No. 19-5693

# In the Supreme Court of the United States

**HARLOW HUTCHINSON,**
***Petitioner***

**vs.**

**THE STATE OF LOUISIANA,**
***Respondent***

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA THIRD 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. Hutchinson'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 plotted and planned for over six months to

[1] Pet'r. Appx. 4a-9a, 18a.

have his wife, a woman he had known since she was fifteen and to whom he had been married for almost twenty-five years, silently murdered with a crossbow as she returned from church. The man he asked to do this was his best friend, a man he had known since they were seven years old and who had been in the couple's wedding. His plan was to take the proceeds from his wife's life insurance policy and travel to the Ukraine to see a woman he had been communicating with on the internet. After that, he planned to buy a yacht. Fortunately for Petitioner's wife, the friend contacted the police instead. Unfortunately for Petitioner, a good bit of the plotting and planning was recorded by audio or video taping.

***Procedural Background.*** Petitioner was charged with solicitation for murder, a violation of Louisiana Rev. Stat. 14:28.1, punishable at hard labor. Prior to trial, he made no complaint about Louisiana's non-unanimous jury verdict laws nor did he proffer a unanimous jury instruction or object to the non-unanimous jury instruction. After trial, he was convicted of solicitation for murder. The jury was polled but the record does not reflect the verdict count.[2] No objection was made at the time the verdict was rendered. No post-verdict motions were filed. Petitioner was sentenced to seventeen years without benefit of probation or parole.

Petitioner appealed to the Third Circuit Court of Appeals and filed both counselled and pro se briefs.[3] His counselled brief did not raise the issue of non-

[2] Petitioner alleges in his petition that he was convicted by a non-unanimous jury and cites his own allegation reflected in the appellate court decision. He offers no evidence of the verdict and the appellate court found there was no evidence of a non-unanimous verdict.

[3] Petitioner only mentions a pro se argument but Petitioner was represented by counsel on appeal. He filed a pro se brief in addition to his counsel's brief. His counsel did not object to a non-unanimous verdict.

unanimous jury verdicts. In his pro se brief, Petitioner alleged as error that the "Trial Court erred in not deeming acquittal or mistrial." His entire argument was

> Polling of the jury after the guilty verdict revealed the decision was not unanimous. *U.S. v. Haber*, 251 F.3d 881. The Sixth Amendment[4] guarantees the defendant the right to a unanimous verdict. And *Broad v. Sealaska Corp*. 85 F.3d 422, the "Supremacy Clause", preempts state law by provision implication, or conflict between federal and state law. In my case, those previous cases together should have rendered the verdict as acquittal or at least as mistrial (sic). Appellant's Original Pro-Se Supplemental Brief.

The Third Circuit noted that, although the record reflected that the jury had been polled, it did not reflect the results of the polling. Accordingly, Petitioner was unable to prove that he had been convicted by a non-unanimous jury. In dicta, the court found that even if he had, the verdict was valid under both federal and state law. Pet'r. Appx. 18a.

The Louisiana Supreme Court denied review without opinion. Pet'r. Appx. 19a. Petitioner now requests review by this Court, raising only a Sixth Amendment 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 for two procedural reasons. First, there is no evidence that Petitioner was convicted by a non-unanimous jury verdict and, thus, he has no standing to complain about the law. There is no reason to hold it pending this Court's decision in *Ramos v. Louisiana* because the Court's decision cannot aid Petitioner—whatever the result.

[4] U.S. Const. amend. 6.

Second, the sole issue raised in the petition was not raised at trial and is procedurally barred. Petitioner should not be allowed to resurrect this claim at this late juncture. 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*, 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. The purported "Question Presented" *lists* three constitutional provisions but 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). And 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 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[5] 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 his petition. In his Reasons for Granting the Writ, he states, *in two paragraphs*, nothing more 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]." Louisiana submits that such a generalized grievance insufficiently presents even the issue presented in *Ramos*.

Then, with neither argument or supporting evidence, he asserts, "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" and "[t]his Court should overrule *Apodaca's* idiosyncratic and incorrect holding and apply the Sixth Amendment's unanimity guarantee to the states." Petitioner appears to conflate the Sixth Amendment claim addressed in Apodaca with an equal protection claim. Moreover, he neither asserts nor briefs an *equal protection claim*.

That said, the Louisiana appellate courts were correct in upholding this verdict. First, the appellate court held that he had no standing to complain because

[5] U.S. Const. amend. 14.

he couldn't prove that he was convicted by a non-unanimous verdict. Secondly, even if Petitioner had been able to prove a non-unanimous jury verdict, such a verdict was constitutional. The appellate court 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 and 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.

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 2018 provision adopting unanimity for convictions of 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.

## ARGUMENT

### I. PETITIONER HAS NO STANDING TO COMPLAIN ABOUT NON-UNANIMOUS JURY VERDICTS

As the Louisiana Third Circuit Court of Appeals observed, "[a]lthough defense counsel requested polling of the jury, neither the transcript nor the minutes reflect the results of said polling. Accordingly, Defendant cannot prove that he was convicted by a less than unanimous jury verdict." Thus, Petitioner has no standing to bring his complaint to this Court.

It is well established that "before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas,* 495 U.S. 149, 154 (1990). Pursuant to Article III of the United States Constitution, this Court only has jurisdiction over "cases and controversies" and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471–476 (1982). To establish an Article III case or controversy, Petitioner must clearly demonstrate that he has suffered an "injury in fact." *Valley Forge*, 454 U.S. at 475. This he cannot do. His injury must be concrete, distinct, and palpable, *Warth v. Seldin,* 422 U.S. 490, 501 (1975), and the alleged harm must be actual or imminent. *Los Angeles v. Lyons,* 461 U.S. 95, 101–102 (1983). Once again, Petitioner has suffered no injury much less one that is concrete, distinct, palpable, actual, or imminent.

Further, Petitioner must be able to show that his injury is likely to be redressed

by a favorable decision. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976); *Valley Forge, supra,* 454 U.S. at 472. Petitioner wants this Court to hold his petition until it decides *Ramos v. Louisiana* and then dispose of it as appropriate in light of that decision. But, even if the decision in *Ramos* is that non-unanimous juries are unconstitutional, it provides no relief to Petitioner because he cannot prove he was convicted by a non-unanimous jury. Thus, his alleged injury, a conviction, will not be redressed by a favorable decision in *Ramos*.

Finally, Petitioner must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. *Whitmore*, 495 U.S. at 155. Although he states in his Petition that he was found guilty by a non-unanimous jury verdict, his only "proof" of that is his own self-serving statement in his pro se brief to the Louisiana appellate court. *See* Pet. p. 7, fn. 1. In Louisiana, as elsewhere, an appellate court must render judgment upon the record. La. Code Civ. P. art. 2164. Such "court has no authority to consider on appeal facts referred to in appellate briefs if those facts are not in the record on appeal." *In re Succession of Badeaux*, 08-1085, pp. 5-6 (La.App. 1 Cir. 3/27/09), 12 So. 3d 348, 352, *writ denied*, 09-822 (La. 5/29/09), 9 So. 3d 166. Thus, Petitioner has set forth no fact sufficient to satisfy the Article III standing requirement. This Court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *See Warth,* 422 U.S. at 508, 518.

## II. 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 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]" because the Sixth Amendment requires a unanimous verdict and "full incorporation is an established principle on which the Court itself has relied for several decades." Then, *with absolutely no argument or supporting evidence*, asserts, "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 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, Supreme Court Rule 14.1 addresses a comparable problem. The fact that Petitioner may have mentioned an issue in the body of his petition does not bring it before the 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,* 510 U.S. at 31-32 & n.5. In *Yee v. City of Escondido,* the Court also discussed the two important purposes for the Rule that aptly apply to the initial petition as well:

> 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 expresses concern with the "smuggling" problem *after* certiorari, 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.

**B. Petitioner is Foreclosed from Raising an Equal Protection Claim**

Although Petitioner alleges that Louisiana's non-unanimous jury laws have "racial origins," he does so in the context of incorporating the Sixth Amendment into the Fourteenth Amendment's due process requirements. If Petitioner sufficiently preserved a Sixth Amendment claim, he certainly has not done so with an equal protection claim.[6] A general reference to the Fourteenth Amendment in the Question Presented cannot suffice. Petitioner's reasons for granting the petition include *only* re-examination of *Apodaca v. Oregon*. The words "equal protection" are mentioned

[6] Nor was an equal protection argument raised at any stage of the proceedings in state court.

nowhere in the petition. 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.

## III. 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

It is well-settled in Louisiana that the party challenging the constitutionality of any provision of law bears the burden of proving it is unconstitutional at trial. *State v. Fleury,* 2001–0871 (La. 10/16/01), 799 So.2d 468, 472. In fact, a constitutional challenge may not be considered by an appellate court unless it was raised in the trial court by specifically pleading the grounds for the challenge and particularizing the basis of unconstitutionality. *See State v. Hatton*, 07-2377 (La. 7/1/078), 985 So.2d 709, 718-19; *State v. Schoening,* 2000–0903, p. 3 (La. 10/17/00), 770 So.2d 762, 764. This law 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 object to the jury instruction.

Second, an objection to the constitutionality of a state law requires an even higher burden. The purpose of this rule is "to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute." *Hatton*, 985 So.2d at 719 (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. . . .")).

Petitioner has not identified anywhere in the record where the constitutionality of the unanimity rule was specially pleaded or the basis of it particularized. He did not complain of the jury instruction prior to trial, when it was given, during deliberations, at any time before the jury was dismissed, or even in post-trial pleadings. The State had no reasonable notice or opportunity at trial to present evidence, brief, or make argument on his purported claim. He has waived that claim and cannot resurrect it now.

Failure to comply with a state procedural rule may constitute an independent and adequate state ground barring its 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)). When a state court refuses to rule on the merits of a claim in light of a neutral state rule, the Court acts with "utmost caution" before deciding that the state court is obligated to entertain the claim. *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 372 (1990). "[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).

As the state appellate court found on direct review, Petitioner has no standing to raise this constitutional claim since he did not prove that he was convicted by a non-unanimous jury. Additionally, he did not object to the jury verdict at trial or, effectively, even on appeal. For these reasons, the Court's decision in *Ramos* cannot aid Hutchinson—whatever the result. Thus, the Court should not hold this case for its decision in *Ramos* and should deny the writ.

## IV. THE JUDGMENT OF THE LOUISIANA CIRCUIT COURT WAS CORRECT

Of course, the true basis of the Louisiana Third Circuit Court of Appeals' decision was that, simply, Petitioner could not prove that he was convicted by a non-unanimous jury. In dicta, though, the Court relied on nearly fifty years of this Court's jurisprudence upon which Louisiana Courts have faithfully relied.[7] The Louisiana Supreme Court has recognized that this Court has cited or discussed the *Apodaca* opinion *not less than nineteen times* since its issuance.[8] On each of these occasions,

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[7] 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).

[8] *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

the Court considered that *Apodaca's* holding as to non-unanimous jury verdicts represents well-settled law. 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.[9] 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

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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).

[9] *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).

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 only recently held to apply to the States in *Timbs v. Indiana,* 139 S. Ct. 682, 687 (2019), the constitutionality of non-unanimous jury verdicts in state trials 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 jury trial 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 of very serious crimes 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. 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. Louisiana courts have been correct in relying on *stare decisis* in their interpretation

and application of *Apodaca*.

**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. 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 Third Circuit, correctly applied settled law in concluding that the Sixth Amendment does not mandate unanimity.

### 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. at145, 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).

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

Petitioner suggests that Louisiana's jury verdict law has "racial origins," although he does not ground that claim in the equal protection clause. He also did not raise that claim in the trial court; thus there is no evidence in the record of the origins of this provision.

More importantly, Defendant was not tried pursuant to the original non-unanimous verdict provision; he 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 motivation.[10] As the Louisiana Fourth Circuit Court of 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). The purpose was judicial efficiency. There was no mention of race at any time during the Convention, whether in the Bill of Rights Committee—where the provision originated—or on the floor. Rep. Alphonse Jackson, Jr., charter member of the Louisiana Legislative Black Caucus and

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

chairman of the Bill of Rights Committee, would surely have objected.[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]

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

Petitioner ignores the important fact that Louisiana in 2018 changed its laws on jury verdicts unanimous jury verdicts 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 avoid possible 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

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[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.*

actively confronted it.

## VI. THIS COURT SHOULD NOT HOLD DEFENDANT'S PETITION PENDING THIS COURT'S DECISION IN *RAMOS V. LOUISIANA*, NO. 18-5924.

Hutchinson asks this Court to hold his petition pending its decision in *Ramos v. Louisiana* which was argued October 7, 2019. However, for all of the above reasons, the Court's decision in *Ramos* cannot aid Petitioner—whatever the result. Thus, the Court should not hold this case for its decision in *Ramos* and should deny the writ.

## CONCLUSION

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

Respectfully submitted.

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