No. 18-5924

In the Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

LOUISIANA,

Respondent.

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

BRIEF IN OPPOSITION

JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL
Solicitor General
COLIN CLARK*
Assistant Solicitor General
PAMELA S. MORAN
Assistant Attorney General
*Counsel of Record
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6200
clarkc@ag.louisiana.gov

LEON A. CANNIZZARO. JR.
District Attorney,
Parish of Orleans
CHRISTOPHER J. PONOROFF
Assistant District Attorney
619 S. White Street
New Orleans, LA 70119
(504) 822-2414
cponoroff@orleansda.com

QUESTION PRESENTED

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

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STATEMENT OF THE CASE

On November 26, 2014, Trinece Fedison was found in a trash can in a wooded area in New Orleans. Pet. App. A3. She had been killed by stab wounds to the neck and abdomen. *Id.* at A5-6. DNA collected from the handles of the trash can and from Fedison's vagina matched that of Petitioner Evangelisto Ramos. *Id.* at A5. The garbage can belonged to a church located across the street from both the crime scene and from the house where Ramos lived. *Id.* at A5. Ramos admitted he had sex with Fedison just prior to the murder. *Id.* at A5. Ramos told investigating Detective Brueggeman that the last time he saw Fedison, she got into a vehicle with men who called her name and that she appeared to know. *Id.* at A5. However, Ramos, inconsistently, told Darryl Scheuermann, operations manager for Ramos' employer, that the men were harassing Fedison. *Id.* at A4-5.

A grand jury on May 21, 2015, indicted Ramos with one count of second-degree murder. He was convicted June 22, 2016, after a two-day trial where ten members of a twelve-person jury voted to return a verdict of guilty. *Id.* at A3. On appeal, Ramos' counsel challenged the sufficiency of the evidence and comments made by prosecutors during their opening statement and closing arguments. *Id.* at 6-8. In addition, Ramos argued in a *pro se* brief that he was the victim of anti-Hispanic racial profiling and that the trial court erred in denying a motion to require a unanimous verdict. *Id.* at 9.

While this motion had presented argument regarding the guarantees of the Sixth Amendment, as incorporated by the Fourteenth Amendment, on appeal Ramos mostly disclaimed reliance on the Sixth Amendment and instead focused on an equal-protection

challenge. R.181; *Pro se* Supplemental Brief on Appeal, 16.[1] On November 2, 2017, the Louisiana Court of Appeal for the Fourth Circuit rejected Ramos's claims, both counseled and *pro se*, and affirmed his conviction and sentence. Pet. App. A1, 3.

The court of appeal denied Ramos's claim that he was entitled to a unanimous jury verdict because it was bound by precedent from both this Court, the Louisiana Supreme Court, and by prior decisions of its own court. *Id.* at A9-10 (citing, *inter alia*, *Apodaca v. Oregon*, 406 U.S. 404 (1972); *State v. Bertrand*, 6 So.3d 738, 743 (La. 2009); *State v. Hickman*, 194 So.3d 1160, 1168–1169 (La. App. Ct. 2016)). Ramos applied for supervisory review thereafter in the Louisiana Supreme Court.[2] The Court denied relief without assigning reasons on June 15, 2018. *Id.* at A11.

REASONS FOR DENYING THE PETITION

Certiorari is unwarranted because Ramos fails to show any new or compelling justification for departing from the doctrine of *stare decisis* to overrule this Court's holding in *Apodaca v. Oregon*, 406 U.S. 404 (1972). No recent developments in this Court's Sixth Amendment jurisprudence justify upsetting longstanding precedent in the manner Ramos proposes. To the contrary, this Court has not questioned *Apodaca* and has cited it positively a number of times. And it recently confirmed that *Apodaca* "does not undermine the well-

[1] "Unlike the familiar Sixth Amendment challenge to this State's non-unanimous jury regime, a challenge the Louisiana Supreme Court has rejected, the Equal Protection challenge presented in this case has not been addressed on the merits by any court." *Pro se* Supplemental Brief on Appeal, 16. *State v. Ramos*, 2016-KA-1199 (La. Ct. App. 2017). But he briefly made the Sixth Amendment argument on page 24 of his *pro se* appellate brief filed with the intermediate court of appeal.

[2] Here again, Ramos wrote that he was not fully presenting "the familiar Sixth Amendment challenge to this State's non-unanimous jury regime." Application at 19, *State v. Ramos*, 2017-KO-2133 (La. 2017). In the main, Ramos' arguments before the Louisiana appellate courts centered on the Equal Protection Clause. But, again, he briefly made the Sixth Amendment argument on page 25 of his application filed with the Louisiana Supreme Court.

established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald v. City of Chicago*, 561 U.S. 742, 766, n. 14 (2010).

Neither the Sixth Amendment nor the Fourteenth (as a matter of incorporation) requires a unanimous jury verdict in a criminal case. A review of the original meaning of the Sixth Amendment reveals no reason to revisit the result in *Apodaca*. Also, Ramos has not shown that Louisiana's current provisions for less-than-unanimous jury verdicts were impermissibly motivated by race.

A. The doctrine of stare decisis counsels against overruling *Apodaca v. Oregon*.

1. *This Court's stare decisis jurisprudence shows that this petition is not worthy of a grant of certiorari.*

Despite regular invitations to do so, this Court has repeatedly declined to grant certiorari to review this issue. *See, e.g., Barbour v. Louisiana*, 562 U.S. 1217 (2011); *Louisiana v. Miller*, 568 U.S. 1157 (2013); *McElveen v. Louisiana*, 568 U.S. 1163 (2013); *Louisiana v. Hankton*, 135 S.Ct. 195 (2014); *Louisiana v. Webb*, 135 S.Ct. 1719 (2015); *Baumberger v. Louisiana*, 138 S.Ct. 392 (2017); *Mincey v. Vannoy*, 138 S.Ct. 394 (2017); *Dove v. Louisiana*, 138 S.Ct. 1279 (2018); *Sims v. Louisiana*, 138 S.Ct. 1592 (2018); *Bowen v. Oregon*, 558 U.S. 815 (2009); *Herrera v. Oregon*, 562 U.S. 1135 (2011). Ramos offers no new or compelling reason to proceed differently here.

Today's Court would, without doubt, approach a great many of its precedents differently as matters of first impression.[3] If, as Ramos suggests, that alone is enough to call those

[3] For example, this Court's "governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation." *McDonald*, 561 U.S. at 765, n. 13. This Court's reasoning, regardless of the potential for a different outcome, would be different had those issues arisen for the first time today rather than more than a century ago. *See Hurtado v. California*, 110 U.S. 516 (1884); *Minneapolis & St. Louis Railroad Company v. Bombolis*, 241 U.S. 211 (1916).

precedents into doubt, then *stare decisis* has no meaning. The doctrine of *stare decisis* "is of fundamental importance to the rule of law" and departures from it demand "special justification." *Welch v. Department of Highways & Public Transportation*, 483 U.S. 468, 494, 495 (1987) (citations omitted). This is true even in constitutional cases. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). This Court does not depart from *stare decisis* absent "compelling justification" because it "promotes stability, predictability, and respect for judicial authority." *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991) (citations omitted).

The factors to consider when applying *stare decisis* are the age of the precedent, the reliance interests at stake, the workability of the earlier decision, and the quality of the reasoning. *Montejo v. Louisiana*, 556 U.S. 778, 792-793 (2009). All support leaving *Apodaca* undisturbed. First, *Apodaca* is 46 years old, and Louisiana (as well as Oregon) has relied on it since 1972 to instruct jurors in felony trials that they may return non-unanimous verdicts.

Next, the reliance interests at stake here are high. Overruling *Apodaca* would bring great instability and unpredictability to Louisiana and Oregon. Thousands of final convictions in these two states could be upset if such a new rule were later declared retroactive. Although the State would contend that a new rule requiring unanimous verdicts in state criminal cases should not be applied retroactively during collateral review, the outcome of such a hypothetical case is not certain and a flood of defendants undoubtedly would immediately file motions claiming otherwise. *Cf. Schriro v. Summerlin*, 542 U.S. 348, 353-358 (2004); *Beard v. Banks*, 542 U.S. 406 (2004). Indeed, one professor noted that "the number of [Oregon] juries rendering verdicts with one or two holdouts is 25 percent of all juries."[4] The potential that about one out of every

[4] Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy*, 199 (BasicBooks 1994). Considering the purpose of Oregon and Louisiana's non-unanimity rule (judicial efficiency), this number makes sense because a non-unanimity rule will result in far fewer mistrials. In *The American Jury*, the authors found that

four jury trials since 1934 in two states would need to be retried would create instability, even if this Court left the decision on retroactivity for another day. *See* Or. Const. art. I, § 11 (1934).[5]

Another important *stare decisis* factor is workability. *Montejo*, 556 U.S. at 792. ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.") (citation omitted). The *Apodaca* and *Johnson* decisions provide a workable rule that is both clear and easy to apply here—the verdict in this non-capital felony may be returned by the concurrence of ten of twelve jurors.[6] Because these decisions do not defy consistent application, this factor also weighs against vacating this Court's precedent. *See Pearson v. Callahan*, 555 U.S. 223, 235 (2009).

Furthermore, the Court has not questioned *Apodaca* and *Johnson* and has cited one or both of them without reservation. *E.g., Schad*, 501 U.S. at 634, n. 5 (plurality) ("a state criminal defendant, at least in noncapital cases, has no right to a unanimous jury verdict"); *Burch v. Louisiana*, 441 U.S. 130, 136 (1979) ("a jury's verdict need not be unanimous to satisfy constitutional requirements"); *Brown v. Louisiana*, 447 U.S. 323, 330-331 (1980) ("the constitutional guarantee of trial by jury" does not prescribe "the exact proportion of the jury that must concur in the verdict.").

2. *This Court's recent Sixth Amendment cases do not cast doubt upon Apodaca.*

No new developments or re-examination of Founding-era history supports overruling a decision upon which Louisiana has relied for almost 50 years. This Court's decision in *McDonald* did not provide any new justification for overruling *Apodaca*. There, this Court observed that protections within the Bill of Rights that are incorporated apply identically to the

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"[t]he jurisdictions that allow majority verdicts have… 45 per cent fewer hung juries than those that require unanimity." Harry Kalven, Jr. & Hans Zeisel, *The American Jury*, 461 (Little, Brown and Company 1966).

[5] Louisiana's non-unanimous jury verdict rule predates 1934.

[6] This Court has never had the opportunity to decide whether the rule of *Apodaca* would apply to a capital case. *See Schad v. Arizona*, 501 U.S. 624, 630 (1991) (plurality opinion). This case does not present that issue.

States and the Federal Government. *McDonald*, 561 U.S. at 765. That rule was well established by 1972. *Cf. Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) ("The Court thus 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.'") (citation omitted). *McDonald* did not alter the incorporation test and does not provide a compelling basis to reconsider *Apodaca*. Indeed, the *McDonald* Court agreed that *stare decisis* is an acceptable rule of decision: "[I]f a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States…." 561 U.S. at 784-785 (footnote omitted) (plurality).

The other cases cited by Ramos, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Southern Union Company v. United States*, 567 U.S. 343 (2012), refer to William Blackstone's prescription 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," *Apprendi*, 530 U.S. at 477 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769)). But that quote from the *Commentaries* was known to the Founders and in 1972, when *Apodaca* was decided.

In December 2017, a Louisiana man petitioned this Court for certiorari following non-unanimous jury verdicts resulting in felony convictions. The Court denied his petition earlier this year. *Sims*, 138 S.Ct. at 1592.

B. Petitioner's historical arguments provide no reason to revisit *Apodaca*.

1. *Neither the text of the Sixth Amendment nor intent of the Founders suggests that the Sixth Amendment contains a requirement of unanimity.*

Although the *Apodaca* plurality did not solely rely on history in concluding the Sixth Amendment contains no requirement of unanimity, it found that the historical record suggests the Founders did not intend the requirement to be contained within the Sixth Amendment. 406 U.S. at 409-410 ("One possible inference is that Congress eliminated references to unanimity and to the other 'accustomed requisites' of the jury because those requisites were thought already to be implicit in the very concept of jury. A contrary explanation, which we found in *Williams* to be the more plausible, is that the deletion was intended to have some substantive effect.") (citing *Williams v. Florida*, 399 U.S. 78, 96-97 (1970)). That finding was correct. Because the original meaning of the right to a jury trial in the Sixth Amendment does not require a finding of unanimity, the analysis should end. *Cf. Crawford v. Washington*, 541 U.S. 36 (2004).

History has not changed. As the plurality in *Apodaca* observed, "the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century." 406 U.S. at 407-408 (footnotes omitted).[7] Yet the text of the Sixth Amendment does not reference a unanimity requirement. And "the relevant constitutional history casts considerable doubt on 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 408-409 (citation and ellipses omitted). A majority of this Court reached precisely that conclusion in *Williams*. *See* 399 U.S. at 92.

As *Williams* explained, not all common law traditions have been grafted upon the word "jury" in the Sixth Amendment. The "usual expectation" that a jury would consist of twelve men did not elevate the rule to constitutional stature. *Williams*, 399 U.S. at 98, n. 45. Similarly, although at "common law jurors were forbidden to impeach their verdict, either by affidavit or

[7] This Court has recognized unanimous jury verdicts were not uniformly accepted by American colonists throughout that entire period of our history in Connecticut, Pennsylvania, and in the Carolinas. *Williams*, 399 U.S. at 98, n. 45.

live testimony," the no-impeachment rule is statutory, rather than constitutional in stature, and subject to exceptions. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 863 (2017); *see also* Fed. R. Evid. 606(b); La. C.E. art. 606(B).

The "most salient fact" that shows that the Sixth Amendment does not include a unanimity requirement is that, as originally proposed by James Madison, the Amendment required a trial "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." *Apodaca*, 406 U.S. at 409 (citing 1 Annals of Cong. 435 (1789)). Although other inferences can be drawn from the refusal to adopt Madison's language, a plurality of this Court found the "more plausible" inference to be that "the deletion was intended to have some substantive effect." *Id*. at 410 (citation omitted). A majority of this Court found the same inference more plausible in *Williams*. 399 U.S. at 97.

What eventually became the Sixth Amendment was sent to a conference committee after the House of Representatives and the Senate could not agree on the text. *Id*. at 94-95. Although the House's version included Madison's unanimity requirement, the Senate deleted it and later refused to adopt a "motion to restore the words providing for trial 'by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites.'" *Id*. at 94, n. 37. Later that month, September 1789, Madison wrote a letter to Edmund Pendleton describing the Senate's position during the conference committee proceedings. "It was proposed to insert after the word Juries, 'with the accustomed requisites,' leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained…." *Id*. at 95-96. This statement suggests that the Senate was concerned

with a unanimity requirement separate and apart from any concerns of the also-deleted vicinage requirement.

James Madison's letter explained that the reason why "the accustomed requisites" bothered Senate members was because they could not agree on the meaning of the phrase: "The truth is that in most of the States the practice is different, and hence the irreconcilable difference of ideas on the subject."[8] The proper inference, therefore, is that the Founders did not intend for the jury requirement in the Sixth Amendment to include common law features typical at the time because the matter was considered and rejected.

Madison's proposal was not the only one that would have had the effect of adopting a unanimity requirement. The Virginia, North Carolina, Rhode Island, and New York state conventions (as well as the Pennsylvania Minority) offered amendments substantially similar to Madison's.[9] And although Alexander Hamilton was particularly critical of it, there was a suggestion within the Pennsylvania Minority Report that the first amendments to the Constitution should include the phrase "Trial by jury shall be as heretofore."[10] Yet the Founders did not adopt it.

By contrast, the 1792 Delaware Constitution provided that institution of a trial by jury would remain "as heretofore"—as the Pennsylvania Minority would have had the federal Constitution read. *Id*. This commonsense phrase meant that the right to a trial by jury would also protect ancillary common-law features, like unanimity. And when the time came, the Delaware Court of Common Pleas interpreted its 1792 state constitutional provision as requiring "the unanimous consent of an impartial jury." Hon. Randy J. Holland, *Symposium on Tomorrow's*

[8] *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 481 (Neil H. Cogan ed., 1997).
[9] *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, at 401-402.
[10] *The Federalist* 83, p. 565 (Easton Press ed. 1979) (Hamilton).

Issues in State Constitutional Law: State Jury Trials and Federalism: Constitutionalizing Common Law Concepts, 38 VAL. U.L. REV. 373, 399-400, n. 137 (2004) (quoting *Wilson v. Oldfield*, 1 Del. Cas. 622, 624-627 (Del. Ct. Comm'n Pleas 1818)) (emphasis added).[11] Likewise, Section XXII of New Jersey's 1776 Constitution retained the common law of England "as have been heretofore practised in this Colony…" which would have had the effect of requiring a unanimous verdict. *See also* N.Y. Const. of 1777, §§ XXXV, XLI (similar); *People v. Olcott*, 2 Johns. Cas. 301, 309-310, 1801 N.Y. LEXIS 54, *15 (Sup. Ct. of Judicature N.Y. 1801).[12]

Not only could the United States Congress have adopted general language protecting the right to a trial by jury with the requisites adopted at common law, it could have been even more explicit. Indeed, "[f]our 18th-century state constitutions provided explicitly for unanimous jury verdicts in criminal cases." *Apodaca*, 406 U.S. at 408, n. 3 (citing N. C. Const. of 1776, Art. IX; Pa. Const. of 1776, Art. IX; Vt. Const. of 1786, Art. XI; Va. Const. of 1776, § 8). Maryland and Delaware should have also been added to that list. Article XIX of Maryland's 1776 Constitution required a jury "without whose unanimous consent [the defendant] ought not to be found guilty."[13] Section 14 of Delaware's 1776 Declaration of Rights similarly guaranteed unanimity in this way.[14]

If the Founders had wanted to ensure that the Sixth Amendment protected the common law tradition of unanimity (and a significant number of factions wanted to do precisely that),

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[11] Delaware's Constitutions have always contained a unanimity requirement because Delaware's 1776 Declaration of Rights guaranteed unanimity and because "such was the common law rule." *Fountain v. Delaware*, 275 A.2d 251, 251 (Del. 1971) (citation omitted); *Wilson*, 1 Del. Cas. at 623-627; Del. Decl. of Rights and Constitution, § 14 (Sept. 11, 1776); *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, at 402. Current Article I, § 4 of the Delaware Constitution still provides "Trial by jury shall be as heretofore."

[12] *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, at 408, 409.

[13] *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, at 403. Article III also stated in part: "That the inhabitants of Maryland are entitled to the common law of England, and the trial by Jury, according to the course of that law…." *Id*.; *see also Apodaca*, 406 U.S. at 408, n. 3 (citing Md. Const. of 1776, Art. III).

[14] *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, at 402.

they could have done so. "[C]ontemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect." *Williams*, 399 U.S. at 97.

The Founders also understood that the sovereign would have considerable deference in determining how the right to a jury trial would be effectuated. In Hamilton's *Federalist* 83, he wrote:

> A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases….

The Federalist 83, p. 557 (Easton Press ed. 1979) (Hamilton).

Hamilton's statements suggest that the Founders did not intend for the United States Constitution to require all of the typical features a common law jury would provide.

Prior to the passage of the Sixth Amendment, the right to a trial by jury in a criminal case was already protected by Article III, § 2 of the Constitution.[15] Like the tradition of a twelve-person jury, the Founders did not understand "the mere reference to 'trial by jury' in Article III" to include the requirement of unanimity, "as the subsequent debates over the Amendments indicate." *Cf. Williams*, 399 U.S. at 96. Indeed, when George Washington described the Philadelphia Convention to the Marquis de Lafayette in April 1788 he wrote that, as to trials by jury, there "was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future

[15] U.S. Const. Art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed….")

adjustment."[16] As a matter of original meaning, therefore, the substantially similar phrase in the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…" cannot be interpreted to contain a requirement of unanimity. As this Court held, "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id*. at 99.

C. The Petitioner's incorporation and historical racial discrimination arguments do not warrant certiorari either.

1. *Unanimity is not subject to incorporation because it is not a fundamental right of trial procedure.*

The text of the Sixth Amendment does not contain a unanimity requirement. Given the evidence that the Founders did not intend the Sixth Amendment to implicate a unanimity requirement, the fact that there is a longstanding—albeit not universal—tradition of unanimous jury verdicts (*see* Pet. 11-14) does not prove much.

There is no showing here that liberty or justice does not exist without jury unanimity. This is not a case like *Loving v. Virginia*, or the many other cases in this Court's history that deal with rights that are personal and substantive. 388 U.S. 1 (1967). Nor is this unenumerated procedure so rudimentary that a trial is not really a trial without it. By contrast, "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970).

Unanimity cannot be ranked in the same category as *Winship* or other fundamental precepts, like the presumption of innocence. As the plurality in *Johnson* reasoned, "[t]hat rational

[16] *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, at 478.

men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." 406 U.S. at 362. That is so because convictions are sustained even when "the jury would have been justified in having a reasonable doubt, even though the trial judge might not have reached the same conclusion as the jury, and even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction." *Id*. at 362-363 (citations omitted).

Moreover, courts do not question the validity of the jury's verdict where a non-unanimous jury hangs but the prosecution obtains a conviction after a second trial. "If the doubt of a minority of jurors indicates the existence of a reasonable doubt, it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial." *Id*. at 363. Further, "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Schad,* 501 U.S. at 631 (plurality) (citation omitted); *see also Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016). So this Court also permits jurors to have inconsistent views of the essential facts of a given case.

With enough jurors there will be differences of opinion, no matter the proof. *Cf. Johnson*, 406 U.S. at 362. ("[T]he State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors… it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors."). There is no clear data that non-unanimous juries are more inaccurate than unanimous juries such that a trial cannot be considered just if a non-unanimous verdict is rendered.

Nor, finally, is *Apodaca* contrary to international practice. England, among other common law jurisdictions, does not require unanimous criminal verdicts.[17] Many other civilian countries similarly allow non-unanimous criminal jury verdicts. In addition to English common law, Louisiana law also arises from Spanish and French civilian legal traditions as both countries ruled Louisiana's territory. *See, e.g.*, *Succession of Lauga*, 624 So.2d 1156, 1159 (La. 1993). Neither of those two countries employs a unanimous jury verdict system.[18]

2. *The history of Louisiana does not counsel in favor of overruling Apodaca.*

Ramos suggests that Louisiana's non-unanimous jury verdict system is impermissibly motivated by race. This argument lacks merit. First, although historical sources show that delegates at Louisiana's 1898 Constitutional Convention were impermissibly race-motivated with regard to some matters, *see, e.g.*, *State v. Webb*, 133 So.3d 258, 283-284 (La. Ct. App. 2014), it does not follow that every action taken by that Convention was motivated by racist intent.[19] The convention also strove to "[s]hape a judiciary system which will relieve the parishes of the enormous burden of costs in criminal trials, and . . . to present to the people of this State a judiciary system which shall be both efficient and economical." *Id*. at 284 (quoting OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 10 (1898)). As a plurality of this Court noted, "[r]equiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit." *Apodaca*, 406 U.S. at 411

[17] England and Wales have adopted the Juries Act of 1974 and currently permit non-unanimous verdicts if the deliberations have been lengthy. Legislation.gov.uk, *Juries Act 1974*, https://www.legislation.gov.uk/ukpga/1974/23/section/17?view=extent&timeline=true (last accessed November 1, 2018). Malta, another common law jurisdiction and a part of the British Empire until 1964, similarly provides for non-unanimous jury verdicts. Kenneth Klein, Student Article, *Comparative Jury Procedures: What a Small Island Nation Teaches the United States About Jury Reform*, 76 LA. L. REV. 447, 450-452 (2015).

[18] Mar Jimeno-Bulnes, *Symposium: The 50th Anniversary of 12 Angry Men: Deliberation in 12 Angry Men*, 82 CHI.-KENT L. REV. 759, 765-766 (2007) (Spain); Valerie P. Hans & Claire M. Germain, *Symposium on Comparative Jury Systems: The French Jury at a Crossroads*, 86 CHI.-KENT L. REV. 737, 747 (2011) (France).

[19] For example, a mundane matter like an ordinance affecting public roads was unlikely to be motivated by racial animus. *See* OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 17 (1898).

(footnote omitted).[20] There is no convincing evidence demonstrating that the 1898 Constitution's specific authorization of non-unanimous jury verdicts was based on racism rather than judicial efficiency.[21]

Moreover, "history did not end in" 1898. *Cf. Shelby County v. Holder*, 133 S.Ct. 2612, 2628 (2013). The 1898 Louisiana Constitution is long defunct, having been superseded by several more recent state constitutions. *Cf. Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (observing that if a law is struck down "because of the bad motives of its supporters," "it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."). The most recent State Constitution was adopted in 1974 and allows ten-out-of-twelve verdicts. LA. CONST. art. I, § 17(A). Records from the constitutional convention show this considered choice was not motivated by any race animus. "The revision of a less-than-unanimous jury requirement in the 1974 Constitution was not by routine incorporation of the previous Constitution's provisions; the new article was the subject of a fair amount of debate." *State v. Hankton*, 122 So.3d 1028, 1038 (La. App. Ct. 2014). The "1973 Constitutional Convention debated the issue of less-than-unanimous jury verdicts when it changed the required number of jurors concurring from nine out of twelve to ten out of twelve." *Id.* The stated purpose (again) was judicial efficiency. Moreover, the 1974 Louisiana Constitution "was adopted by a vote of the people." *Id.* There is no suggestion or contemporary evidence of popular appeals to

[20] *See also* n. 2, *supra*. Reducing hung juries is a laudable goal. Hung juries crowd courts, place tremendous emotional and financial strains on defendants, drain state treasuries, and "give the public the impression that the justice system is not working." Michael H. Glasser, Student Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 660-661 (1997) (footnotes omitted). While both the prosecution and the defense can benefit from a retrial after a mistrial because both sides were given a "dress rehearsal," mistrials can also indirectly prevent retrials because witnesses disappear, refuse to testify, or their memories have faded. *Id*. at 660.

[21] *See also Oregon v. Sagdal*, 343 P.3d 226, 231 (Or. 2015) ("[V]oters would have understood that this constitutional amendment [contained in Or. Const. art. I, § 11] was intended to increase the efficiency of the courts by providing for nonunanimous verdicts.").

race as a reason for the passage of the non-unanimous-verdict provision of the 1974 Constitution, or any that preceded it. It is this provision, not Article 116 of the 1898 Louisiana Constitution, that applied to these proceedings.

Ramos has chosen not to "take on the responsibility to prove that the non-unanimous jury verdict proceeds on an unbroken line of racism from 1898 to 2018…" Pet. 26. Presumably he made this choice because, even if one accepts his (at best) circumstantial evidence that the 1898 constitutional convention provided for non-unanimous verdicts because of race, he cannot prove that the 1974 Louisiana Constitution was infected with racial animus. Ramos has also chosen not to include here his claim below that the non-unanimous jury law violates the Equal Protection Clause. This may be so because, in order to succeed, the Defendant must prove that the 1974 state constitutional article allowing non-unanimous juries was enacted with racist intent. *Cf. Abbott v. Perez*, 138 S.Ct. 2305, 2324 (2018) ("Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State.") (citation omitted). The *Perez* case illuminates this issue. Like the Louisiana Constitutional Convention, the 2013 Texas Legislature "was not obligated to show that it had 'cured' the unlawful intent that the court attributed to the 2011 [Texas] Legislature." *Id*. at 722. "The 'historical background' of a legislative enactment is 'one evidentiary source' relevant to the question of intent. But we have never suggested that past discrimination flips the evidentiary burden on its head." *Id*. at 2325 (citing *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). Therefore, "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Id*. at 2324.

3. *Other procedural safeguards and policy considerations further undermine any purported need to revisit Apodaca.*

This Court has created an elaborate system required by the United States Constitution to root out racism during jury deliberations. The suggestion that Louisiana's rule "silence[s] minority jurors" is unfounded. Pet. 26.

If any Louisiana juror was significantly motivated to convict a person because of his or her race that conviction should not stand, regardless of whether the verdict was unanimous.

Also, the ideal of a jury containing a cross-section of the community was founded upon neutralizing systemic biases as much as possible rather than ensuring that a certain quota of racial, ethnic, or gender groups exist within every jury.[22] The *Apodaca* plurality wrote that "[n]o group… has the right to block convictions; it has only the right to participate in the overall legal processes by which criminal guilt and innocence are determined." 406 U.S. at 413.

Moreover, the very idea that a juror should have to be the representative of a larger identity group in a jury deliberation room is a misunderstanding of the role of a juror. "[P]eople have sympathies and prejudices, and of course they cannot leave all of them at the door, but jurors should be encouraged to leave as many as they can. This country has made great strides, at great expense in blood and money, toward realizing a good and noble self-image." *Ten Reasonable Men*, 38 AM. CRIM. L. REV. at 192, n. 47. But "[t]o encourage, or even to condone, a juror's approaching his task in terms of whether he has a dog in the fight is to take a very big step backward." *Id*.

A plurality of this Court refused to "assume… that a majority [of a jury] will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal." *Apodaca*, 406 U.S. at 413. The suggestion that jury deliberations are not really deliberations at all because of the non-unanimity rule relies on an "essential premise,

[22] *See* Richard H. Menard, Jr., Student Note, *Ten Reasonable Men*, 38 AM. CRIM. L. REV. 179, 192 (2001); *see also Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

which is that 10 or 11 jurors who are persuaded that a defendant is guilty will not listen to counter-arguments if it means being late for dinner. It is conceivable that the average juror is so base, but it seems fairer to assume that most Americans take the job a bit more seriously…." *Ten Reasonable Men*, 38 AM. CRIM. L. REV. at 195.

Non-unanimity does not solely benefit either the State or a criminal defendant. According to Professor Abramson, "[a]ll studies confirm that the ratio of convictions to acquittals would not significantly change" between unanimous conditions and "9-3 or 10-2 verdict rules." *We the Jury*, p. 201; *see also Apodaca*, 406 U.S. at 411, n. 5 ("The most complete statistical study of jury behavior has come to the conclusion that when juries are required to be unanimous, 'the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it.'") (citing *The American Jury* at 461). Both in unanimous conditions and non-unanimous conditions, where juries reach a verdict, they convict about two-thirds of the time and acquit one-third of the time. *The American Jury* at 461.

The Founders did not intend the Sixth Amendment to include a unanimity requirement. The suggestion that neither liberty nor justice exists when a non-unanimous verdict is reached was properly rejected by this Court 46 years ago. There is no compelling reason to revisit these issues because this Court considered the same arguments (and essentially the same evidence) in 1972.

D. The people's decision to amend their state constitution to prospectively eliminate non-unanimous juries makes this petition less worthy of certiorari.

On November 6, 2018, the voters of Louisiana chose to require unanimous verdicts in all cases where the offense was committed on or after January 1, 2019. *See* 2018 La. Reg. Sess., Act 722.

Rule X of this Court lists two general considerations when this Court chooses to exercise its power to review a state court decision. The first is whether there is a conflict between the decision below and the federal courts of appeals or the other state courts of last resort. Sup. Ct. R. X(b). There is no such conflict here. The second is whether the case presents an important federal question "that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id*. As *Apodaca*, *Johnson*, and subsequent cases show, the question presented has been settled. Ramos's argument is that subsequent cases and experience suggest revisiting a settled question in spite of *stare decisis*.

The change to Louisiana's constitution considerably lessens the importance of the question presented. The procedure at issue only occurs in two states out of fifty. Although this case is not moot, the alleged importance of the federal question has been further diminished. In a few years, Louisiana will no longer have trials with non-unanimous juries. Given how many times over the past 46 years this Court has refused to review Louisiana's non-unanimous jury system, this moment would be an odd one in which to choose to intervene. Louisianans have just chosen for themselves, expressed in their own state's constitution, that they want unanimous juries and have chosen to make the rule apply only to crimes committed next year and beyond.

CONCLUSION

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

Respectfully submitted,

/s/ Colin Clark

JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL
Solicitor General
COLIN CLARK*
Assistant Solicitor General
PAMELA S. MORAN
Assistant Attorney General
*Counsel of Record
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6200
clarkc@ag.louisiana.gov

LEON A. CANNIZZARO. JR.
District Attorney,
Parish of Orleans
CHRISTOPHER J. PONOROFF
Assistant District Attorney
619 S. White Street
New Orleans, LA 70119
(504) 822-2414
cponoroff@orleansda.com