. 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). This wasn't done.

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). Again, Petitioner did not object to the non-unanimous jury verdict at the time it was given.

More importantly, 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 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 timely done in this case. No objection was made to the jury

instruction nor to the verdict. The trial court had no ability to correct the error until after the jury was dismissed, when it was too late. The State had no opportunity during trial to present evidence, brief, or make argument on the constitutionality of its jury verdict laws – until it was too late.

Failure to comply with a state procedural rule is an independent and adequate state ground barring this Court's review of a federal question. *Hathorn*, 457 U.S. at 262–63 (citing *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1978); *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964)). "[F]ederal law takes the state courts as it finds them." *Id.* (quotation omitted). This rule is "bottomed deeply in belief in the importance of state control of State judicial procedure." *Id.* This Court has acknowledged that states have great latitude to establish the structure and jurisdiction of their own courts. *Id.*; *see also Walker v. Martin*, 562 U.S. 307, 316 (2011); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 398 (1990).

Petitioner did not complain of the 11-1 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. He cannot resurrect it now. Because there is an adequate and independent State-law basis for upholding his conviction, the Court should not hold his petition for this Court's decision in *Ramos v. Louisiana*. It should deny the writ.

III. THE JUDGMENT OF THE LOUISIANA CIRCUIT COURT WAS CORRECT

The Louisiana First Circuit Court of Appeals spoke of nearly fifty years of this

Court's jurisprudence upon which Louisiana Courts have faithfully relied.[6] As the Louisiana Supreme Court has recognized, as of today, the Court has cited or discussed the opinion *not less than nineteen times* since its issuance.[7] 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.

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[6] 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).

[7] *Bertrand*, 6 So. 3d at 742. *See Colgrove v. Battin,* 413 U.S. 149, 169 (1973) (Marshall, dissenting)(neither *Apodaca, Johnson* nor *Williams* squarely presented the Court with the problem of defining the meaning of jury trial in a federal context.); *Michigan v. Payne*, 412 U.S. 47, 49 (1973); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (Defendants are not entitled to a jury of any particular composition; 'a jury will come to such a (commonsense) judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of a defendant's guilt.'); *Ludwig v. Massachusetts,* 427 U.S. 618, 625 (1976) (the jury's verdict need not be unanimous; what is important is that the verdict reflect the commonsense judgment of a group of laymen); *Ballew v. Georgia,* 435 U.S. 223, 229 (1978); *Crist v. Bretz*, 437 U.S. 28, 37 (1978) (when jeopardy attaches); *Burch v. Louisiana,* 441 U.S. 130, 136 (1979) (noting that in *Apodaca*, it had upheld a state statute providing for 10 out of 12 verdicts and that there was no difference between those juries required to act unanimously and those permitted to act by votes of 10 to 2 and that unanimity did not materially contribute to the exercise of the jury's judgment or as a necessary condition to a jury representing a fair cross section of the community); *Brown v. Louisiana*, 447 U.S. 323, 331 (1980) (10-to-2 vote in state trial does not violate the Constitution); *Blackburn v. Thomas*, 450 U.S. 953, 955 (1981); *Spaziano v. Florida*, 468 U.S. 447, 482, fn 26 (1984) (Stevens, concurring); *Holland v. Illinois,* 493 U.S. 474, 511 (1990) (Stevens, dissenting) (we have permitted nonunanimous verdicts); *McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, dissenting) (we have approved verdicts by less than a unanimous jury.); *Schad v. Arizona,* 501 U.S. 624, 630 (1991) (the Sixth, Eighth, and Fourteenth Amendments do not require a unanimous jury in state cases); *Victor v. Nebraska*, 511 U.S. 1, 8 (1994); *United States v. Gaudin*, 515 U.S. 506, 511, n. 2 (1995) (jury unanimity is not constitutionally required); *Rita v. United States*, 551 U.S. 338, 384–85 (2007) (Souter, dissenting) (the Sixth Amendment right to trial by jury otherwise relies on history for details, and the practical instincts of judges and legislators for implementation in the courts.); *McDonald v. City of Chicago, Ill.,* 561 U.S. 742, n. 14 (2010) (noting the Court had held that the Sixth Amendment does not require a unanimous jury verdict in state criminal trials); *see also*, 561 U.S. at 867–68 (Stevens, dissenting) (noting the Court had resisted a uniform approach to the Sixth Amendment's criminal jury guarantee, demanding 12–member panels and unanimous verdicts in federal trials, yet not in state trials.); *Welch v. United States*, 136 S.Ct. 1257, 1275 (2016) (Thomas, dissenting) (the Court's jury unanimity rule is, undoubtedly, "procedural"); *Timbs v. Indiana,* 139 S.Ct. 682, 687 (2019).

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.[8] For the same reasons the State presents in its brief on the merits in *Ramos*, the State appellate court was not wrong.

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). *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.

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

[8] *See, e.g., Sims v. Louisiana*, 138 S.Ct. 1592 (2018); *Dove v. Louisiana*, 138 S.Ct. 1279 (2018); *Baumberger v. Louisiana*, 138 S.Ct. 392 (2017); *Mincey v. Vannoy*, 138 S.Ct. 394 (2017); *Barbour v. Louisiana*, 562 U.S. 1217 (2011); *Louisiana v. Webb*, 135 S.Ct. 1719 (2015); *Louisiana v. Hankton*, 135 S.Ct. 195 (2014); *Louisiana v. Miller*, 568 U.S. 1157 (2013); *McElveen v. Louisiana*, 568 U.S. 1163 (2013); *Herrera v. Oregon*, 562 U.S. 1135 (2011); *Bowen v. Oregon*, 558 U.S. 815 (2009).

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 lower courts are already receiving a crush of petitions for relief seeking to apply a mandatory unanimity rule retroactively to long-final convictions in Louisiana and Oregon. 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 a revisionist approach to the Sixth Amendment. Although just two States and the Territory of Puerto Rico have permitted felony convictions by a non-unanimous vote, at least 40 States allow juries smaller than 12 in some types of criminal cases. 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 states that the Sixth Amendment requires a unanimous verdict to convict a defendant of a non-petty offense. Although a number of this Court's opinions reference a federal requirement of unanimity, all do so in dicta and based on an assumption. None have critically considered the history of jury unanimity in this country.

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 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—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 in a state court proceeding.

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

Unanimity 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 v. Louisiana*, 391 U.S. 145, 156 (1968) ("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.").

But 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 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).

The decision below was correct and should be affirmed.

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

Petitioner ignores the important fact that in 2018 Louisiana changed its laws on jury verdicts requiring a unanimous jury verdict in all felony trials for crimes committed after January 1, 2019. 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). Petitioner offers no compelling reason to short-circuit this robust democratic process. The legislative resolution of this long-debated policy issue provides a clear date for implementation of a new system that avoids negative collateral consequences.

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 asks this Court to hold his petition pending its decision in *Ramos v. Louisiana* which was argued October 7, 2019. Only if this Court finds Petitioner properly raised the same claim raised in *Ramos* then this petition should be held and disposed of in light of the *Ramos* decision.

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, Crehan's petition should be denied because he has not properly raised any other claim.

CONCLUSION

The State of Louisiana respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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