NO. _____

IN THE
Supreme Court of the United States

_____

KAUNDA LOPAZ MAGEE,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

_____

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

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PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

PARTIES TO THE PROCEEDING

The petitioner is Kaunda Lopaz Magee, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kaunda Lopaz Magee, respectfully petitions for a writ of certiorari to the Louisiana First Circuit Court of Appeal in *State v. Magee*, No. 2016-1074, 2017 WL 1376568 (La. App. 1 Cir. 4/12/17).

OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal (Appendix "A") is an unpublished opinion reported at *State v. Magee*, No. 2016-1074, 2017 WL 1376568 (La. App. 1 Cir. 4/12/17). See Appendix "A". The Louisiana Supreme Court's order denying review of that decision is reported at *State v. Magee*, 2017-KO-1003 (La. 2/23/18), 237 So.3d 514, and attached as Appendix "B".

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana First Circuit Court of Appeal were entered on April 12, 2017. The Louisiana Supreme Court denied review of that decision on February 23, 2018. *See* Appendix A and B. This Court's jurisdiction is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

Article 782(A) of the Louisiana Code of Criminal Procedure provides, in pertinent part: "Cases 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." La. C.Cr.P. art. 782(A).

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STATEMENT OF THE CASE

This was a "he-said, he-said" case. Petitioner, Kaunda Lopaz Magee, was charged with ten separate non-capital felonies arising from an incident on October 3, 2011. The complainant alleged that Magee had "tied C.G.'s hands in front of him and forced C.G. to load some of his belongings (including televisions and guns) into his own truck. After C.G. helped defendant load the truck, defendant forced C.G. to go to his bedroom, where defendant then tied C.G.'s feet and pulled down C.G.'s pants. Defendant bent the victim over a bed and anally raped him while wearing a condom. When defendant finished, he threw C.G. into a closet and drove away in the victim's truck." Appendix A, at 2. In a custodial interrogation, Magee explained that "the sexual act between himself and the victim was consensual and had happened many times in the past." Appendix A, at 2. He further stated the victim helped "load his belongings into his truck in exchange for money he owed defendant." *Id.*

The jury returned a 10-2 verdict on eight of the counts, and an 11-1 verdict on two of the counts—not one of the verdicts was unanimous. Magee was then sentenced to two life sentences without the benefit of parole or probation, and to thirty years, twenty-five years, twenty years (on four counts), ten years and two years, all at hard labor. Then, deeming this sentence still insufficient, the State filed a habitual offender bill, and enhanced Mr. Magee's sentence to seven additional life sentences without the possibility of parole.

On appeal, Magee's lawyer raised a single claim, challenging the non-unanimous jury. The Louisiana First Circuit Court of Appeal rejected the argument

finding, "Under 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." Pet. App. "A" at 2a. The court explained:

> Defendant suggests that subsequent legal developments since *Apodaca* should cause this Court to revisit the issue and find Louisiana's non-unanimous verdict scheme unconstitutional. Even though *Apodaca* was a plurality rather than a majority decision, the United States Supreme Court and other courts have cited or discussed the opinion various times since its issuance.

Pet. App. at 3a.

Mr. Magee filed an application for writ of review with the Louisiana Supreme Court, which denied review without reasons. *State v. Magee*, 2017-KO-1003 (La. 2/23/18), 237 So.3d 514. Appendix "B".

SUMMARY OF THE ARGUMENT

The law is clear: under the Sixth Amendment, a unanimous jury is required. The vast majority of the Bill of Rights have been fully incorporated and made applicable to the states through the Fourteenth Amendment. The Fourteenth Amendment should incorporate the Sixth Amendment's guarantee of a unanimous jury because a) this Court has made clear that the guarantees in the Bill of Rights must be protected regardless of their current functional purpose; b) this Court has rejected the notion of partial incorporation or watered down versions of the Bill of Rights, and c) Louisiana's non-unanimous jury rule was adopted as part of a strategy by the Louisiana Constitutional Convention of 1898 to establish white supremacy.

First, this Court has made clear that the guarantees in the Bill of Rights must be protected regardless of their current functional purpose, based upon the historical origins of the constitutional protection. This Court has since rejected the hitherto accepted premise of *Apodaca*, that constitutional rights should be confirmed based upon their functional purpose rather than their historical origins. See C*rawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 128 S. Ct. 2678 (2008).

Second, this Court has rejected the notion of partial incorporation or watered down versions of the Bill of Rights. This Court has rejected "'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether the claim was

asserted in a state or federal court.'" *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (*citing Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)).

Finally, even if there were an element of the Bill of Rights that need not fully transfer to the states, jury-unanimity would not be such an element. Louisiana's non-unanimous jury rule was adopted during the 1898 Louisiana Constitutional Convention, where the entire point of the Convention was to limit African-American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "Journal"]. The Fourteenth Amendment was supposed to protect against these racist purposes, and the rational for incorporation is at its zenith under these circumstances.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Consider Whether *Apodaca v. Oregon* Should No Longer Stand.

Louisiana and Oregon are now the only states that allow for non-unanimous jury verdicts. These provisions were upheld as constitutional in *Apodaca v. Oregon,* 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972). *Apodaca's* plurality was made up of two distinct, inconsistent, and practically contradictory perspectives, both of which have since been disavowed. First, the four-person plurality recognized that the common law long-required juries to return unanimous verdicts, *Apodaca*, at 407-08 & n.2, but relied "upon the function served by the jury in contemporary society," 406 U.S. at 410, to conclude that unanimity "was not of constitutional stature" in criminal cases. 406 U.S. at 406.

Second, Justice Powell offered a never-used-before – never-used-since theory of partial incorporation of the Sixth Amendment. Justice Powell believed that the Sixth Amendment required unanimity at the Founding, and in federal cases, but opined that the protections guaranteed by the Fourteenth Amendment were less than those offered by the Sixth Amendment. Justice Powell's curious view on incorporation has also been exploded by this Court's recent holding in *McDonald*. This Court rejected the City's claim that *Apodaca* endorsed a "two-track approach to incorporation," *id.* at 3035 n.14.

There has been a sea-change in constitutional exegesis with regard to both the application of the Bill of Rights to the states and whether constitutional rights are merely functional protections since the opinions of *Apodaca v. Oregon*, 406 U.S. 404

(1972), *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Walton v. Arizona*, 497 U.S. 639 (1990).

A. The Historical Record is Clear that Unanimity Is an Essential Component of the Jury Trial Right.

The historical record is clear that unanimity was an essential component of what was conceived of when the Constitution referred to juries. Indeed, In *Johnson v. Louisiana* and *Apodaca*, all nine justices agreed that at the Founding, unanimity was required. *See Apodaca* 406 U.S. at 407-08 (White J, Burger C.J., Blackmun J., Rehnquist J.) ("Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century"); *see also Johnson,* 406 U.S. at 393 (Douglas, J., Brennan, J., Stewart, J., Marshall, J., dissenting) ("The requirements of a unanimous jury verdict in criminal cases and proof beyond a reasonable doubt are so embedded in our constitutional law and touch so directly all the citizens and are such important barricades of liberty that if they are to be changed they should be introduced by constitutional amendment.") see *id*. at 369 (Powell, J., concurring) ("In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial.").

As with the reasonable-doubt standard, a jury unanimity requirement "dates at least from our early years as a Nation." *In re Winship*, 397 U.S. 358, 361 (1970), and in fact from even earlier. Influential British jurists consistently included jury unanimity as a defining characteristic of the trial by jury. For example, Sir Matthew

Hale wrote that, "[t]he law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment . . . ." 1 Hale, *The History of the Pleas of the Crown* 33 (1736).

In his *Commentaries*, Sir William Blackstone noted the critical role a unanimity requirement can play in ensuring that the Crown not wrongly seize an individual's liberty. Blackstone first observed the special risk of "violence and partiality of judges appointed by the crown" in criminal cases, and the attendant risk of overzealous prosecution if the power to prosecute were "exerted without check or control." 4 W. Blackstone*, Commentaries on the Laws of England* 343 (1769). Out of concern for those dangers, "[o]ur law has wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown." *Id.* But according to Blackstone, it was not merely the existence of the jury that provided that barrier; it was the additional requirement "that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours." *Id.* Perhaps for this reason, Blackstone explainedthat it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. 3 W. Blackstone, Commentaries on the Laws of England 379 (1769).

The Framers carried this perspective with them in crafting the Sixth Amendment. In its original form, the proposed Amendment provided that, "The trial

of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . .” 1 Annals of Cong. 435 (1789). Although the House ratified that Amendment in substantially similar form, it underwent considerable transformation in the Senate, which was “inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or too strict a term; . . .” *Williams v. Florida*, 399 U.S. 78, 95 (1970) (emphasis in original) (quoting 1 Letters and Other Writings of James Madison 492-93 (1865)). The debate over the vicinage requirement ultimately led to the more broadly-worded Sixth Amendment ratified in 1791, but the historical record contains scant evidence that there was any debate regarding the unanimity requirement. As this Court has acknowledged, however, losing the explicit unanimity requirement “is concededly open to the explanation that the ‘accustomed requisites’ were thought to be necessarily included in the concept of a ‘jury.’” *Williams*, 399 U.S. at 97.

The subsequent historical record suggests that this explanation is correct. In his *Commentaries*, Justice Joseph Story wrote, “A trial by jury is generally understood to mean . . . a trial by jury of twelve men . . . who must unanimously concur in the guilt of the accused . . . . Any law, therefore, dispensing with any of these requisites, may be declared unconstitutional.” 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 n. 2 (1891). In a series of lectures on the Constitution, Justice John Marshall Harlan asked “whether a state may dispense with a petit jury or modify the trial as it was at the time of the adoption of the

Constitution? I answer unhesitatingly that no court of the United States . . . can sentence any man upon the return of a verdict of jury in which all the jury have not concurred." Frye, et al., *Justice John Marshall Harlan: Lectures on Constitutional Law*, 81 Geo. Was. L. Rev. 12A, 253 (2013). Indeed, Justice Harlan went even further, in language reminiscent of Blackstone's appreciation of the importance of a unanimity requirement:

> The glory of our civilization is that we do have some regard for human life and human liberty when a man's life is at stake, or when his liberty is put at stake. I have heard that three-fourths might be sufficient to agree to a verdict. I think that a unanimous verdict is required under this Constitution in the Courts of the United States.

Id. at 252.

This Court's own precedent provides support for this conclusion, as well. After recognizing the historical roots of jury unanimity as one of the essential components of trial by jury, this Court held it "must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; . . . ." *Thompson v. Utah*, 170 U.S. 343, 350 (1898).[1]

[1] One year earlier, this Court also noted, in the civil context, that "unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right." *American Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897). Surely, if unanimity was "substantial and essential" in civil cases, it was even more important in criminal cases, where individuals face deprivation of property, life, and liberty.

B. *Apodaca* and *Johnson* Were Fractured Opinions Without a Coherent Justification for Non-Unanimous Verdicts, Which Have Subsequently been Disavowed and Unworthy of *Stare Decisis*.

Principles of *stare decisis* are at their nadir where a case depends upon a plurality opinion in which no five Justices are able to muster a controlling view concerning the law. Additionally, the inconsistent and practically contradictory perspectives in the *Apodaca* plurality have since been disavowed. First, *Apodaca*'s four-person plurality concluded that unanimity "was not of constitutional stature" in criminal cases, 406 U.S. at 406, although it recognized the long-standing common law requirement for juries to return unanimous verdicts, 406 U.S. at 407-08 & n.2. Second, Justice Powell's concept of "partial incorporation" can no longer be considered good law.

1. This Court has Rejected the *Apodaca* Concept that Constitutional Rights Should be Assessed by their Functional Purpose

This Court has subsequently broadly rejected the idea that the Sixth Amendment derives its meaning from functional assessments, and has strictly adhered to historical origins of the amendment. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 128 S. Ct. 2678 (2008).

This Court no longer measures the value of a constitutional right by the function that it serves. While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's purposes, but rather from the original understanding of the guarantees contained therein. In a line of cases beginning with

Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely*, 542 U.S. at 313. Rather, the controlling value is "the Framers' paradigm for criminal justice." *Id.*

Similarly, in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California*, 554 U.S. 353 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 375. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted). This pronounced shift in constitutional exegesis—the return to historical analysis—calls *Apodaca* into serious question.

Moreover, evincing this shift, this Court's Sixth Amendment jurisprudence has repeatedly eschewed a functional approach holding firm the applicability of the longstanding tenet of criminal jurisprudence that the "truth of every accusation be confirmed by the unanimous suffrage of twelve of his equals and neighbors." *S. Union Co. v. United States*, 567 U.S. 343, 344 (2012) ("The rule that juries must determine facts that set a fine's maximum amount is an application of the "two longstanding tenets of common-law criminal jurisprudence" on which *Apprendi* is based. First, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'"); *United States v. Booker*, 543 U.S. 220, 238, (2005) ("Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, "[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,'…"); *Blakely v. Washington*, 542 U.S. 296, 301, (2004) ("This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,"…"); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("As we have, unanimously, explained, the historical foundation for our recognition of these principles extends down centuries into the common law. "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of

[our] civil and political liberties," … trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours."); *United States v. Gaudin*, 515 U.S. 506, 510-11, 115 S. Ct. 2310, 2313-14 (1995) ("Blackstone described "trial by jury" as requiring that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . ."); id at 511 ("Justice Story wrote that the "trial by jury" guaranteed by the Constitution was "generally understood to mean . . . a trial by a jury of twelve men, impartially selected, who must unanimously *concur in the guilt of the accused before a legal conviction can be had*." This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.").

2. Since *Apodaca*, this Court Has Rejected the Concept of Partial Incorporation

Second, Justice Powell offered a theory of partial incorporation of the Sixth Amendment, unique to Justice Powell, not found anywhere else in this Court's jurisprudence. Justice Powell believed that the Sixth Amendment required unanimity at the Founding, and in federal cases, but that the protections guaranteed by the Sixth Amendment were more expansive that those of the Fourteenth Amendment. This Court's holding in *McDonald* now makes clear that Justice Powell's

creative view on incorporation is not constitutionally acceptable. This Court rejected the City's claim that *Apodaca* endorsed a "two-track approach to incorporation," *id.* at 3035 n.14. Instead, the Court left no doubt that it "abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Id.* at 3035 (internal quotation marks and citation omitted). The Court has made clear that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights Protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *McDonald v. City of Chicago*, 561 U.S. 742, 765, (2010) (citing *inter alia*, *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961); *Ker v. California*, 374 U.S. 23, 33-34 (1963); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964); *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969); *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985)).

3. The Fractured Nature of *Apodaca* Undermines its Continued Vitality.

Nine justices have essentially agreed that unanimity was required at the Founding. Eight justices agreed that the Fourteenth Amendment incorporated the full force of the Sixth Amendment. Five justices agreed that the Sixth Amendment currently required adherence to its historical origins. And yet the odd configuration of opinions resulted in a rule permitting non-unanimous verdicts in the States. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole*

Tribe v. Florida, 517 U.S. 44, 66 (1996) (overturning prior decision in part because a majority of the Court had "expressly disagreed with the rationale of the plurality" (the concurring opinion providing the fifth vote, as well as the dissent)).

Justice Powell's peculiar and atypical view of *partial* incorporation led the Court to rule by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty." As Justices Douglas, Brennan, Marshall and Stewart observed, dissenting in *Johnson*, "[t]he result of today's decisions is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?" 406 U.S. at 383. As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*], when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson, 406 U.S. at 395 (Brennan, J. *dissenting*). As this Court observed in *McDonald*, the odd accounting of votes undermines the coherence of the *Apodaca* and *Johnson* opinions:

> In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. . . .
>
> Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either

> federal or state criminal trials . . . and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials . . .
>
> Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.

McDonald, 561 U.S. at 766. It is significant to note that the four plurality justices who held that the Sixth Amendment did not require unanimity did not do so because of a different view of the original history (compare for instance Justice Stevens' historical understanding of the Second Amendment in *Heller* with Justice Scalia's historical understanding of the Second Amendment) but rather observed, "Our inquiry must focus upon the function served by the jury in contemporary society." *Apodaca*, at 410 (plurality of White, J. Blackmun, J., Rehnquist, J., and Burger, CJ).

Although Louisiana courts continue to use this Court's decision in *Apodaca* to justify non-unanimous jury verdicts, this Court's recent Sixth Amendment jurisprudence renders *Apodaca*—both Justice Powell's partial incorporation theory, and the plurality's focus on the function of the jury in contemporary society—impossible to defend. In fact, this Court's recent Sixth Amendment decisions have rejected both theoretical predicates on which the *Apodaca* plurality opinion is based.

C. The Racist Origins and Continued Impact of the Non-Unanimous Jury Provide Strong Justification for Ensuring that the Fourteenth Amendment Fully Incorporates the Sixth Amendment


Now then, what have we done
the question. **Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done.** and what
ordinance on suffrage, the

The opening address at the 1898 Louisiana Constitutional Convention made clear that the point of the entire Convention was to limit African-American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "Journal"]. Closing the Convention, Hon. Thomas J. Semmes celebrated the putatively successful "mission" of the delegates "to establish the supremacy of the white race in this state." *Id*. at 374.

When discussing the provisions adopted to prevent African-American suffrage, a like-minded delegate explained:

> [T]he Supreme Court of the United States in the *Wilson* case, referring to that, said that they had swept the field of expedients, but they were permissible expedients, and that is what we have done in order to keep the negro from exercising the suffrage. What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause)

Constitutional Convention of the State of Louisiana, supra, at 380.

In his closing remarks, President Kruttschnitt bemoaned that the delegates had been constrained by the Fifteenth Amendment such that they could not provide what they would have wished: "universal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins." *Id.* at 380. He went on to proclaim:

> I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system that we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.

Id. at 381.

The proponents of those rules sometimes tried to justify them under the guise of cost-saving devices, but commentators have directly linked the diminution of the jury trial right to the Convention's larger effort "to consolidate Democratic power in the hands of the 'right people,' thereby bypassing the poorer sorts, just as the suffrage provision did." W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993), pp. 93-109. *See also* Thomas Aiello, *Jim Crow's Last Stand, Nonunanimous Criminal Jury Verdicts in Louisiana*, LSU Press, 2015; Angela A. Allen-Bell, *These Jury Systems Are Vestiges of White Supremacy*, Washington Post, 9/22/2017. The 1898 Convention substantially diminished the Sixth Amendment jury trial guarantee though non-unanimity rules, the elimination of misdemeanor juries, and the reduction of jury size for lesser felonies.

In recent debates in the Louisiana Legislature, John DeRosier, district attorney in Calcasieu Parish, told the panel that the law's roots in white supremacy

are not sufficient enough to change these historically racist provisions: "I've heard a lot about this system begin adopted as a vestige of slavery. I have no reason to doubt that. I'm not proud of that, that that's the way it started, but it is what it is…" Associated Press, Bid to strike Louisiana's Jim Crow-era jury law advances in state House NOLA.com (2018), http://www.nola.com/crime/index.ssf/2018/04/bid_to_strike_louisianas_jim_c.html (last visited May 23, 2018).

This Court has previously confronted the uncorrected problems of the 1898 Constitutional Convention. It held:

> The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws, policies, and traditions of the State of Louisiana, completely justified the District Court in entering the decree it did and in retaining jurisdiction of the entire case to hear any evidence of discrimination in other parishes and to enter such orders as justice from time to time might require.

Louisiana v. United States, 380 U.S. 145, 156, 85 S. Ct. 817, 823 (1965).

Whatever the views on partial incorporation of the Fourteenth Amendment in other contexts, the Sixth Amendment's guarantee of a unanimous jury verdict is not the location to provide a watered down version of the Bill of Rights. Louisiana's non-unanimity rule uniquely strikes at the heart of equality and citizenship. Like Alabama's Constitutional Convention of 1901, the Louisiana Constitutional Convention of 1898 "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *See Hunter v. Underwood,* 471 U.S. 222, 229 (1985) citing S. Hackney, Populism to Progressivism in Alabama 147 (1969); C. Vann

Woodward, Origins of the New South, 1877-1913, pp. 321-322 (1971). In Alabama, like Louisiana:

> [t]he delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901, p. 8 (1940).

Hunter v. Underwood, 471 U.S. at 229. These conventions understood that denial of suffrage, both from the jury box and the voting poll, through misdemeanor disenfranchisement, dilution, and other apparatus in a manner that would ensure the "supremacy" of the Anglo-Saxon race and would avoid the scrutiny of "Massachusetts judges." *See Official Journal* At 381; *see also* Robert J. Smith, Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice*, Vol. 72 No. 2 LA. LAW REV. 361, 375 (2012) ("The Delegates achieved these anti-participation goals not only by restricting access to the ballot box but also by diluting the voice of members of racial minority groups by allowing non-unanimous jury verdicts in criminal cases"); *id* at 376 (noting commentators at the time of Constitutional Convention's concern that African-American presence on juries would prevent convictions, and result in hijacking sentencing outcomes); Thomas Aiello, *Jim Crow's Last Stand: Non-Unanimous Criminal Jury Verdicts in Louisiana*, Louisiana State University Press, Baton Rouge, Louisiana, 2015; Aliza Kaplan, Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: NonUnanimous Verdicts In Criminal Cases Undermine The Credibility Of Our Justice System*, Vol. 95 OREGON

LAW REVIEW No. 1, 3 (February 2017); .Angela A. Allen-Bell. *These Jury Systems are Vestiges of White Supremacy*, Washington Post, Sept. 22, 2017.

The non-unanimous jury rule continues to have the impact that of its original design. An exhaustive non-partisan analysis of approximately 3,000 felony trials over the last six years, by the Advocate identified 993 jury verdicts by 12 member jury verdicts. Forty percent of these trials were non-unanimous. The review revealed that the combination of prosecutorial strikes and the non-unanimous jury rule effectively silenced participation by African-American jurors. *See* Jeff Adelson, Gordon Russell and John Simerman, *How An Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, The Advocate, April 1, 2018, available at http://www.theadvocate.com/new_orleans/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html. The recent Advocate article merely confirms what researchers have previously suggested: that non-unanimity serves to silence minority jurors. Kim Taylor-Thompson, *Empty Votes In Jury Deliberations,* 113 Harv. L. Rev. 1261, 1264 (Apr. 2000).

Ultimately, petitioner does not take on the responsibility to prove that the non-unanimous jury verdict proceeds on an unbroken line of racism from 1898 to 2018, or even that the rule imposed a racist silencing of jurors in his own case. Instead, petitioner must simply demonstrate that the Fourteenth Amendment incorporation doctrine should be at its most robust where the history and the impact of the rule has such a sordid racial component.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 23rd day of May, 2018, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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