No. 18-5924

IN THE

Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Since its founding by Thurgood Marshall close to 80 years ago, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has strived to secure the constitutional promise of equality for all people. Petitioner asks the Court to reconsider an important question about the Fourteenth Amendment's reach, which, more than any other constitutional provision, embodies our Nation's commitment to equal justice under the law.

LDF has been at the forefront of efforts to enforce the Fourteenth Amendment's promise of equality. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). LDF has also led the fight of eradicating discrimination from jury verdicts. *See, e.g.*, *Ham v. South Carolina*, 409 U.S. 524 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Swain v. Alabama*, 380 U.S. 202 (1965).

LDF submits this brief to aid the Court in deciding whether the Fourteenth Amendment's Due Process Clause incorporates the Sixth Amendment's unanimity requirement against the States.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

After the Civil War, Congress passed the Fourteenth Amendment and the Civil Rights Act of 1875 to protect the rights of newly freed African Americans. One of the rights protected by those provisions was the right to serve on a jury. Indeed, this Court affirmed the centrality of jury service to the citizenship of African Americans 140 years ago. *See Strauder v. West Virginia*, 100 U.S. 303 (1879).

Then, in 1898, white Louisianans convened a constitutional convention. Their goal was to craft a constitution that would "establish the supremacy of the white race . . . to the extent to which it could be legally and constitutionally done . . . ." Louisiana ratified its non-unanimous jury provision at this convention to help achieve its goal of cementing white supremacy. While federal law made it illegal to exclude Black people from jury service, the delegates passed the non-unanimous jury provision to nullify the votes of Black jurors and allow white jurors to more easily convict Black defendants.

Louisiana's non-unanimous jury provision worked exactly as intended. Up until 2018, when Louisianans voted to remove the non-unanimous jury provision from their constitution, Black defendants were more likely to be convicted by non-unanimous juries than white defendants, and Black jurors were more likely than white jurors to be in the dissent. Thus, despite jury service being a hallmark of American citizenship, for over a century, Louisiana's

non-unanimous jury provision effectively undermined Black participation on juries.

Louisiana has been permitted to thwart the intent of the Reconstruction Congress in this manner because of this Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), in which Justice Powell's idiosyncratic view that the Sixth Amendment's unanimity requirement does not apply to the States was the controlling opinion. This is the rare case in which *stare decisis* should not control, and this Court should hold that the Sixth Amendment requires state juries—like federal juries—to be unanimous.

ARGUMENT

I. THE HISTORY OF THE FOURTEENTH AMENDMENT COMPELS THE INCORPORATION OF THE SIXTH AMENDMENT UNANIMOUS JURY TRIAL RIGHT.

This Court recently reiterated that "[a] Bill of Rights protection is incorporated . . . if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)). Accordingly, when determining whether a provision of the Bill of Rights is "fundamental" or "deeply rooted," the Court reckons with the historical context of the Fourteenth Amendment. *See, e.g.*, *McDonald*, 561 U.S. at 770-78 (explicating the position of "the

Framers and ratifiers of the Fourteenth Amendment"); *id*. at 776 (relying on "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment"); *Timbs*, 139 S. Ct. at 688 (same). An examination of this history compels the incorporation of the Sixth Amendment's unanimity requirement.

In the aftermath of the Civil War, Southern whites were neither prepared nor willing to accept the "fundamentally altered . . . racial status quo in the South."[2] The Thirteenth Amendment's ratification abolished slavery in 1865.[3] Nevertheless, recalcitrant Southern states persisted in "subjugat[ing] newly freed slaves and maintain[ing] the prewar racial hierarchy." *Timbs*, 139 S. Ct. at 688. Between 1865 and 1866, Southern legislatures accomplished this by passing discriminatory statutes, known as Black Codes, which "reduce[d] blacks to a status somewhere between that of slaves (which they no longer were) and full free people (which most white southerners opposed)."[4] And Black Codes governed a wide range of aspects of everyday life, including the extent of African American access to the courtroom.[5] For

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[2] Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev. 671, 681 (2003).

[3] *See 13th Amendment to the U.S. Constitution: Abolition of Slavery*, National Archives: America's Historical Documents, https://www.archives.gov/historical-docs/13th-amendment (last visited June 4, 2019).

[4] Finkelman, *supra* note 2, at 685.

[5] *See* Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 402-03

example, under the Alabama Black Code, while Black people were allowed to testify in court, they were limited to testifying "only in cases in which freedmen, free negroes and mulattoes are parties."[6] Other states passed similar Black Codes, all of which had the same effect: Black people could not testify in civil cases between white people or in criminal cases in which a white person harmed another white person.[7] "[T]he law in effect declared that blacks were not 'equal' to whites and that their testimony was not as 'good' as that of whites."[8]

It was against this backdrop of state-legislated refusal "to accept that the freed people were entitled to liberty, equality, or even fundamental legal rights,"[9] that the need for Congress to create legal protections for formerly enslaved African Americans became clear. In December 1865, Congress created the Joint Committee on Reconstruction, and authorized the Committee "to investigate conditions in the South."[10]

This investigation showed that with respect to formerly enslaved Black people, "it was impossible to abandon them, without securing them their rights as

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(2004). State Constitutions also served to relegate African Americans to a status less than the whites. *Id.* at 403-04.

[6] *Id.* at 402 (quoting Act. of Nov. 24, 1865, ch.6, 1865 Alabama Laws 90).

[7] *Id.*

[8] *Id.*

[9] Finkelman, *supra* note 2, at 681.

[10] *Id.* at 686.

free men and citizens."[11] It spurred Congress to pass the Civil Rights Act of 1866[12] over the staunch opposition of President Andrew Johnson.[13] "[M]arking the first time Congress legislated upon civil rights,"[14] the Act established that formerly enslaved African Americans had "the same right[s] in every State and Territory in the United States" and "full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens . . . ."[15] Notwithstanding the Act's straightforward declaration of the rights of African Americans, "the Committee concluded that nothing short of a Constitutional amendment – what became the Fourteenth Amendment – would protect the rights of the former slaves."[16]

Congressman John Bingham, a key member of the Joint Committee, "took the lead in framing the 14th Amendment."[17] Bingham fully understood that he was drafting the Amendment "in the context of the Black Codes of 1865-66 and the violence directed at

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[11] H.R. Rep. No. 39-30, at xii (1866).
[12] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).
[13] John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 Hastings L.J. 1135, 1136 (1990).
[14] *The Civil Rights Bill of 1866, April 09, 1866*, U.S. House of Representatives: Historical Highlights, https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/ (last visited June 4, 2019).
[15] Civil Rights Act of 1866 § 1.
[16] Finkelman, *supra* note 2, at 687.
[17] Gerald V. Magliocca, *The Father of the 14th Amendment*, N.Y. Times: Opinionator (Sept. 17, 2013), https://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/.

blacks and white Unionists in the immediate post-war South."[18] The goal of the Fourteenth Amendment was clear: "reverse the racism and violence of slavery and its immediate aftermath,"[19] and "secur[e] the fruits both of the war and of the three decades of antislavery agitation proceeding it."[20]

For newly freed Black people, the Fourteenth Amendment was an assurance that the Constitution now protected rights that were once brazenly denied them by state and local governments. Indeed, the Fourteenth Amendment "fundamentally altered our country[ ]." *McDonald*, 561 U.S. at 754. Before the end of the Reconstruction era, the States also ratified the Fifteenth Amendment in 1870[21] (giving Black men the right to vote), and Congress enacted the Civil Rights Act of 1875[22] (outlawing racial discrimination in public accommodations and in jury selection), further securing Black people's civil rights.

One of the most important rights Congress protected in both the Fourteenth Amendment and the

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[18] Finkelman, *supra* note 2, at 691.
[19] Finkelman, *supra* note 5, at 409.
[20] William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 61 (1988).
[21] *See* A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875, Library of Congress, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=016/llsl016.db&recNum=1166 (last visited June 11, 2019).
[22] *The Civil Rights Act of 1875, February 04, 1875*, U.S. House of Representatives: Historical Highlights, https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Act-of-1875/ (last visited June 11, 2019).

Civil Rights Act of 1875 is the right to trial by a jury free from racial discrimination in jury selection. As this Court said in *Duncan v. Louisiana*, "[t]he guarantees of jury trial . . . reflect a profound judgment about the way in which law should be enforced and justice administered." 391 U.S. 145, 155 (1968). Jury service is a "free school . . . in which each juror learns his rights,"[23] "teach[ing] men equity in practice."[24] And the exclusion of African Americans from juries not only denies a core right of citizenship to excluded jurors, it restricts access to justice both to African Americans charged with crimes and to African Americans who are victims of crimes.[25]

In making the right to trial by jury a federal constitutional right for state trials as well as federal ones, the Reconstruction Congress also enshrined the right to a unanimous jury verdict. Because of its long-understood importance,[26] the right to jury trial was

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[23] Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 876 (1994) (quoting Alexis de Tocqueville, 1 *Democracy in America* 285 (Knopf, 1945)).

[24] *Id.*

[25] Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1602-03 (2018); *see also* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 918-19 (2004) (recounting the role of juries with respect to violence committed by whites against politically active African Americans and white Republicans).

[26] The right to a jury trial was "enshrined in our foundational legal documents, from the Magna Carta to the Declaration of Independence and the Bill of Rights, and in every state constitution." Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy* 9 (2010).

explicitly protected by state constitutions in 36 out of the 37 states when the Fourteenth Amendment was ratified in 1868.[27] And unanimity had "been a feature of the Anglo-American legal system for centuries."[28] Indeed, unanimity became the accepted rule in the United States during the eighteenth century. *See Apodaca v. Oregon*, 406 U.S. 404, 408 n. 3 (1972).[29] As stated in 1788 by Chief Justice M'Kean of the Supreme Court of Pennsylvania when discussing the state's constitutional provision explicitly requiring unanimous juries, "I have always understood it to be the law, independent of this section, that the twelve jurors must be unanimous in their verdict, and yet this section makes this express provision." *Respublica v. Oswald*, 1 Dall. 319, 323 (Pa. 1788).

Unanimity in jury trials is fundamental to the purpose of the jury trial: "to prevent oppression by the

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Furthermore, the right to jury trial is the only right guaranteed both in the original Constitution and the Bill of Rights. *See* U.S. Const. art. III, § 2; U.S. Const. amend. VI.

[27] Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 77 (2008).

[28] Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After* McDonald, 101 J. Crim. L. & Criminology 1403, 1419 (2011).

[29] "[T]he explicit constitutional provisions, particularly of States such as North Carolina and Pennsylvania, the apparent change of practice in Connecticut, and the unquestioning acceptance of the unanimity rule by text writers such as St. George Tucker indicate that unanimity became the accepted rule during the 18th century . . . ."

Government."[30] The government's power to take away one's liberty by way of criminal conviction is a power that remains in check by jury trials only when they follow "an 'indestructible principle' of American criminal law . . . that 'guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt.'"[31] In this way, the unanimous jury trial and the Fourteenth Amendment overlap in purpose: "to prevent oppression by Government."[32]

In short, "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment," *McDonald*, 561 U.S. at 776, shows that the Framers would have intended the Sixth Amendment's unanimity requirement to be incorporated against the States.

II. LOUISIANA'S NON-UNANIMOUS JURY PROVISION WAS DESIGNED TO NULLIFY BLACK JURY SERVICE.

Despite the foregoing, a majority of this Court in *Apodaca* held that the Fourteenth Amendment does not require the Sixth Amendment's unanimity rule to be applied in state trials. In reaching that conclusion, the Court did not grapple with the racist history of Louisiana's non-unanimous jury provision. Thus, the

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[30] *Duncan*, 391 U.S. at 155.
[31] Riordan, *supra* note 28, at 1424 (quoting *Billeci v. U.S.*, 184 F.2d 394, 403 (D.C. Cir. 1950)).
[32] *Duncan*, 391 U.S. at 155.

Court failed to appreciate the protections unanimity provides against racial prejudice infecting jury trials.

In *Apodaca*, the Petitioners argued "unanimity [was] a necessary precondition for effective application of the cross-section requirement, because a rule permitting less than unanimous verdicts will make it possible for convictions to occur without the acquiescence of minority elements within the community." *Apodaca*, 406 U.S. at 412-13.

Justice White's opinion rejected this argument because it refused to accept its premise. *Id.* at 413. Justice White could not "assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds . . . or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal." *Id.* Justice White "simply [found] no proof for the notion that a majority will disregard its instructions and cast its votes for guilt or innocence based on prejudice rather than evidence." *Id.* at 413-14.

In so reasoning, Justice White's opinion does not reckon with the overwhelming evidence that shows Louisiana's non-unanimous jury provision was enacted with discriminatory intent and was designed to facilitate white jurors being able to convict Black defendants over the dissent of Black jurors.

After Reconstruction ended and federal troops left the South, Louisianan Democrats called a

Constitutional Convention in 1898.[33] As two scholars of this period summarized, "the sinister purpose of the Convention was to create a racial architecture in Louisiana that could circumvent the Reconstruction Amendments and marginalize the political power of black citizens."[34] It was at this Convention that Louisiana ratified its non-unanimous jury provision.[35]

The Convention's official record is replete with references to its racist goals. In his opening remarks, Convention President Ernest Kruttschnitt stated that the "convention has been called together by the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics."[36] The goal, said Kruttschnitt, was the "purification of the electorate."[37] The Judiciary Committee Chair, Judge Thomas Semmes, was more blunt. He declared that the purpose was "to establish the supremacy of the

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[33] *See* Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 374-75 (2012).

[34] *Id.*

[35] The provision first required for "cases in which the punishment is necessarily at hard labor," that nine out of twelve jurors vote for guilt. La. Const. art. 116 (1898). The provision was updated in 1974 to require that at least ten jurors vote for guilt. *See* La. Const. art. I, § 17 (1974).

[36] *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 9 (1898), https://babel.hathitrust.org/cgi/pt?id=njp.32101065310607 [hereinafter *Official Journal*].

[37] *Id.*

white race in this State to the extent to which it could be legally and constitutionally done . . . ."[38]

Convention delegates sought to placate the "popular sentiment of th[e] State," which, as one delegate put it, was the desire for "universal white manhood suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins."[39] At the end of the Convention, Kruttschnitt marveled at its success, congratulating the delates for drafting a constitution that would "perpetuate the supremacy of the Anglo-Saxon race in Louisiana."[40]

Before 1898, juries needed to be unanimous for a felony conviction.[41] That changed, as "one product of the Louisiana Constitution of 1898 was the enactment of Article 116 of the Constitution of 1898, which, for the first time in Louisiana, provided for non-unanimous jury verdicts in non-capital felony cases . . . ."[42] This provision was one of the ways the Convention delegates sought to perpetuate white supremacy.[43]

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[38] *Id.* at 375.
[39] *Id.* at 380.
[40] *Id.* at 381.
[41] *See* John Simerman & Gordon Russell, *Louisiana Voters Scrap Jim Crow-Era Split Jury Law; Unanimous Verdicts to be Required*, The Advocate (Nov. 6, 2019), https://www.theadvocate.com/baton_rouge/news/politics/elections/article_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html.
[42] *State v. Webb*, 133 So. 3d 258, 282 (La. Ct. App. 2014).
[43] *See* Frampton, *supra* note 25, at 1619 ("[N]onunanimous verdicts carefully and methodically worked to dilute the political

Around the time of the Convention, there were growing calls for Louisiana to adopt a non-unanimous jury system. Because of the newly ratified Fourteenth Amendment and the passage of the Civil Rights Act of 1875, Black men were guaranteed the right to serve on juries.[44] White Louisianans mourned over this new reality, as one paper, envious of southern states that resisted Black people serving on juries until the 1880s, stated, "Evidently our neighbors have not had as large experience as we Louisiana in the matter of negro jurors. We were 'broke in' to it immediately after the war."[45] It was this new reality that prompted white Louisianans to advocate for a non-unanimous jury provision.[46]

The calls for a non-unanimous jury provision were in part borne from the belief that Black people were not of "much advantage in any capacity in the

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and civil rights of black Louisianans within a legal framework that demanded at least lip service to the fiction of race neutrality.").

[44] *See Strauder v. West Virginia*, 100 U.S. 303 (1879); An Act to Protect All Citizens in their Civil and Legal Rights, ch. 114, § 4, 18 Stat. 335 (1875). This Court later found much of the Civil Rights Act of 1875 unconstitutional. *See Civil Rights Cases*, 109 U.S. 3 (1883). The Court, did not, however, strike down Section 4 of the Act, which outlawed racial discrimination in jury selection. *Id.* at 15.

[45] Frampton, *supra* note 25, at 1602 (quoting *Negro Jurors in Texas*, Daily Shreveport Times, Feb. 19, 1885, at 4).

[46] *See* Smith & Sarma, *supra* note 33, at 374-76.

courts of law"[47] as they were "ignorant, incapable of determining credibility, and susceptible to bribery."[48]

The calls were also borne from a desire to ensure that Black men were convicted when charged with a crime, regardless of the evidence. The thought of Black defendants being acquitted was untenable to white Louisianans. As one local paper acknowledged, "in some of the parishes of the State the hostility to the negro is . . . such . . . that . . . juries in these benighted localities seem to think that it is their bounden duty to render a verdict of 'guilty as charged,' because the accused has black skin."[49] White Louisianans believed a non-unanimous jury provision would address this fear by ensuring white jurors' ability to convict Black defendants over the dissent of Black jurors.[50]

By contrast, white Louisianans feared that if Black men served on juries, Black defendants "would simply not be convicted because of the African-American presence in the jury box."[51] After the Fourteenth Amendment was ratified, one popular newspaper lamented that "if a negro be on trial for any crime, [a Black juror] becomes at once his earnest

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[47] *Id.* at 375 (quoting *Future of the Freedman*, Daily Picayune, Aug. 31, 1873, at 5).
[48] *Id.* at 376.
[49] *See* Frampton, *supra* note 25 at 1603 (quoting *Prejudiced Verdicts*, Opelousas Courier, Oct. 26, 1985, at 1).
[50] *See* Smith & Sarma, *supra* note 33 at 375-76.
[51] *Id.* at 375.

champion, and a hung jury is the usual result."[52] A few years before the 1898 Convention, the same paper "endorsed the adoption of nonunanimous verdicts" to avoid hung juries.[53] The paper claimed such a provision was needed to avoid "popular justice"—the mob lynchings that often occurred when Black defendants were acquitted.[54] The article reasoned that guilty verdicts "placat[ed] those intent on committing extralegal forms of racial violence."[55] The paper concluded that a non-unanimous jury provision was needed to ensure that "one partisan" (read: Black person) on the jury does not "disappoint or obstruct justice."[56]

The history of Louisiana's non-unanimous jury provision is important to an incorporation analysis and is the "proof" Justice White thought lacking that shows unanimity is required to ensure convictions are *not* "based on prejudice rather than evidence." *Apodaca*, 406 U.S. at 413-14.

III. THE DISCRIMINATORY DESIGN OF LOUISIANA'S NON-UNANIMOUS JURY PROVISION PERSISTED AS INTENDED.

While jury deliberations are the proverbial black box, a dataset recently compiled by investigative

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[52] *Id.* at 375 (quoting *Future of the Freedman*, Daily Picayune, Aug. 31, 1873, at 5).
[53] Frampton, *supra* note 25, at 1613 (citing *Put a Stop to Bulldozing*, Daily Picayune, Feb. 1, 1893, at 4).
[54] *Id.*
[55] *Id.*
[56] *Id.*

journalists provides the opportunity to analyze information from thousands of criminal jury trials in Louisiana.[57] One scholar's analysis of 199 recent non-unanimous verdicts in the dataset reveals the discriminatory effect of Louisiana's non-unanimous jury provision between 2011 and 2017.[58] In *The Jim Crow Jury*, Thomas Frampton examines, among other things, the 190 non-unanimous guilty verdicts delivered by racially mixed juries over that period.[59] As stated by Frampton, "[t]hese cases demonstrate that the nonunanimous-decision rule operates today just as it was intended to 120 years ago—to dilute the influence of black jurors."[60]

Frampton found that, with respect to non-unanimous guilty verdicts (11-1 or 10-2 votes), African American jurors disproportionately cast not guilty votes overridden by the guilty votes of the other

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[57] *See* Jeff Adelson et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, The Advocate (Apr. 1, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html; Jeff Adelson, *Download the Data Used in the Advocate's Exhaustive Research in "Tilting the Scales" Series*, The Advocate (Apr. 1, 2018), https://www.theadvocate.com/new_orleans/news/courts/article_6f31d456-351a-11e8-9829-130ab26e88e9.html.

[58] Analyses of this nature are not without their limitations. *See* Frampton, *supra* note 25, at 1621 ("The quality and detail of the data vary from parish to parish—a limitation attributable to the diversity of recordkeeping practices of minute clerks, clerks of court, and district attorneys in different jurisdictions.").

[59] *Id.* at 1636.

[60] *Id.*

jurors: African American jurors were approximately 2.5 times more likely to be in dissent.[61]

Frampton also found that African American defendants "were more likely to be convicted in cases where at least one or two jurors harbored doubts."[62] In other words, African American defendants were overrepresented in the pool of defendants who were convicted non-unanimously; by contrast, white defendants "were overrepresented . . . among unanimous convictions and underrepresented . . . among nonunanimous convictions."[63]

Thus, just as the delegates at the 1898 Constitutional Convention intended, Louisiana's non-unanimous juries continued to over-empower white jurors while disempowering Black jurors. The story of two Black Louisianans who recently served as jurors—Willie Newton and Bobbie Howard—compellingly illustrates this point.[64]

Mr. Newton and Mr. Howard were both born and raised in the small town of Houma, in Terrebonne Parish; the same town where Evangelisto Ramos worked. Mr. Newton, who is 72 years old, runs a family business selling burial vaults. Sixty-three-

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[61] *Id.* at 1637.
[62] *Id.* at 1639.
[63] *Id.*
[64] Mr. Newtown and Mr. Howard's story stems from an interview that the men did with the *Advocate*, *see* Adelson et al., *supra* note 57, and follow up interviews with undersigned counsel. Everything quoted is from their interviews with counsel unless attributed otherwise.

year-old Mr. Howard has his own accounting practice. Mr. Newton and Mr. Howard both attended segregated schools growing up. In fact, they went to the same high school, as there was only one in the Parish that educated Black children.

In 2014, two years before Mr. Ramos faced trial for second-degree murder, Mr. Newton and Mr. Howard were selected to serve on the jury for the trial of Matthew Allen, a 20-year-old Black man also accused of second-degree murder. The prosecution's theory was that Mr. Allen intentionally shot and killed the victim; Mr. Allen's defense to the charge was that he acted in self-defense.[65] Mr. Newton and Mr. Howard were the only Black jurors. The other ten jurors on Mr. Allen's jury were white.

Mr. Newton vividly recalled his feelings when he saw the jury's composition: "Bobby and I saw from the beginning that our vote wasn't going to matter. We were outnumbered." "I could have just stayed home." "Ain't no difference we can make." Mr. Newton felt doubly distraught when he saw that Mr. Allen had a "bad judge" who had been reprimanded for wearing blackface.[66] Mr. Newton thought to himself, "Buddy, you're doomed."

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[65] *See State v. Allen*, 2015-0675, 2015 WL 6951570, at *2 (La. Ct. App. 2015).

[66] In 2004, Judge Timothy Ellender was suspended for wearing blackface, handcuffs, and a jail jumpsuit to a Halloween party. *See* Seth Fox, *Houma Judge Suspended for Wearing Blackface Halloween Costume*, Houma Today (Dec. 13, 2014),

Reflecting back, Mr. Newton and Mr. Howard thought Mr. Allen's race worked against him with the white jurors. "They see a Black defendant in a drug deal and maybe think 'he's hustling corner to corner, let's teach him a lesson,'" Mr. Howard speculated. Mr. Newton echoed this sentiment: "I think they saw him as a potential threat to the community."

Mr. Newton and Mr. Howard looked at Mr. Allen differently. They saw a young man who may have made a mistake, but who still had a life ahead of him. Mr. Howard thought these differing perspectives could be due to the fact "their life experiences were different."

After listening intently to the evidence, both Mr. Howard and Newton favored finding Mr. Allen guilty of manslaughter. "I thought about his age. I thought he deserved a second chance," Mr. Howard said quietly. Mr. Newton confirmed that he "never thought it was second-degree murder" and proposed to his fellow jurors that Mr. Allen should be convicted of manslaughter, not murder.

Deliberations gave both men hope that at least some of the white jurors would see the evidence their way and would find Mr. Allen guilty of manslaughter, not murder. Mr. Howard recalled that one juror, a white woman, seemed to be leaning in favor of manslaughter going into lunch. Mr. Newton remembered there being two or three white jurors

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https://www.houmatoday.com/article/DA/20041213/News/608099465/HC/.

who seemed to think manslaughter was the just conviction.

Things took a turn after lunch, however. Mr. Howard recounted that he and Mr. Newton had lunch together, while the white jurors ate together. When they returned from lunch, all ten white jurors wanted to vote for second-degree murder; there was no convincing them otherwise, "everyone was set in their ways."

Mr. Newton's prediction that his vote wouldn't matter proved prescient. The jury convicted Mr. Allen of second-degree murder by a vote of 10-2. All ten white jurors voted for guilt. Mr. Newton and Mr. Howard voted not guilty.

What took place troubled Mr. Howard and Mr. Newton. Mr. Howard recalled: "I pretty much felt sorry for the young man, to tell you the truth." Mr. Newton was more shaken: "It hurt me real bad when I looked at that young man, and I looked at his mother and father, and I knew they weren't going to see him again, not unless they go up to Angola."[67] Indeed, Mr. Newton felt the effects of the trial long after it was over: "When I left that jury, it took me a couple of weeks to get myself together. Serving on that jury took something out of me." Mr. Allen, who entered prison for a crime he a when he was only 20, continues to serve a life sentence in Angola Prison.

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[67] Adelson et al., *supra* note 57.

Mr. Newton realized that what happened in Mr. Allen's trial probably happened in many others, causing him to wonder, "How many others had passed this way . . . and got the same treatment this boy got." The trial, Mr. Newton explained, made him feel like his "voice didn't matter," "a second-class citizen."

This experience confirmed for Mr. Newton that Louisiana's non-unanimous jury system was unfair to Black defendants and Black jurors. In his opinion, the prosecutors "found a way to get around the system" by limiting the number of Black people on Mr. Allen's jury to two, knowing they only needed ten votes for a conviction. The trial shook Mr. Newton's confidence in the fairness of Louisiana's justice system: "I know I couldn't sit there and think I'd get a fair trial."

Mr. Newton took solace in the fact Louisiana voters repealed the non-unanimous jury provision last year.[68] He expressed that while he does think that "justice was served" during Mr. Allen's trial, he felt "encouraged" and "empowered" to serve on a jury now that his vote was guaranteed to matter. Mr. Howard said that he, too, is ready to perform his "civic duty" and serve on a jury under Louisiana's new unanimous jury scheme.

Mr. Newton and Mr. Howard's experience is a stark example of the indignities inflicted upon Black people by Louisiana's non-unanimous jury provision. It is a reminder that, until last year, Louisiana's non-unanimous jury system worked the way its racist

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[68] Oregon is now the only state with a non-unanimous jury provision.

proponents intended—to more easily convict Black defendants and to silence Black jurors. What makes this even worse, is that this system, conceived from racism, has been operating with this Court's blessing for 47 years. *Apodaca* must be overruled. This Court should hold that the Fourteenth Amendment incorporates the Sixth Amendment's unanimity requirement against the States.

CONCLUSION

LDF respectfully urges this Court to hold that the Fourteenth Amendment incorporates the Sixth Amendment's unanimity requirement against the States.

Respectfully submitted,

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