No. 18-5924

IN THE

Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

LOUISIANA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict to convict.

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BRIEF FOR PETITIONER

Petitioner Evangelisto Ramos respectfully requests that this Court reverse the judgment of the Louisiana Fourth Circuit Court of Appeal.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal (J.A. 3-23) is published at 231 So. 3d 44. The Louisiana Supreme Court's order (J.A. 24) denying review of that decision is published at 257 So. 3d 679.

JURISDICTION

The opinion of the Louisiana Court of Appeal was issued on November 2, 2017. The Louisiana Supreme Court denied review of that decision on June 15, 2018. Petitioner filed a petition for a writ of certiorari on September 7, 2018, which this Court granted on March 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "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."

At all times relevant to this case, Section 17(A) of Article I of the Louisiana Constitution provided in relevant part: "A case in which the punishment is

necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict."

At all times relevant to this case, article 782(A) of the Louisiana Code of Criminal Procedure provided in relevant 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."

STATEMENT OF THE CASE

Last Term, this Court reaffirmed the "'well-established rule'" that "if a Bill of Rights protection is incorporated" against the states, "there is no daylight between the federal and state conduct it prohibits or requires." *Timbs v. Indiana*, 139 S. Ct. 682, 687 & n.1 (2019) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010)); *see also, e.g.*, *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964). In a footnote, the Court added: "The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings." *Timbs*, 139 S. Ct. at 689 n.1 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)). This case concerns the propriety of that aberration in this Court's jurisprudence.

A. Historical background

1. Louisiana became a state in 1812. At the time, every state in the Union—consistent with the common law and the uniform practice at the Founding—required juries to vote unanimously to convict a defendant of a nonpetty offense. *See* Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 179 (1994). For the next three-quarters of a century, including when the states

ratified the Fourteenth Amendment, Louisiana, too, required unanimous jury verdicts in all criminal cases.

Yet following Reconstruction, many in Louisiana became increasingly concerned about the ability of African-Americans to exercise "political and legal power." *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist. Oct. 11, 2018), J.A. 39 (citing historian's expert testimony)[1]; *see also* Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Jury Verdicts in Louisiana* 22 (2015). In 1896, African-American citizens flocked to the polls and nearly facilitated the election of a black governor. *Maxie*, J.A. 39. And most relevant here, this Court held in *Strauder v. West Virginia*, 100 U.S. 303 (1879), that the Fourteenth Amendment prohibited excluding residents from jury duty on the basis of race. As a result, African-Americans increasingly appeared in jury pools and participated in petit juries. *See Maxie*, J.A. 39.

White Louisianans responded with alarm to these developments. In one 1895 trial, for example, the judge asserted that when African-Americans were included on juries, "there was no possibility of just verdicts." *Maxie*, J.A. 43. Louisiana newspapers at the time similarly decried black jurors as ignorant, susceptible to bribery, and likely to hijack sentencing outcomes. Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of*

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[1] In *Maxie*, the Louisiana District Court held an evidentiary hearing, and then wrote a detailed opinion, analyzing the origins and current effects of Louisiana's nonunanimous verdict rule. The parties later reached a plea agreement, mooting any appeal. So petitioner cites the opinion only for its factual findings, not any legal conclusions. Because the opinion is not readily available online, it is reproduced at J.A. 25-83.

Criminal Justice in Louisiana, 72 La. L. Rev. 361, 376 & n.80 (2012) (collecting articles).

In 1898, Louisiana called a constitutional convention—one of several throughout the South that cemented the legal restrictions of the Jim Crow era. *See* Michael Perman, *Struggle for Mastery: Disenfranchisement in the South, 1888-1908*, at 16 (2001). As this Court has observed, the purpose of the convention was to "assur[e] white political supremacy" in the State. *Louisiana v. United States*, 380 U.S. 145, 152 (1965); *see also* Constitutional Convention of the State of Louisiana, *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 380-81 (H.J. Hearsey ed., 1898). A Democratic Party advertisement explicitly rallied people behind this cause, stating the purpose of the Convention was to eliminate "the vast mass of ignorant, illiterate and venal negroes from the privileges of the elective franchise." Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1612 (2018) (quoting advertisement).

The new constitution that emerged from this convention imposed, among other things, a poll tax and a combination literacy test and property qualification for voting. The 1898 Constitution also included the infamous Grandfather Clause, exempting white residents from these requirements. *See Louisiana*, 380 U.S. at 147-48; Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 Harv. L. Rev. 279, 286-87 (1899).[2]

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[2] As this Court has observed, the State used the Grandfather Clause and subsequent measures adopted with the same

Louisiana's 1898 Constitution also changed the voting rules applicable to juries. Abandoning the preexisting unanimity requirement, the new constitution permitted juries to convict a criminal defendant of any non-capital felony with the concurrence of only nine of twelve jurors. La. Const. of 1898, art. CXVI.

2. Louisiana remained the only state to permit nonunanimous jury verdicts for nonpetty convictions until 1934, when Oregon adopted a comparable law. At the time, Oregon was roiled by growing nativism and bigotry, including the rise of the Ku Klux Klan. *See* Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 Or. L. Rev. 1, 4-6 (2016); *State v. Williams*, No. 15-CR-58698 (Or. Cir. Ct. Dec. 15, 2016), J.A. 98-99.[3]

Most notably, Oregonians fixated on the trial of Jacob Silverman. Silverman was a Jewish man accused of murder. Kaplan & Saack, *supra*, at 3; *Williams*, J.A. 101. The jury returned a manslaughter verdict, coming up one vote short of a murder conviction. Shane Dixon Kavanaugh, *Inside the Gangland Murder That Gave Oregon Its Unusual Jury System*, The Oregonian (Sept. 2017). *The Morning Oregonian* responded with furious editorial coverage

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objective "with phenomenal success to keep Negroes from voting in the State." *Louisiana*, 380 U.S. at 152. When the clause was adopted, "approximately 44% of all the registered voters in the State were Negroes." *Id.* at 147. For many decades after, "the percentage of registered voters in Louisiana who were Negroes never exceeded one percent." *Id.* at 148.

[3] The *Williams* opinion is reproduced at J.A. 84-124.

complaining that "the vast immigration into America from southern and eastern Europe, of people untrained in the jury system," had made the "jury of twelve increasingly unwieldy and unsatisfactory." *Williams*, J.A. 102.

In response to rising public anger over the Silverman trial, the Oregon Legislature proposed a constitutional amendment to allow convictions for any crime except first-degree murder so long as ten of twelve jurors found the defendant guilty. The voter pamphlet explicitly cited the Silverman trial as support for the amendment. *Williams*, J.A. 103. The press supported the initiative, contrasting "white" jurors with those of "mixed blood"; warning against immigrant participation on juries; and claiming that certain "peoples in the world" were "unfit for democratic institutions." *Id.* 104. Voters passed the amendment, and it became law shortly thereafter. *Id.* 102; Or. Const. art. I, § 11.

3. In the 1960s and early 1970s, this Court decided a series of cases holding that the Fourteenth Amendment's Due Process Clause required states to abide by the provisions of the Bill of Rights. Among those decisions was *Duncan v. Louisiana*, 391 U.S. 145 (1968), holding that the Sixth Amendment's guarantee of trial by jury applies to the states. Because the Court had previously held that the Sixth Amendment required "[u]nanimity in jury verdicts," *Andres v. United States*, 333 U.S. 740, 748 (1948), *Duncan* gave rise to the question whether the nonunanimity laws in Louisiana and Oregon violated the Fourteenth Amendment.

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), the Court

considered that question. The result was a tangle of seven separate opinions. Five Justices adhered to the Court's prior decisions holding that the Sixth Amendment requires unanimity. *See Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); *Johnson*, 406 U.S. at 381-83 (Douglas, J., dissenting in *Apodaca*). Four of those five Justices also concluded the incorporation doctrine required the states to abide by the Sixth Amendment's unanimity requirement. *Apodaca*, 406 U.S. at 414-15 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting in *Apodaca*). No other outcome, those Justices explained, was available under the Court's Fourteenth Amendment precedent, which established that "once it is decided that a particular Bill of Rights guarantee [applies to the states], the same constitutional standards apply against both the State and Federal Governments." *Johnson*, 406 U.S. at 385 (Douglas, J., dissenting in *Apodaca*) (internal quotation marks and citations omitted).

Yet Justice Powell refused to follow this precedent. Instead, he cast his deciding vote based on his belief that "due process does not require the States apply the federal jury-trial right with all its gloss." *Johnson*, 406 U.S. at 369-71 (Powell, J., concurring in the judgment in *Apodaca*). Justice Powell conceded that it was "perhaps late in the day" for an expression of this view. *Id.* at 375. But he was "unwilling[] to accept the 'incorporationist' notion that jury trial must

be applied with total uniformity" to the states. *Id.* at 375 n.15.[4]

In light of this splintered vote, the Court upheld the practice of allowing criminal convictions where some jurors disagreed with the verdict. *Apodaca*, 406 U.S. at 406 & n.1; *Johnson*, 406 U.S. at 366 (Powell, J., concurring in the judgment in *Apodaca*). As this Court later put it, *Apodaca* "held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." *McDonald*, 561 U.S. at 766 n.14; *see also Johnson*, 406 U.S. at 383 (Douglas, J., dissenting in *Apodaca*) (explaining the holding of *Apodaca* the same way at the time).

4. Oregon law has not changed since 1972. But in the years following *Apodaca*, Louisiana amended—and then recently abandoned—its nonunanimity rule. In 1973, the State amended its Constitution to require ten, instead of nine, out of twelve jurors to concur in a guilty verdict. *See* La. Const. art. I, § 17(A) (1974); *see also* La. Code Crim. Proc. Ann. art. 782(A) (1974). Then, in 2015, historian Thomas Aiello published *Jim Crow's Last Stand*, in which he described the nonunanimity rule as the last remnant of the racist "redeemer" agenda in the Louisiana legal system.

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[4] The four remaining Justices agreed that the Sixth Amendment applies to the States in the same way it applies to the federal government, but would have abandoned this Court's precedents holding that the Sixth Amendment requires unanimous verdicts. *See Apodaca*, 406 U.S. at 406 (opinion of White, J.); *Johnson*, 406 U.S. at 395 (Brennan, J., dissenting in *Apodaca*) (noting agreement with the Justices who signed Justice White's opinion that "the same standards" apply to both the states and the federal government).

Aiello, *supra*, at ix. The largest newspaper in Louisiana, *The Advocate*, also ran a series of pieces examining the operation and effects of the State's nonunanimity rule. The series, which won a Pulitzer Prize, included an empirical analysis revealing that black defendants were significantly more likely than white defendants to be convicted by nonunanimous verdicts. Jeff Adelson et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, Advocate (Apr. 1, 2018).

This groundswell culminated in 2018, when the people of Louisiana voted to repeal the State's nonunanimity rule and to replace it with a law requiring unanimous jury verdicts in every felony trial.[5] The new law, however, applies only prospectively to crimes committed on or after January 1, 2019. *See* 2018 La. Sess. Law Serv. Act 722. It does not apply to cases arising from crimes occurring before that date, even if the cases have not yet gone to trial or (as here) are still on direct review.

B. Facts and procedural history

This case arises out of a terrible crime and a dispute over who committed it.

1. In November 2014, a woman later identified as Trinece Fedison was found dead by a New Orleans

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[5] Although the 2018 law repealed the constitutional provision dealing with felony trials, it did not expressly abrogate La. Const. art. I, § 17(B), which allows nonunanimous verdicts when felonies are tried together with misdemeanors. We are not aware of post-2018 charges where the State has sought, or a Louisiana court has accepted, a nonunanimous verdict because the State tried felonies together with misdemeanors.

police officer. Her body was stuffed into a trash can that ordinarily sat outside of a church but had been moved across the street into a nearby alley. She had been stabbed, and her pants were around her ankles and her shirt pulled up to her chest. J.A. 17-18.

The day before, Ms. Fedison's nephew Jerome had seen Ms. Fedison near the church, chatting with (in his words) a "Spanish" man. Ms. Fedison had then entered a house with the man. So, after hearing about his aunt's death, Jerome returned to that street. Upon seeing petitioner Evangelisto Ramos walk out the front door of the house, Jerome approached and cornered him. "I know what you did," Jerome warned. "You gonna [sic] feel me, partner, for real." J.A. 6.

Frightened for his life, Mr. Ramos left home and spent the next few nights in a trailer near the dock where he worked. He told his manager that he had had sex with a woman who had later been found dead and that a family member of the victim had approached him on the street and threatened to kill him. J.A. 7. The manager encouraged Mr. Ramos to contact the police. Mr. Ramos agreed, and the manager arranged an interview. *Id.* 7-8.

In the interview, Mr. Ramos told the investigating detective that the night before Ms. Fedison was found dead, he had had consensual sex with her at his home. J.A. 9. He added that they had had sex several times before. That night, Mr. Ramos continued, Ms. Fedison had left his house and climbed into a black car with two men who had flagged her down. R. vol. 1, at 74.

Mr. Ramos also voluntarily agreed to provide a DNA sample. Resulting lab reports indicated that Mr. Ramos was one of three sources of DNA found on the trash can in which the victim's body had been found.

J.A. 11. When the detective returned to ask Mr. Ramos about this, Mr. Ramos told him that he had placed a bag of garbage in the church garbage can after Ms. Fedison left his house, while on his way to the corner store. *Id.* 9; R. vol. 2, at *19.[6]

2. A grand jury charged Mr. Ramos with a single count of second-degree murder. Mr. Ramos maintained his innocence and insisted on a trial.

The State's case against Mr. Ramos was based on circumstantial evidence. The State stressed that Mr. Ramos had been seen with the victim the day before her death and that he had admitted he had touched the garbage can in which her body was found. Supp. Tr. *10-11, *18-19. But the State presented no eyewitness or physical evidence directly linking Mr. Ramos to the killing. Even though police officers had thoroughly searched Mr. Ramos's home (where, under the prosecution's theory, the violent crime would presumably have taken place), the police had found no murder weapon, blood from Ms. Fedison, or any trace physical evidence. *See* R. vol. 2, at *200.

Instead, the State relied on suppositions and innuendo. The lead detective testified that Jerome Fedison and other local residents had told him the stabbing must have been committed by a "Mexican or Hispanic" individual, because "they like to use knives." J.A. 10. And the prosecution suggested in arguments to the jury that that the victim must have been "sexually assault[ed]" or "raped," *id.* 16-17—even falsely suggesting Mr. Ramos was a "sexual assault

[6] Volume two of the trial record does not contain pagination. Citations (indicated with *) are to the page number of the PDF.

defendant," R. vol. 2, at *270—despite the fact Mr. Ramos was not charged with any such offense, J.A. 4.

Mr. Ramos continued to insist he had nothing to do with the criminal acts against Ms. Fedison. But even though evidence the State presented against him was "susceptible of innocent explanation," J.A. 14, and he had suggested to the police that Ms. Fedison might have been killed by two men who picked her up the evening she was killed, Mr. Ramos's attorney did not conduct any independent investigation or put on a single witness.

After about two hours of deliberation, the jury was divided. R. vol. 1, at 6, 16. Two jurors believed the prosecution had failed to prove Mr. Ramos guilty beyond a reasonable doubt. But ten jurors thought the State had proven its case against Mr. Ramos. J.A. 4. Under Louisiana's then-applicable nonunanimity law, that was enough for a conviction. The jury thus stopped deliberating and delivered its verdict.

Upon learning of the jury's divided vote, Mr. Ramos moved for a new trial. Renewing a claim the court had rejected at the outset of trial, he argued that the U.S. Constitution requires a unanimous verdict for conviction. *See* J.A. 1, 20. The court overruled the motion and entered a guilty verdict. J.A. 5, 22.

Mr. Ramos was sentenced to life in prison without the possibility of parole. J.A. 5.

3. The Louisiana Court of Appeal affirmed. J.A. 23. Rejecting the arguments raised by Mr. Ramos's appointed counsel, the panel held that sufficient evidence supported his conviction and that the prosecution's unsubstantiated references to "sexual assault" and rape did not constitute prosecutorial misconduct. *Id.* 16, 18-19.

The Court of Appeal also rejected Mr. Ramos's contention, which he raised in a separate pro se filing, that Louisiana's nonunanimity rule violated the Sixth and Fourteenth Amendments. "[U]nder current jurisprudence from the U.S. Supreme Court," the court observed, "non-unanimous twelve-person jury verdicts are constitutional." J.A. 23.

4. Mr. Ramos sought review from the Louisiana Supreme Court, renewing his pro se claim that the nonunanimous verdict in his case violated the U.S. Constitution. The Court denied review without assigning reasons. J.A. 2.

5. A few weeks after issuing its opinion in *Timbs*, this Court granted certiorari. 139 S. Ct. 1318 (2019).

SUMMARY OF THE ARGUMENT

The Sixth Amendment requires a unanimous verdict to convict a defendant of a nonpetty offense, and the Fourteenth Amendment applies that requirement to the states.

I. The Sixth Amendment's Jury Trial Clause requires a unanimous verdict to convict a defendant of a crime. Although the State resisted this principle in its brief in opposition, this Court has so held on multiple occasions stretching back to the nineteenth century. Five Justices in *Apodaca v. Oregon*, 406 U.S. 404 (1972), accepted this rule. And the Court has reiterated it multiple times since.

Even if the issue were not already settled, it would be clear that the Jury Trial Clause requires a unanimous vote to convict. The common law demanded unanimity for hundreds of years leading up to the Founding, and the Framers codified that common-law understanding in the Sixth Amendment.

Furthermore, unanimity is vital to carrying out the purposes of the Jury Trial Clause. The requirement allows the jury to serve as a check on prosecutorial or judicial bias; fosters careful deliberation; ensures the jury's verdict represents the voice of the whole community; and promotes public confidence in the reliability and fairness of the criminal justice system.

II. The Fourteenth Amendment obligates states to abide by the Sixth Amendment's unanimity requirement. The Jury Trial Clause is incorporated against the states. And this Court has repeatedly held—including just last Term in *Timbs v. Indiana*, 139 S. Ct. 682 (2019)—that incorporated provisions of the Bill of Rights must apply the same way to the states as they apply to the federal government. Even apart from those holdings, the Fourteenth Amendment's guarantee of procedural due process directly requires states to follow time-honored procedures such as the unanimity requirement. So does the Privileges or Immunities Clause.

To be sure, Justice Powell's decisive opinion in *Apodaca* balked at requiring the states to abide by the Sixth Amendment's unanimity requirement. But this vote need not be accorded *stare decisis* weight because all eight other Justices in the Court's splintered ruling disagreed with Justice Powell.

At any rate, Justice Powell's conclusion in *Apodaca* cannot stand. His vote contradicted controlling precedent at the time (that he made no attempt to distinguish), and this Court has since directly repudiated the position Justice Powell espoused. The Court has also consistently made clear that any reliance interest states may have in prior decisions declining to require conformance to constitutional

guarantees must give way when necessary for the populace to enjoy the full protections of the Bill of Rights. Such is particularly the case where, as here, the state law at issue broke from centuries of tradition, depriving racial minorities of the ability to participate on equal terms in—and to benefit from—a core aspect of self-governance.

ARGUMENT

The question whether the Constitution permits a state to convict someone of a crime by a nonunanimous jury verdict breaks down into two sub-issues: (1) whether the Sixth Amendment's Jury Trial Clause requires unanimity; and (2) if so, whether the requirement applies to the states by means of the Fourteenth Amendment. This Court has long held—and properly so—that the Jury Trial Clause requires unanimity. Although Justice Powell's decisive vote in *Apodaca* concluded that this particular component of the Jury Trial Clause does not bind the states, that vote squarely contradicted this Court's Fourteenth Amendment precedent and has since been unequivocally repudiated. This Court should reverse.

I. The Sixth Amendment's Jury Trial Clause requires a unanimous jury verdict to convict.

The Sixth Amendment guarantees the accused in a criminal case a "trial, by an impartial jury." U.S. Const. amend. VI. This Court has long instructed that this provision requires unanimous jury verdicts to convict. Yet the bulk of the State's brief in opposition defended the nonunanimous verdict in this case on the ground that the Sixth Amendment does not require all jurors to agree the defendant is guilty. BIO 6-12. The Court should reject that argument.

A. This Court has repeatedly instructed that the Jury Trial Clause requires unanimity.

1. In a series of decisions dating back to the nineteenth century, this Court has repeatedly held that the Sixth Amendment's Jury Trial Clause requires unanimous verdicts in criminal trials. The first time the Court discussed the issue, it pronounced that the Framers and the ratifying public believed "life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the *unanimous* verdict of twelve jurors." *Thompson v. Utah*, 170 U.S. 343, 353 (1898) (emphasis added). Other contemporaneous descriptions of the right to jury trial are in accord. *See Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Patton v. United States*, 281 U.S. 276, 288 (1930), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970).

Two generations after first addressing the unanimity issue, this Court returned to the subject in *Andres v. United States*, 333 U.S. 740 (1948). The issue there was whether a federal murder sentencing statute allowed juries to impose capital sentences by nonunanimous votes. *See id.* at 746-47. Emphasizing that the Sixth Amendment's Jury Trial Clause demands "[u]nanimity in jury verdicts," the Court construed the statute to require unanimity "upon both guilt and whether the punishment of death should be imposed." *Id.* at 748-49.

2. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), a majority of the Court agreed yet again that the Sixth Amendment requires jury unanimity to convict. Justice Powell accepted the "unbroken line of cases reaching back into the late 1800's" holding that, under the Sixth Amendment, "unanimity is one of the

indispensable features of *federal* jury trial." *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring in the judgment in *Apodaca*). Justice Stewart, writing for three Justices, likewise concluded that "the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous." *Apodaca*, 406 U.S. at 414-15 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting). Justice Douglas similarly maintained that "the Federal Constitution require[s] a unanimous jury in all criminal cases." *Johnson*, 406 U.S. at 382 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting in *Apodaca*).[7]

3. Subsequent decisions have continued to recognize that the Jury Trial Clause requires unanimity to convict someone of a crime. In a line of cases involving the scope of the jury trial right, this Court has repeatedly explained that the Sixth Amendment requires that "*the truth of every accusation* . . . be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (second emphasis added) (quoting 4 William Blackstone, *Commentaries on the Laws of England* *349-50 (1769); *accord S. Union Co. v. United States*, 567 U.S. 343, 356 (2012); *United States v. Booker*, 543 U.S. 220, 239 (2005); *Blakely v.*

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[7] To be sure, four of these five Justices dissented on other grounds. But where five Justices expressly embrace a legal proposition, the consensus of the five Justices prevails over any separate opinions on that issue. *See, e.g.*, *Alexander v. Choate*, 469 U.S. 287, 292-93, 293 n.9 (1985) (proposition adopted by one Justice in the majority and four in dissent in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), constituted a "holding").

Washington, 542 U.S. 296, 301 (2004); *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

The Court has similarly relied on *Andres* and Justice Powell's opinion in *Apodaca* to hold that "a jury in a federal criminal case cannot convict unless it *unanimously* finds" each element of a crime. *Richardson v. United States*, 526 U.S. 813, 817 (1999) (emphasis added); *see also Descamps v. United States*, 570 U.S. 254, 269 (2013) ("The Sixth Amendment contemplates that a jury" will find the essential facts "unanimously and beyond a reasonable doubt.").

This Court returned to the subject most recently in two cases involving the incorporation of other provisions of the Bill of Rights. Referencing *Apodaca*, the Court has noted that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials." *McDonald*, 561 U.S. at 766 n.14; *see also Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019) (same). The outcome in *Apodaca*, this Court has explained, resulted from Justice Powell's vote that the Fourteenth Amendment did not require states to fully abide by the Sixth Amendment. *See McDonald*, 561 U.S. at 766 n.14.

B. Contrary to the State's assertions, this precedent is correct.

Even if the matter were not already settled by more than a century of precedent, the history and purpose of the Jury Trial Clause make clear that the Clause requires a unanimous verdict to convict.

1. The Jury Trial Clause's historical origins demand unanimity.

Unanimity is an aspect of the Sixth Amendment's right to trial by jury that is "mandated by history."

Johnson, 406 U.S. at 370 (Powell, J., concurring in the judgment in *Apodaca*).

a. *Common law.* The State does not dispute that unanimity was an integral feature of the right to trial by jury at common law. *See* BIO 7. Nor could it. This Court has remarked that this history is so well known and accepted that "[n]o authorities are needed to sustain this proposition." *Am. Publ'g Co. v. Fisher*, 166 U.S. 464, 468 (1897). Indeed, all nine Justices in *Apodaca* agreed on the point. 406 U.S. at 407-08, 408 n.3 (opinion of White, J., joined by Burger, C.J., Blackmun & Rehnquist, JJ.); *id.* at 414 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); *Johnson*, 406 U.S. at 382-83, 383 n.2 (Douglas, J., dissenting in *Apodaca*); *id.* at 371 (Powell, J., concurring in the judgment in *Apodaca*).

In a nutshell: For centuries leading up to the Founding, the laws of England required unanimous verdicts. The unanimity requirement was established in 1367 and became the norm in England during the fifteenth century. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 397 (1996) (citing James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 86-90 (1898)). The leading Founding-era treatises and scholars all agreed that "trial by jury" necessarily required a unanimous verdict. *See, e.g.*, 4 Blackstone, *Commentaries* *350; 1 Matthew Hale, *The History of the Pleas of the Crown* 33 (1736); 2 James Wilson, *Works of the Honourable James Wilson* 350 (1804). A nonunanimous verdict at common law, therefore, necessarily resulted in a "mistrial." John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* The Trial Jury in

England, France, Germany 1700-1900, at 38 (Antonio Schioppa ed., 1987).

The American colonies retained this aspect of trial by jury. As noted in *Apodaca*, "unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems." 406 U.S. at 408 n.3 (opinion of White, J.); *see also* Abramson, *supra*, at 179.

b. *The Founding.* When the Framers drafted the Bill of Rights, they constitutionalized several common-law safeguards. It is "widely understood," for example, that clauses within the First, Second, and Fourth Amendments each "codified a *pre-existing right*." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The Sixth Amendment's Confrontation Clause likewise is "most naturally read as a reference to the right of confrontation at common law," and this Court has construed it accordingly. *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *see also Giles v. California*, 554 U.S. 353, 375 (2008) (plurality opinion) (Confrontation Clause codified "the trial rights of Englishmen").

The Jury Trial Clause is of a piece. *See Booker*, 543 U.S. at 238 (describing the Jury Trial Clause as rooted "in the ideals our constitutional tradition assimilated from the common law"); *Blakely*, 542 U.S. at 313 (Jury Trial Clause codifies "the common-law ideal" of trial by jury). Indeed, "trial by jury" was the "technical phrase" that the common law used to refer to the procedure of having a jury render a verdict. *United States v. Burr*, 25 F. Cas. 55, 141 (Va. Cir. Ct. Aug. 31, 1807). As elaborated above, this phrase was understood to denote more than simply *having* a jury. It necessarily guaranteed a certain *way* in which the jury had to

issue a verdict—namely, unanimously. Anything short of full agreement did not constitute an actual "trial by jury"; it was a "mistrial." *See* Langbein, *supra*, at 38.[8]

Pointing to the Jury Trial Clause's drafting history, the State protests that "the Founders did *not* intend" to carry forward the common law's unanimity requirement within the Sixth Amendment. BIO 9 (emphasis added). The original draft of what became the Sixth Amendment, passed by the House, provided for 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." 1 Annals of Cong. 435 (1789). The Senate, however, significantly pared down the text to provide for "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. From this editing, the State surmises that the Framers deleted the unanimity language to allow conviction by nonunanimous verdicts. BIO 9-12.

A majority of the Court in *Apodaca* was unmoved by this argument. *See Johnson*, 406 U.S. at 370-71, 370 n.6 (Powell, J., concurring in the judgment in *Apodaca*); *Apodaca*, 406 U.S. at 414-15 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 382 & n.1 (Douglas,

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[8] The Sixth Amendment's codification of the common-law conception of trial by jury accords with the provision in Article III requiring that "the trial of all crimes, except in cases of impeachment, shall be by jury." U.S. Const. art. III, § 2, cl. 3 (capitalization altered). As this Court has explained, this provision "implied a trial in that mode and according to the settled rules of the common law." *Callan v. Wilson*, 127 U.S. 540, 549-50 (1888).

J., dissenting in *Apodaca*). This Court should turn it aside again here.

Absent "substantial evidence" to the contrary, this Court has assumed that constitutional provisions codifying common-law rights include the historical components and limitations on those rights. *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). Consider, for instance, the Double Jeopardy Clause. Madison's original draft, approved by the House, protected against "more than one punishment" for the same offense. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* § 8.1.1.1 (Neil H. Cogan ed., 1997). The Senate changed the provision to protect against being put twice in jeopardy of "life or limb." *Id.* at § 8.1.1.23a. Yet this Court has always held the Double Jeopardy Clause—consistent with its "common-law ancestry"—protects not just a second trial where the defendant's life or limb is on the line, but against *any* kind of successive punishment. *Yeager v. United States*, 557 U.S. 110, 117 (2009); *accord Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170-71 (1873).

Heller provides another example. There, the Court refused to ascribe meaning to the Framers' deletion of a conscientious-objector clause from the original draft of the Second Amendment. 590 U.S. at 589-90. "It is always perilous," the Court explained, "to derive the meaning of an adopted provision from [language] deleted in the drafting process." *Id.* at 590. This methodology is especially "dubious" where a constitutional provision "was widely understood to codify a pre-existing right, rather than to fashion a new one." *Id.* at 603.

So too here. There are no records of the relevant Senate debates. *Williams*, 399 U.S. at 94-95, 95 n.38.

Nor is there mention of the unanimity requirement in any other record. Nor did anyone ever suggest more generally that the Jury Trial Clause would not require adherence to the common law's core features of trial by jury. In short, one cannot "divine 'the intent of the Framers' when they eliminated references to the 'accustomed requisites.'" *Apodaca*, 406 U.S. at 410 (opinion of White, J.) (citation omitted).[9]

At most, the removal of the language elaborating on the concept of "trial by jury" suggests the Sixth Amendment did not guarantee every "accidental" or "negligible" feature of the common-law jury. *Williams*, 399 U.S. at 88, 90, 102. In *Williams*, the Court relied on that conception to hold that the Jury Trial Clause does not require the presence of "precisely 12" jurors. *Id.* at 102. The number of jurors, the Court explained, was a "historical accident, unrelated to the great

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[9] As best as scholars can determine, the unanimity requirement seems to have been deleted incident to a heated debate over the vicinage requirement. *See, e.g.*, Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After* McDonald, 101 J. Crim. L. & Criminology 1403, 1419-21 (2011); Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621, 639-45 (1998). At the time, the states had varying practices for determining the geographical area from which jurors could be drawn. Riordan, *supra*, at 1420. Madison's original draft thus stated simply that jurors had to be drawn from "the vicinage." The Senate, however, did not like "the restraint with respect to *vicinage*." *Letter from James Madison to Edmund Pendleton* (Sept. 14, 1789), *in* 1 Letters and Other Writing of James Madison 491 (1865). Consequently, the Framers forged a compromise to specify a moderate vicinage requirement. No such variation among the states or similar controversy existed with respect to unanimity. Riordan, *supra*, at 1420.

purposes which gave rise to the jury in the first place." *Id.* at 89-90; *see also Ballew v. Georgia*, 435 U.S. 223, 229 (1978). Indeed, the rationales for the presence of twelve jurors at common law ranged from "circular" to "fanciful," resting on "little more than mystical or superstitious insights into the significance of '12.'" *Williams*, 399 U.S. at 87-88.

By contrast, this Court has held that the Jury Trial Clause guarantees the integral components of the common-law right. For example, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt," *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); juries must be drawn from a fair cross section of the community, *Taylor v. Louisiana*, 419 U.S. 522, 526-28 (1975); and any fact that increases a defendant's sentencing range must be proved to the jury, *Apprendi*, 530 U.S. at 490; *Alleyne v. United States*, 570 U.S. 99, 103 (2015).

The requirement of a unanimous verdict was also a critical component of the common-law right to trial by jury. As this Court put it over one hundred years ago, unanimity was one of the "essential features of trial by jury at the common law." *Am. Publ'g Co.*, 166 U.S. at 468. The Court had good reason to say so. The Framers and other learned authorities described unanimity as "indispensable" to the right to jury trial. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 777 (1833). John Adams declared that the jury unanimity requirement "preserves the rights of mankind." 1 John Adams, *A Defence of the Constitutions of Government of the United States of America* 376 (1794). Blackstone was in accord, proclaiming the protection against conviction absent the "unanimous consent" of the jury "is the most

transcendent privilege which any subject can enjoy, or wish for." 3 Blackstone, *Commentaries* *379.

Founding Father and Supreme Court Justice James Wilson articulated at the greatest length why the common law deemed unanimity "of indispensable necessity." Wilson, *supra*, at 350. He explained that criminal juries exercise "absolute and discretionary power" over defendants' liberty. *Id.* at 311. He also cautioned that criminal prosecutions can be infected by "the concealed and poisoned darts of private malice." *Id.* at 351. In light of these dynamics, a requirement of "unanimous and universal approbation" ensures a guilty verdict represents "the judgment of the whole society." *Id.* at 311.

Unanimity was deemed so important at common law that the Framers did not even restrict it to criminal trials. In *American Publishing Co.*, this Court made clear that the Seventh Amendment requires a unanimous verdict in civil cases. 166 U.S. at 467-68. That being so, it necessarily follows that the requirement is at least equally "essential" in criminal trials. *Id.* at 468. Otherwise, the Constitution would "grant greater protection . . . to property than to human liberty," *Stogner v. California*, 539 U.S. 607, 631-32 (2003)—an unacceptable result.

c. *Post-Founding era.* Prominent jurists and scholars of the nineteenth century confirmed the public understanding that the Sixth Amendment's Jury Trial Clause included the common law's unanimity requirement. *See, e.g.*, *Heller*, 554 U.S. at 597, 608 (relying on such sources to corroborate original understanding); *Apprendi*, 530 U.S. at 477 (same); *Blakely*, 542 U.S. at 301 (same); *Crawford*, 541 U.S. at 50 (same).

Justice Story, for example, considered the issue in his "famous Commentaries," *Heller*, 554 U.S. at 608. He explained that the Constitution's guarantee of "trial by jury" prohibited any law that dispensed with the requirement that the jury "*unanimously* concur in the guilt of the accused before a legal conviction may be had." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1779 (1891).

Other prominent treatises contained similar declarations. Nathan Dane's oft-cited 1824 treatise observed that the Constitution demanded that "the jury in *criminal* matters must be unanimous." 6 Nathan Dane, *A General Abridgment and Digest of American Law* 226 (1824). Joel Prentiss Bishop likewise recognized that, "in a case in which the constitution guarantees a jury trial," a statute allowing "a verdict upon anything short of the unanimous consent of the twelve jurors" would be "void." 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 897 (1866). The first Justice Harlan agreed, declaring that "when a man's life is put at stake, or when his liberty is put at stake" in a criminal trial, the Constitution requires "a unanimous verdict." Brian L. Frye, et al., *Lecture from March 12, 1898*, *in* Justice John Marshall Harlan: Lectures on Constitutional Law, 1897-98, 81 Geo. Was. L. Rev. Arguendo 244, 252 (2013) (quoting Justice John Marshall Harlan).

The "near-uniform judgment of the Nation" also "provides a useful guide" to the accepted understanding of the Jury Trial Clause. *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). Throughout history, nearly all states and the federal government have required unanimity for all charges that trigger the right to trial by jury. Nonunanimity in state trials

for nonpetty offenses is an aberration that emerged only at the dawn of the twentieth century, and only in two states—one of which has since renounced its deviation from tradition.[10]

2. Unanimity remains essential to fulfilling the Jury Trial Clause's purposes.

Instead of following history and tradition, four Justices in *Apodaca* suggested the meaning of the Jury Trial Clause should turn on the "function served by the jury in contemporary society." 406 U.S. at 410 (opinion of White, J.). This suggestion contradicts this Court's pronouncements that common-law principles—not modern assessments of purpose—determine the contours of the Sixth Amendment's guarantees. *See supra* at 15-18. But insofar as the animating purposes of the Jury Trial Clause are relevant, they only reinforce that the Clause requires unanimous verdicts to convict.

The Sixth Amendment guarantees trial by jury for a few overlapping reasons: to ensure a community check against prosecutorial zeal or "intimidation"; to "promote group deliberation"; and to guarantee decision-making by "a representative cross-section of the community." *Ballew*, 435 U.S. at 229-30 (citation omitted). This Court has also explained that "a central

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[10] Two other U.S. jurisdictions allow convictions for nonpetty offenses by nonunanimous verdicts: the military and Puerto Rico. *See* 10 U.S.C. § 852; P.R. Const. art. II, § 11. But the Sixth Amendment right to trial by jury does not apply in court-martial proceedings. *See Ex parte Quirin*, 317 U.S. 1, 39-40 (1942); *Sanford v. United States*, 586 F.3d 28, 35 (D.C. Cir. 2009); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012). Nor does it apply in Puerto Rico's courts. *See Balzac v. Porto Rico*, 258 U.S. 298, 304-09 (1922).

premise of the Sixth Amendment trial right" is to promote public confidence in the outcomes of criminal trials. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). Unanimity is vital to each of those purposes.

a. *Checking prosecutorial power.* Conditioning criminal punishment on unanimous verdicts serves the core Sixth Amendment purpose of checking prosecutorial authority. The power to bring criminal charges is an awesome one. And that power can be abused. *See Duncan*, 391 U.S. at 155-56. Furthermore, experience teaches that "judges, like other government officers, [can] not always be trusted to safeguard the rights of the people"—particularly in "politically charged cases." *Crawford*, 541 U.S. at 67-68.

Requiring a unanimous verdict to convict enables the jury to serve as a "great bulwark" against these forces. *Gaudin*, 515 U.S. at 510-11 (citation omitted). By requiring all jurors to agree, the Jury Trial Clause ensures the verdict reflects "the conscience of the community," *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J. concurring), rather than the whim of a prosecutor or even the passions of a subset of the jury. *See Duncan*, 391 U.S. at 156 (Jury Trial Clause is designed to ensure "community participation in the determination of guilt or innocence"). Indeed, the knowledge that a conviction cannot be obtained absent a unanimous verdict deters prosecutors from bringing questionable charges in the first place. If a verdict could be nonunanimous, a "zealous prosecutor would carry a far lighter burden of persuasion" in such contestable cases. *Hibdon v. United States*, 204 F.2d 834, 839 (6th Cir. 1953).

b. *Effective deliberation.* The criminal justice system often depends on juries "to weigh the

credibility of competing witnesses," *Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009), or to "measure intelligently the weight" of "evidence with some element of untrustworthiness," *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977). The jury trial right is therefore designed to facilitate "a comparison of views" and to foster debate and "arguments among the jurors themselves." *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)). Through such back and forth, jurors can evaluate the strength of the evidence, test hypotheses, and challenge latent assumptions—all in service of the search for the truth.

Requiring unanimity is central to this process. In Louisiana, as elsewhere, juries deliberate in private and are allowed to structure their deliberations however they wish. They need not express reasons for their positions before voting. Indeed, jurors may take a vote immediately upon entering the jury room, "before discussions begin." *Blueford*, 566 U.S. at 607. Even when jurors exchange perceptions and arguments, there is no way to referee the interactions to ensure each person's point is fairly considered.

Instead of micromanaging juries in any of these respects (or others), our system ensures meaningful deliberation by insisting upon unanimity. If one or two jurors harbor doubt about the prosecution's theory or questions regarding the adequacy of defense counsel's efforts, they may effectively require the others to engage in discussion. And that collective discussion can unlock insights that the jurors individually may have missed. *See Blueford*, 566 U.S. at 607 (describing how "discussions about the circumstances of the crime" while trying to reach unanimity can cause jurors to "rethink[]" their positions); *Allen*, 164 U.S. at 501

(recognizing that jurors' initial opinions may be "changed by conference in the jury-room"). To illustrate the point by way of a cultural touchstone: Without the unanimity rule, the play *Twelve Angry Men* would have ended on page eleven. *See* Reginald Rose, *Twelve Angry Men* act I, at 11 (1955) (Penguin Grp. ed. 2006).[11]

Even Louisiana and Oregon have implicitly recognized the risks inherent in nonunanimous verdicts. Both states have always required unanimous verdicts in capital cases, where the risk of a wrongful conviction is particularly unacceptable. *See* La. Code Crim. Proc. art. 905.6; Or. Rev. Stat. § 163.150(1)(a). It is hard to understand this exception to their general rule as anything other than a recognition that unanimous verdicts are more dependable.

c. *A representative jury.* The Jury Trial Clause is also designed to ensure that a guilty verdict comes from "a representative cross-section of the community." *Ballew*, 435 U.S at 230. And for a jury to be "representative," the procedures that govern it must not prevent members of racial minorities from serving and expressing their views. *Batson v. Kentucky*, 476 U.S. 79, 86 n.8 (1986).

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[11] To be sure, four Justices in *Apodaca* surmised there was "no difference" in the quality of deliberation between juries required to act unanimously and those permitted to reach verdicts without unanimity. 406 U.S. at 410-11 (opinion of White, J.). But when they made this assertion, "little empirical research had evaluated jury performance." *Ballew*, 435 U.S. at 230. Subsequent research has demonstrated beyond any doubt that unanimity rules are critical to quality deliberation. *See* ABA Am. Jury Project, *Principles for Juries and Jury Trials* 24-25 (2005) (Commentary to Principle 4.B, collecting and discussing research).

Louisiana and Oregon's nonunanimity laws are a direct affront to this principle. As discussed above, Louisiana's rule originated in a concerted effort to maintain "white political supremacy" in the wake of Reconstruction. *Louisiana v. United States*, 380 U.S. 145, 152 (1965); *see also supra* at 3-5. The 1898 State Constitution required only nine of twelve jurors vote for a conviction. In light of the State's demographic composition, requiring only three-quarters of the jurors to vote to convict typically nullified the voting power of African-Americans in the jury pool. *See State v. Maxie*, No. 13-CR-72522 SBB (11th Jud. Dist., La. 2018), J.A. 41-42. Oregon's nonunanimity law was likewise "intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on Oregon juries." *Williams*, No. 15-CR-58698 (Or. Cir. Ct. Dec. 15, 2016), J.A. 43 *see also supra* at 5-6.

The Louisiana Court of Appeal has acknowledged the 1898 Convention was laced with an "overtly racist intent" to exclude "every man with a trace of African blood in his veins" from suffrage. *State v. Hankton*, 122 So. 3d 1028, 1037 (La. App. Ct. 2013) (quoting delegate). But in a case litigated without any submission of evidence on the subject, the court claimed that the Convention's adoption of the nonunanimity rule had nothing to do with "disenfranchisement." *Id.* at 1037. The State has similarly claimed there is "no convincing evidence" that its adoption of the nonunanimity rule was "based on racism rather than judicial efficiency." BIO 15.

These assertions are flawed on multiple levels. For one thing, jury service has always been—in the words of Blackstone—a form of "suffrage," enabling the people to "ensure their control in the judiciary," *Blakely*, 542 U.S. at 306. Curtailing the role of racial

minorities on juries thus strikes at the heart of "our basic precepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940); *see Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (jury service entails "the privilege of participating . . . in the administration of justice").

In addition, a Louisiana court recently did what was never done in *Hankton*: It conducted a full evidentiary hearing on the origins of the 1898 constitution's nonunanimity law. The court concluded the law was "designed to ensure that African-American jury service would be meaningless." *State v. Maxie*, No. 13-CR-72522 SBB, at 28; *see also* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1612 (2018) (same).

Even if the 1898 law were motivated in part by efficiency, it would not matter. The right to trial by jury cannot be impinged in the name of "efficiency." *Blakely*, 542 U.S. at 313. Indeed, the system the right guarantees "has never been efficient; but it has always been free." *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). And the Framers included this guarantee in the Bill of Rights because they understood, absent such enshrinement, "that the jury trial right could be lost not only by gross denial, but by erosion"—that is, by subtle efforts to "'sap and undermine it'" in the name of "'convenien[ce].'" *Jones v. United States*, 526 U.S. 227, 246-48 (1999) (quoting 4 Blackstone, *Commentaries* *350).

Louisiana's nonunanimity rule has continued over the years to allow de facto suppression of minority viewpoints. Racial minorities tend to be under-represented in jury pools—and thus are usually outnumbered on petit juries. *See* Kim Taylor-

Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1262 (2000). These realities dictate that minority voices can often be discounted or even ignored when unanimity is not needed. Indeed, an analysis of the "most comprehensive data assembled to date on race, jury selection, and jury deliberation in U.S. courts" found black members of nonunanimous juries are 250% more likely than their white counterparts to cast "empty" votes—that is, votes to acquit that do not contribute to the verdict. Frampton, *supra*, at 1598; *see also* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606-07 (2006); Taylor-Thompson, *supra*, at 1264.

d. *Public confidence.* Finally, unanimity is essential to maintaining public faith in the criminal justice system. Years before the Founding, Hale observed that the common law's unanimity requirement gave guilty verdicts "great weight, value and credit." Matthew Hale, *History of the Common Law* 293 (4th ed. 1792). That remains true today. Both "the defendant and society can place special confidence in a unanimous verdict." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

Consistent with these observations, surveys show that the public considers unanimous juries more accurate and fair than the nonunanimous alternative. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 L. & Hum. Behav. 333, 337, 338 tbl.1 (1988). Complete agreement of jurors who represent the whole community lends crucial legitimacy to the governmental act of depriving a person of his liberty.

II. The Fourteenth Amendment requires states to abide by the unanimity requirement.

Eight Justices in *Apodaca v. Oregon*, 406 U.S. 404 (1972), concluded the Sixth Amendment applies equally to the states and the federal government. *Johnson v. Louisiana*, 406 U.S 356, 395-96 (1972) (Brennan, J., dissenting in *Apodaca*); *see also McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010). Yet Justice Powell cast the outcome-determinative vote in the case. Rejecting prior precedent and the continuing views of the remainder of the Court on the meaning of the Fourteenth Amendment, he thought that the Sixth Amendment need not apply to the states in the same way it applied to the federal government.

That fluke of voting should not sway the Court in this case. This Court's Fourteenth Amendment precedent—before and after *Apodaca*—dictates that states must abide by the Jury Trial Clause in its totality, including the requirement of jury unanimity. And *stare decisis* does not stand in the way of giving effect to that reality here.

A. This Court's Fourteenth Amendment jurisprudence demands jury unanimity in state criminal trials.

1. For decades, this Court has addressed questions like the one here by asking whether the Fourteenth Amendment's Due Process Clause "incorporates" the relevant protection of the Bill of Rights. *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019); *see also, e.g.*, *McDonald*, 561 U.S. at 763-65. Applying that test, a simple syllogism establishes that the Due Process Clause incorporates the Sixth Amendment's unanimity requirement against the states.

First, the Court held long ago that the Jury Trial Clause applies to the states. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The Clause is "fundamental to the American scheme of justice." *Id.*

Second, "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs*, 139 S. Ct. at 687. This Court first crystallized this concept in *Malloy v. Hogan*, 378 U.S. 1 (1964). Refusing to exempt the states from a component of the Self-Incrimination Clause, this Court explained that incorporated provisions of the Bill of Rights "are all to be enforced against the States under the Fourteenth Amendment according to the *same standards* that protect those personal rights against federal encroachment." *Id.* at 10 (emphasis added). The Court reiterated this concept in *McDonald*. It explained that "it would be 'incongruous' to apply different standards" to an incorporated provision of the Bill of Rights "depending on whether the claim was asserted in a state or federal court." 561 U.S. at 765 (quoting *Malloy*, 378 U.S. at 10-11).

Just last Term, this Court reaffirmed this rule without a dissenting vote. In *Timbs*, the Court held that the Eighth Amendment's Excessive Fines Clause is "an 'incorporated' protection." 139 S. Ct. at 686. It then turned to Indiana's argument that the Clause's restrictions against civil *in rem* forfeitures—applicable against the federal government under *Austin v. United States*, 509 U.S. 602, 621-22 (1993)—should not apply to the states. *See Timbs*, 139 S. Ct. at 690. The Court swiftly dispatched the argument: "In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not

each and every particular application of that right—is fundamental or deeply rooted." *Id.*

This reasoning controls here. Because the Sixth Amendment's Jury Trial Clause applies to the states, *Duncan*, 391 U.S. at 149-50, and the Clause "requires a unanimous jury verdict in federal criminal trials," *McDonald*, 561 U.S. at 766 n.14, the Fourteenth Amendment requires the same in state court.

2. In recent cases dealing with the incorporation doctrine, Justice Thomas has declined to apply the doctrine. *McDonald*, 561 U.S. at 811-12 (Thomas, J., concurring in part and concurring in the judgment). The Due Process Clause, Justice Thomas has asserted, should not restrict state power beyond requiring certain *procedures*. *See id.* at 811; *Timbs*, 139 S. Ct. at 691 (Thomas, J., concurring in the judgment).

Even if the reach of the Due Process Clause were limited in this manner, the outcome here would be the same. The Due Process Clause's procedural component directly regulates state criminal trials. Specifically, the Fourteenth Amendment forbids states from dispensing with procedural protections "so rooted in the traditions and conscience of our people to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445 (1992) (citation omitted). For example, the Due Process Clause directly requires states to abide by the time-honored beyond-a-reasonable-doubt rule. *See In re Winship*, 397 U.S. 358, 364 (1970).

The "primary guide in determining whether the principle in question is fundamental" is "historical practice"—that is, "common-law tradition." *Montana v. Engelhoff*, 518 U.S. 37, 43, 46-48 (1996) (plurality opinion); *see also Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996). State practice at the time of the Fourteenth

Amendment's adoption also provides "crucial" guidance about what due process requires. *Burnham v. Superior Court*, 495 U.S. 604, 609-10, 612 (1990) (plurality opinion). An overwhelming consensus in modern state policy can also be instructive. *See, e.g.*, *Cooper*, 517 U.S. at 360-62, 361 n.17 (46-state consensus reinforced due process requirement).

Each of these guideposts supports a freestanding due process right to unanimity. As explained above, there is scarcely any procedural protection for criminal trials more deeply pedigreed than the unanimity requirement. *See supra* at 18-27; *see also Apprendi v. New Jersey*, 530 U.S. 466, 500 n.1 (2000) (Thomas, J., concurring) (Sixth Amendment codified vital "procedural rights"). Moreover, every state abided by that rule when the Fourteenth Amendment was adopted, and every state but one follows that rule today. *See supra* at 2-3, 8-9. Jury unanimity, in other words, is "the inescapable element of due process that has come down to us from the earliest time." *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953).[12]

3. Given the Due Process Clause's "straightforward" resolution of the question presented, there is no reason to seek guidance elsewhere. *McDonald*, 561 U.S. at 791 (Scalia, J., concurring). But if one were to ask the Fourteenth Amendment question through the lens of the Privileges or Immunities Clause, the result would not change. "'[T]he ratifying public understood

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[12] In *Johnson*, this Court rejected the argument that due process requires unanimous verdicts "to give substance to the reasonable-doubt standard." 406 U.S. at 359. But the Court did not consider—and has never otherwise considered—whether due process includes a unanimity requirement as a matter of historical practice.

the Privileges or Immunities Clause to protect constitutionally enumerated rights' against interference by the States." *Timbs*, 139 S. Ct. at 692 (Thomas, J., concurring in the judgment) (quoting *McDonald*, 561 U.S. at 837 (Thomas, J., concurring in part and concurring in the judgment)). The right to trial by jury is enumerated in the Sixth Amendment and requires unanimity. *See supra* at 15-33. Accordingly, regardless of whether the "appropriate vehicle for incorporation" is the Due Process Clause or the Privileges or Immunities Clause, this case is just like *Timbs* in that "nothing . . . turns on that question." *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring).[13]

B. *Stare decisis* presents no obstacle here.

Approaching the issue from the standpoint of the incorporation doctrine, Justice Powell concluded in *Apodaca* that the Sixth Amendment's "particular requirement" of unanimity does not apply to the

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[13] The Privileges or Immunities Clause prohibits states from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of *citizens* of the United States." U.S. Const. amend. XIV, § 1 (emphasis added); *see also McDonald*, 561 U.S. at 815 (Thomas, J., concurring in part and concurring in the judgment) (describing "citizens" as the "rights-bearers" under the Clause). The only references in the record, including the arrest report, say that Mr. Ramos is a U.S. citizen. *See* R. vol. 1, at 154, 181, 236-37. But citizenship is ultimately immaterial here. Louisiana's nonunanimous verdict law unquestionably abridges the privileges and immunities of citizens. And even if the Privileges or Immunities Clause does not apply directly to noncitizens, Louisiana has never argued that Article 782(a) of the Louisiana Code of Criminal Procedure is severable. Nor, in any event, could the law survive on the basis of its applying solely to noncitizen defendants. *See, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 219-20 (1984) (Equal Protection Clause generally forbids "state law[s] that discriminate[] on the basis of alienage").

states. *Johnson*, 406 U.S. at 373 (concurring in the judgment in *Apodaca*). The deeply fractured nature of *Apodaca* precludes this conclusion from being entitled to *stare decisis* weight. In any event, Justice Powell's position in *Apodaca* should not be followed here.

1. *Apodaca*'s fractured vote deprives Justice Powell's controlling opinion of any precedential effect.

Where, as here, a past decision consists of a splintered set of opinions, and a majority of the Justices disagreed with the rationale of the controlling vote, considerations of *stare decisis* need not play any role in a subsequent case presenting the issue.

a. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, the Court considered whether the Commerce Clause allows Congress to abrogate state sovereign immunity. Years before, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court had issued a deeply fractured decision on that issue. Justice White had "provided the fifth vote for the result," but he had written "separately in order to indicate his disagreement with the plurality's rationale." *Seminole Tribe*, 517 U.S. at 64 (citing *Union Gas*, 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part)). Furthermore, "a majority of the Court [had] expressly disagreed with the rationale of the plurality." *Seminole Tribe*, 517 U.S. at 66.

In *Seminole Tribe*, therefore, this Court deemed *Union Gas*'s holding of "questionable precedential value" and declined to follow it. *Seminole Tribe*, 517 U.S. at 66. Some Justices in *Seminole Tribe* disagreed with the Court's substantive decision. But they found no fault with the majority's "decision to reexamine *Union Gas*, for the Court in that case produced no

majority for a single rationale." *Id.* at 100 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

More recently, in *Hughes v. United States*, 138 S. Ct. 1765 (2018), the Court addressed how to construe a federal sentencing statute. In *Freeman v. United States*, 564 U.S. 522 (2011), the Court had divided four-one-four over the issue. "No single interpretation or rationale [had] commanded a majority," *Hughes*, 138 S. Ct. at 1771; Justice Sotomayor provided a fifth vote for the judgment, but eight of nine Justices disagreed with the reasoning behind her decisive vote. *See Freeman*, 564 U.S. at 534; *Hughes*, 138 S. Ct. at 1779 (Sotomayor, J., concurring). When a majority in *Hughes* agreed on how to construe the statue to "resolve the sentencing issue on its merits," the Court adopted that construction without according *stare decisis* weight to its earlier decision. *Id.* at 1772.

b. The same approach is appropriate here. In *Apodaca*, Justice Powell's single vote decided the case. Yet no other Justice agreed with Justice Powell's two-track approach to incorporation. *See Johnson*, 406 U.S. at 395 (Brennan, J., dissenting in *Apodaca*). Because the vote in *Apodaca* was splintered—and because the Court's settled incorporation doctrine clearly mandates that the unanimity requirement apply equally in state criminal trials—this Court should resolve the issue "on its merits," *Hughes*, 138 S. Ct. at 1772, without according any weight to *Apodaca*.

2. Even if *stare decisis* has some purchase here, *Apodaca*'s incorporation holding cannot stand.

a. Even if Justice Powell's opinion in *Apodaca* were entitled to some *stare decisis* weight, it would not matter. His "partial incorporation" theory flouted

then-existing precedent and has since been squarely repudiated.

i. *Stare decisis* does not require adherence to precedent that "colli[ded] with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). In *Gideon v. Wainwright*, 372 U.S. 335 (1963), for example, this Court noted that several decisions before *Betts v. Brady*, 316 U.S. 455 (1942), had treated the right to counsel as a "fundamental" right. *Gideon*, 372 U.S. at 342-45 (citing cases). Because *Betts*'s holding to the contrary "made an abrupt break with [those] well-considered precedents," and the reasoning in those cases was "sounder" than that in *Betts*, the Court overruled *Betts*. *Gideon*, 372 U.S. at 343-45.

Justice Powell's concurrence was an equally abrupt break from carefully reasoned precedent. In a series of cases before *Apodaca*, the Court had repeatedly considered and 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.'" *Malloy*, 378 U.S. at 10-11 (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)); *see also Pointer v. Texas*, 380 U.S. 400, 406 (1965) (incorporating the Confrontation Clause against the states "according to the same standards that protect those personal rights against federal encroachment" (quoting *Malloy*, 378 U.S. at 10)); *Duncan*, 391 U.S. at 149 (same regarding Jury Trial Clause); *Benton v. Maryland*, 395 U.S 784, 794-95 (1969) (same regarding Double Jeopardy Clause).

Justice Powell declined in *Apodaca* to follow this established consensus. Justice Powell himself

conceded that it was "perhaps late in the day" to express the view that a provision of the Bill of Rights need not apply to the States "with total uniformity." *Johnson*, 406 U.S. at 375 & n.15 (concurring in the judgment in *Apodaca*). That was an understatement. Justice Powell's opinion flew in the face of existing precedent that he made no effort to distinguish. *See id.*; *id.* at 384-87 (Douglas, J., dissenting in *Apodaca*); *id.* at 395-96 (Brennan, J., dissenting in *Apodaca*).

ii. This Court also has consistently abrogated prior decision where "later law has rendered the decision[s] irreconcilable with competing legal doctrines or policies." *Patterson v. McClean Credit Union*, 491 U.S. 164, 173 (1989) (collecting cases). Indeed, when prior holdings "conflict with other, more recent authority, the Court 'has never felt constrained to follow precedent.'" *Vasquez v. Hillery*, 474 U.S. 254, 269 (1986) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

For example, this Court has had little difficulty overruling prior decisions that conflict with the *Apprendi* doctrine, explaining that those decisions cannot "survive the reasoning" of *Apprendi*. *Ring v. Arizona*, 536 U.S. 584, 603, 609 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *see also Hurst v. Florida*, 136 S. Ct. 616, 623 (2016) (overruling in part *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989)). In *United States v. Gaudin*, 515 U.S. 506 (1995), the Court likewise overruled a prior case because intervening law had effectively "repudiated" it, leaving it "an unfortunate anomaly." *Id.* at 520-21; *see also Agostini*

v. Felton, 521 U.S. 203, 235-36 (1997) (similar); *Alabama v. Smith*, 490 U.S. 794, 803 (1989) (similar).[14]

This Court has even more clearly disavowed Justice Powell's partial incorporation approach. In *McDonald*, the Court stressed that the holding in *Apodaca* "was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation." 561 U.S. at 766 n.14. And in *Timbs*, the Court locked down the rule that a Bill of Rights protection, once incorporated, applies identically in both federal and state court. 139 S. Ct. at 689-90. In light of these pronouncements, overruling *Apodaca* would be nothing more than "recogniz[ing] the inevitable," *Benton*, 395 U.S. at 795.

b. Even beyond the direct clash between Justice Powell's opinion and other case law, further *stare decisis* considerations reinforce the propriety of overruling *Apodaca*.

i. There is perhaps no area of law in which *stare decisis* holds less force than with respect to precedent refusing to incorporate a Bill of Rights guarantee against the states. *See McDonald*, 561 U.S. at 766 (collecting cases). In case after case, this Court has

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[14] Earlier this year, this Court overruled *Nevada v. Hall*, 440 U.S. 410 (1979), explaining that intervening developments had rendered it "an outlier in [the Court's] sovereign immunity jurisprudence." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019). The dissent disagreed with this characterization of *Hall* but did not contest that it is appropriate to overrule a decision when it is "a relic of an abandoned doctrine." *Id.* at 1505 (Breyer, J., dissenting); *see also Herrera v. Wyoming*, No. 17-532, slip op. at 10-11 (May 20, 2019) (repudiating an earlier case because its reasoning had been "upended").

held in this setting that *stare decisis* must give way to the need to apply the Constitution's vital safeguards of individual liberty equally to federal and state governments. In doing so, the Court has stressed the propriety of "re-examin[ing] past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties" than the Amendment envisions, *Malloy*, 378 U.S. at 5; *see also id.* at 6 (overruling *Adamson v. California*, 332 U.S. 46 (1947) and *Twining v. New Jersey*, 211 U.S. 78 (1908)).[15]

Even more directly on point, the Court has "abandoned" decisions allowing states to disregard particular components of incorporated rights. *McDonald*, 561 U.S. at 765. Condoning such a two-track approach to incorporation, the Court has explained, would render the Bill of Rights an "empty promise." *Mapp*, 367 U.S. at 660. To determine that a guarantee is fundamental—yet deny the people the benefit of its full protection—"is to grant the right but in reality to withhold its privilege and enjoyment." *Id.* at 656. Where the Bill of Rights demands a particular procedure for criminal trials, states should not be allowed to take "shortcut[s] to conviction." *Id.* at 660.

This reasoning governs here. When the Bill of Rights was written, the Framers described the jury trial right as "the very palladium of free government." The Federalist No. 83, at 498 (Alexander Hamilton)

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[15] For other examples, *see, e.g.*, *Pointer*, 380 U.S. at 406 (*overruling in part West v. Louisiana*, 194 U.S. 258 (1904)); *Gideon v. Wainwright*, 372 at 339 (*overruling Betts v. Brady*, 316 U.S. 455 (1942)); *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (*overruling in part Wolf v. Colorado*, 338 U.S. 25 (1949)); *Benton*, 395 U.S. at 794 (*overruling Palko v. Connecticut*, 302 U.S. 319 (1937)).

(Clinton Rossiter ed., 1961) (expressing his views and those of others at the Constitutional Convention); *see also* 3 William Blackstone, *Commentaries on the Laws of England* *379 (1769) (characterizing right to jury trial as "the glory of English law"). And unanimity was—and still is—considered fundamental to realizing the protections of the jury trial right. The federal unanimity requirement recognizes as much. It would be "incongruous," *Malloy*, 378 U.S. at 11, to continue allowing the unanimity right, essential at the federal level, to be denied in state court.

ii. The State nevertheless argues it has a reliance interest in convictions obtained from divided juries. BIO 4-5. Not so. Only "legitimate reliance interest[s]" merit consideration under *stare decisis*. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). Convictions obtained under a racially tinged law that broke from centuries of tradition—and that crimped one of our Nation's most cherished liberties—do not deserve such deference. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) (emphasizing the special importance of eradicating "race discrimination in the jury system"); *McDonald*, 561 U.S. at 775-76 (incorporating right where "necessary to provide full protection for the rights of blacks").

What is more, the Court put states on notice years ago that it viewed *Apodaca* as an anachronistic result due to an "unusual division among the Justices." *McDonald*, 561 U.S. at 766 n.14. In *McDonald*, the Court refused even to try to reconcile *Apodaca* with its broader incorporation jurisprudence or holding in that case. *Id.* And before that, the Court applied the Jury Trial Clause to the states in a series of decisions explaining that criminal punishment should not be

imposed absent "unanimous" agreement of the jury. *Apprendi*, 530 U.S. at 477 (citation omitted).

At any rate, only one state continues to seek nonunanimous jury verdicts for crimes committed after 2018. Forty-nine states and the federal court system require unanimity to obtain a conviction in trials for such nonpetty offenses. And the need for a certain number of retrials in a limited number of states has not prevented the Court in the past from overruling cases that infringed fundamental rights. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 103, 115 n.4 (2015) (overruling precedent to require juries to find facts exposing defendants to mandatory minimum sentences despite numerous state laws to the contrary); *Ring*, 536 U.S. at 608 & n.5 (overruling precedent to require juries to find aggravating facts exposing defendants to the death penalty, even though nine states did not so require); *Gideon*, 372 U.S. at 345 (overruling precedent to require appointed counsel in criminal cases); Br. for State Gov'ts as Amici Curiae Supporting Pet'r at 2, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155) (noting that fifteen states did not require appointed counsel at the time).

Interests relating to settled expectations cut the other way here too. Full incorporation is an established principle on which the Court itself has relied for several decades. In case after case, this Court has identified new aspects of incorporated rights without separately inquiring whether those aspects apply to the states. Such a result has been thought implicit in the primary holding. *Timbs*, 139 S. Ct. at 690-91; *see also, e.g.*, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Tolerating the notion that a feature of an incorporated right need not be applied against the states could unsettle this Court's jurisprudence much more than overruling *Apodaca*. It is "far too late to exhume" the notion that the Fourteenth Amendment requires the states to respect only a "watered-down, subjective version of the individual guarantees of the Bill of Rights." *McDonald*, 561 U.S. at 788 (plurality opinion) (quoting *Malloy*, 378 U.S. at 10-11). This Court should overrule *Apodaca*'s idiosyncratic and incorrect holding and apply the Sixth Amendment's unanimity guarantee to the states.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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