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

REPLY BRIEF FOR PETITIONER

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Yaira Dubin
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

G. Ben Cohen
Counsel of Record
Shanita Farris
Erica Navalance
THE PROMISE OF JUSTICE
INITIATIVE
1024 Elysian Fields Avenue
New Orleans, LA 70116
(504) 529-5955
bcohen@defendla.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

The *stare decisis* shoe is now on the other foot. Given Justice Powell's decisive vote, this Court has always treated *Apodaca v. Oregon*, 406 U.S. 404 (1972), as having "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 v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010). In other words, *Apodaca* held that the Sixth Amendment requires unanimity, but the Fourteenth Amendment does not compel the states to abide by that requirement. But neither the State nor anyone else defends that holding; the State, in fact, disavows it. Resp. Br. 47, 49. The State's sole argument in defense of the judgment below is that the Sixth Amendment does not require unanimity *at all*—meaning that not only other states but also the federal government could adopt a nonunanimous verdict rule.

This argument is foreclosed by precedent. Not only did five Justices in *Apodaca* reject the State's view of the Sixth Amendment, but the Court has done so numerous other times before and since. It is much too late in the day to reopen that issue—and to give rise to a host of other difficult questions to boot.

The State's Sixth Amendment argument also fails on its own terms. The text, structure, history, and function of the Jury Trial Clause all point to the same conclusion: The right to trial by jury includes the time-honored requirement of a unanimous vote to convict. And, contrary to the State's contention, reaffirming that rule would not disturb this Court's holding in *Williams v. Florida*, 399 U.S. 78 (1970), that juries may have fewer than twelve members. The Court

concluded in *Williams* that the twelve-person feature of the common-law jury was a "historical accident," not considered essential to its proper functioning. *Id.* at 89-90. The unanimity requirement, by contrast, has always been deemed vital.

Finally, the Court should not bow to the State's claim of a reliance interest in convictions it has obtained by nonunanimous verdict. Having renounced the legal linchpin of *Apodaca*, the State is in no position to make assertions about settled expectations. In any event, reliance arguments cannot relieve the State of its obligation to abide by one of our Nation's most fundamental protections against erroneous deprivations of liberty.

I. The Sixth Amendment requires a unanimous jury verdict to convict.

A. This Court has already determined multiple times that the Jury Trial Clause requires unanimity.

1. In no fewer than *fourteen* opinions—ranging from one in the late nineteenth century to two just last Term—this Court has explained that the Sixth Amendment's Jury Trial Clause requires a "unanimous" verdict to convict. *See United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (citation omitted); Petr. Br. 16-18 (citing the other thirteen cases). The State asks this Court to brush aside all of those decisions, contending not a single one is entitled to any precedential value. Resp. Br. 40-43.

This Court's decisions are worth more than that. Yes, some of the prior declarations that the Jury Trial Clause requires unanimity were made "in passing" (Resp. Br. 41) or without substantial elaboration. But

some—both before and after *Apodaca*—were important components of holdings. *See, e.g.*, *Descamps v. United States*, 570 U.S. 254, 269 (2013) (Sixth Amendment rule that juries must "unanimously" find essential facts required narrow construction of federal sentence enhancement statute); *Richardson v. United States*, 526 U.S. 813, 817 (1999) (rule that juries must "unanimously find" each element required pinpointing what facts constitute a given element under federal criminal statute); *Andres v. Unites States*, 333 U.S. 740, 748-49 (1948) ("requirement of unanimity" supported construing federal capital sentencing statute to require unanimity). And "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [the Court] is bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996).

This Court's more glancing references to the unanimity rule are telling in their own right. In recent decisions applying the incorporation doctrine, for example, the Court described *Apodaca* as the "sole exception," *Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019), to "the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government," *McDonald*, 561 U.S. at 766 n.14. If the Sixth Amendment did not require unanimity, *Apodaca* would not be an exception at all. The unanimity principle would have no salience in incorporation cases.

The State's position cannot even be squared with *Apodaca* itself. Justice Powell, whose concurrence in the judgment "broke the tie," *McDonald*, 561 U.S. at 766 n.14, and four other Justices concluded after full briefing and careful consideration 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., dissenting); *see also Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring in the judgment in *Apodaca*); *id.* at 382 (Douglas, J., dissenting in *Apodaca*). As petitioner has noted, this Court has accorded such five-Justice holdings *stare decisis* value in the past. Petr. Br. 17 n.7. The State offers no argument for declining to do so here.

2. Disowning the longstanding view that the Sixth Amendment requires unanimity would have far-reaching and deeply unsettling consequences. For starters, the State's position would insulate nonunanimous verdicts in Louisiana and Oregon from constitutional scrutiny for years to come. Oregon continues to maintain its nonunanimity regime, and Louisiana still allows nonunanimous verdicts for any crime committed before 2019. *See* Petr. Br. 9.

Adopting the State's position would also invite other state legislatures, as well as Congress, to dispense with unanimity rules. Sensing this problem, the State suggests "the issue is unlikely to arise again in the foreseeable future, if ever." Resp. Br. 45 n.8. But the fourteen states appearing as amici tell a different story, indicating they would like to "experiment[]" with nonunanimity regimes. Br. of Utah et al. 26-31. And it is not hard to imagine Congress considering similar adjustments to federal law. In recent years, for instance, Congress has curtailed the jury trial rights of at least one disfavored group. *See, e.g.*, *Haymond*, 139 S. Ct. at 2385 (sex offenders). Maybe Congress would explore a comparable tack, at least in a subset of federal cases.

Accepting the State's position would also trigger a multitude of additional constitutional questions. To start: What would be the minimum number (or percentage) of votes needed for a conviction? Ten? Nine (the State's rule when *Apodaca* was decided, *see Johnson*, 406 U.S. at 357 n.1)? A simple majority? The State refuses to say. *See* Resp. Br. 45 n.8. Nor does the State even tell the Court how that question would be analyzed. History certainly provides no guidance. In *Apodaca*, Justice White suggested the relevant metric would be "the function served by the jury in contemporary society." 406 U.S. at 410. But the State rightly distances itself from that amorphous approach too. Resp. Br. 30-31. This Court should require more before casting aside an age-old component of the right to jury trial and committing itself to a new approach.

Questions of scope could arise as well. The Sixth Amendment does not differentiate among types of "criminal prosecutions," U.S. Const. amend. VI. So would the State's position enable states to dispense with unanimity for conviction in capital cases? Would there be some sort of sliding scale depending on the seriousness of the charge?

Finally, if the State were right that the Sixth Amendment codifies no historical attribute—no matter how vital or well pedigreed—that is not referenced explicitly, what about other foundational aspects of the right to trial by jury? Could states require juries to deliberate in public view? Would the "fair cross-section" requirement recognized in *Taylor v. Louisiana*, 419 U.S. 522, 526-28 (1975), continue to be sustainable?

These questions may not come all at once. But many would likely arise in subsequent years, creating

new areas of confusion and vexing constitutional litigation. Far better to stick to the venerable understanding of the Sixth Amendment that this Court has followed for generations.

B. First principles confirm this Court's consistent understanding of the Jury Trial Clause.

Even if the matter were not already settled, first principles confirm that the Sixth Amendment requires a unanimous verdict to convict. Indeed, the State's argument to the contrary fails on every level.

1. *Text.* The State's opening premise is that "[n]othing in the Constitution's text" indicates unanimity is necessary to convict. Resp. Br. 12. That is incorrect. The unanimity requirement was an essential aspect of the common-law right to trial by jury. And as this Court has repeatedly instructed, the Sixth Amendment's phrase "trial, by an impartial jury" is a clear reference to the common-law right and must be construed accordingly. *See* Petr. Br. 20-21 (citing case law).

Ignoring these instructions, the State protests that the word "jury" cannot be given its common-law meaning or else jury service would be limited to "male freeholders." Resp. Br. 13 (citation and internal quotation marks omitted). There is no evidence, however, that historical restrictions regarding who could serve on juries were ever considered part of the *defendant's right* to trial by jury. To the contrary, such restrictions were designed to serve other ends and have fallen away with developments like "the enlightened emancipation of women." *J.E.B. v. Alabama*, 511 U.S. 127, 134 (1994) (citation omitted).

More fundamentally, the key language here is not the word "jury" standing in isolation. The Sixth Amendment guarantees a "trial, by . . . jury." U.S. Const. amend. VI. This phrase covers more than just having a jury; it includes the *method* by which the jury reaches a verdict. That is why a "mistrial" occurs—at common law, as today—if the jury is unable to agree on a verdict. 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); *Downum v. United States*, 372 U.S. 734, 736 (1963). In short, whatever common-law connotation the unadorned word "jury" may carry with it, there can be little doubt that "*trial* by jury" includes a right to insist that the jury reach its verdict in a particular way: by a unanimous vote.

2. *Structure.* The structure of the Constitution likewise supports the unanimity requirement.

As the State concedes (Resp. Br. 13), the Sixth Amendment should be read in concert with Article III's instruction that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury." U.S. Const. art. III, § 2, cl. 3. The State questions whether Article III requires unanimity. Resp. Br. 13-15. But this Court has explained that Article III requires "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). Unanimity, of course, was foremost among those rules. *See* Petr. Br. 19-20.

The State also errs when comparing the Sixth Amendment to the Seventh Amendment. The Seventh Amendment requires a unanimous verdict in civil cases, *Am. Publ'g Co. v. Fisher*, 166 U.S. 464, 467-68 (1897), and the State does not dispute that it would be

incongruous—indeed, otherwise unheard of—for the Bill of Rights to provide greater protection from civil liability than from criminal convictions. *See* Petr. Br. 25. But the State argues the Seventh Amendment demands precisely this transposition because, unlike the Sixth Amendment, it "expressly references the 'common law.'" Resp. Br. 14.

Not so. The Seventh Amendment references the common law to describe *which* civil lawsuits it covers and when courts can "reexamine[]" facts tried to juries. U.S. Const. amend. VII. It does not say anything more than the Sixth Amendment does regarding *how* juries must reach their verdicts. Accordingly, when it comes to unanimity, both provisions are equally inexplicit. The maxim that the Constitution should not "grant[] greater protection . . . to property than to human liberty," *Stogner v. California*, 539 U.S. 607, 631-32 (2003), controls.

Finally, the State contends that the vicinage requirement in the Sixth Amendment itself demonstrates that insofar as the Framers wanted the Jury Trial Clause to guarantee a common-law feature of that right, they said so explicitly. Resp. Br. 5, 17-19. The vicinage requirement actually supports the opposite (more conventional) inference: where the drafters of the Bill of Rights wanted to *deviate* from a core aspect of a common-law right, they said so explicitly. The common-law vicinage rule required the jury to be drawn from the local "county." *Williams*, 399 U.S. at 93 n.35 (citing 4 William Blackstone, *Commentaries on the Laws of England* *350-51 (1769)). The Jury Trial Clause, by contrast, requires a jury to come from merely the local "state and district," U.S. Const. amend. VI—typically a much larger

geographical region. *Williams*, 399 U.S. at 95 n.39; *see also* 28 U.S.C. § 98 (listing the numerous counties in each judicial district in Louisiana); Petr. Br. 23 n.9 (describing debate and compromise concerning vicinage rule). Consequently, the absence of an explicit voting rule in the Jury Trial Clause signals that the Framers accepted, not rejected, the common law's unanimity requirement.

3. *History*. The State does not cite a single contemporaneous authority endorsing its hollowed-out conception of the Jury Trial Clause. And for all the State's attempts to downplay petitioner's historical evidence as "middling," Resp. Br. 9, 30, 48, that evidence reinforces that the Clause requires a unanimous verdict to convict.

a. The State first argues that the Framers would not have expected the words "trial by jury," "without more," to trigger a unanimity requirement because some early state constitutions explicitly imposed a unanimity requirement, while others did not. Resp. Br. 15-17. But here, as with the vicinage requirement, the State gets it exactly backward: the variation in state constitutional language supports *petitioner*. All agree that the "general rule" throughout the colonies and in the immediate post-Founding era was unanimity. Resp. Br. 16-17. So variation in language among state constitutions shows that the Framers would have expected unanimity to be required regardless of whether it was explicitly spelled out in a constitutional guarantee of "trial by jury." *See* Br. of ACLU 14-16 (collecting examples of state constitutions held to require unanimity even though not explicitly stated in jury trial provisions).

The State's attempts to extract significance from the Sixth Amendment's drafting history fare no better. Petitioner has already answered the State's argument that the deletion of the express reference to unanimity from Madison's initial draft signaled an indifference to what type of vote was needed to convict. *See* Petr. Br. 21-24. And while the State spills much ink arguing that the Framers did not intend to require that juries have "*every* common-law feature," Resp. Br. 4-5. 11-19 (emphasis added), that argument attacks a straw man. Petitioner agrees that the Sixth Amendment "d[oes] not guarantee every 'accidental' or 'negligible' feature of the common-law jury." Petr. Br. 23 (quoting *Williams*, 399 U.S. at 88, 90, 102). Rather, as this Court has held, the Sixth Amendment guarantees the *integral* components of the common-law jury trial right. S*ee* Petr. Br. 23-24 (citing cases).

b. That leaves the State to tackle the notion that unanimity was a critical component of the common-law right to trial by jury. *See* Resp. Br. 20-29. The State's efforts fail there as well: As numerous seminal Framing-era authorities recognized, unanimity was indispensable to the common-law right. *See* Petr. Br. 24-27, 33.

The State quibbles with the authorities petitioner collects, suggesting that several references to unanimity were "stray," "in passing," or "taken out of context." Resp. Br. 6, 22. This is a losing battle. Learned authorities on the common law, as well as several Framers themselves, said in no uncertain terms that unanimity was a crucial feature of trial by jury—and they said so again and again. *See* Petr. Br. 19, 24-26. It is of no moment that some (though not all) of these declarations were brief. If anything, that

brevity only underscores how non-controversial everyone considered the unanimity requirement to be. As a readily understood rule and one of the "essential features of trial by jury at the common law," the unanimity requirement needed no elaboration or lengthy defense. *Am. Publ'g Co.*, 166 U.S. at 468.[1]

The State also criticizes petitioner's reference to a passage in Justice Story's Commentaries stating that the Constitution requires that the jury "unanimously concur in the guilt of the accused." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1779 (5th ed. 1891); *see* Resp. Br. 25-26. It does appear petitioner made the same mistake this Court has previously made: erroneously assuming these words were written by Story himself rather than a subsequent editor. *See United States v. Gaudin*, 515 U.S. 506, 510 (1995). But there is no question regarding Justice Story's understanding of the Sixth Amendment. In a passage from the original Commentaries petitioner also quoted but the State ignores, Justice Story explained that in criminal prosecutions "unanimity in the verdict of the jury is indispensable." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 777 (1833) (emphasis added), *cited in* Petr. Br. 24.

---

[1] A similar phenomenon exists with respect to the Double Jeopardy Clause. This Court has observed that, "[a]s with many other elements of the common law," the protection against double jeopardy "was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries." *Benton v. Maryland*, 395 U.S. 784, 795 (1969). Yet Blackstone's reference to the guarantee against double jeopardy is strikingly succinct. *See id.* (citing 4 Blackstone, *Commentaries* *335).

As a fallback, the State contends that these historical authorities prove too much. Some of these commentators, the State observes, suggested that the twelve-person rule was *also* integral to the right to jury trial, and yet *Williams* held that the Jury Trial Clause does not require exactly twelve jurors. *See* Resp. Br. 20, 22. But that was because other evidence, which the Court credited, indicated that the twelve-person rule was really a "historical accident"—a product of "little more than mystical or superstitious" support for "the significance of '12.'" *Williams*, 399 U.S. at 87-89. The State identifies no comparable historical cross-currents—or even equivocation—respecting the unanimity requirement.

The Court's holding in *Williams* is also entitled to *stare decisis* effect. *Stare decisis*, however, runs the other way with respect to whether the Sixth Amendment requires unanimity. *See supra* at 2-4. Indeed, *Williams* itself rested its conclusion that the Sixth Amendment does not require twelve jurors in part on the Court's sense that there was "little reason to think that the[] goals [of the right to jury trial] are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained*." 399 U.S. at 100 (emphasis added). There is no basis for backing away from that assumption now.

4. *Purposes.* Contrary to the State's argument, more is needed to carry out the purposes of jury trial than simply placing some "body of citizens," using some indeterminate voting rule, "between the prosecution and the defendant." Resp. Br. 31.

a. To begin, the State never explains how a 10-2 vote—or, if all that is needed is the mere presence of a

jury, a 9-3 or 7-5 vote—suffices to protect "against the corrupt or overzealous prosecutor," Resp. Br. 31 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). Only unanimity can ensure a conviction comports with the conscience of the community. *See* Petr. Br. 28.

b. The State acknowledges that unanimity can "promote better deliberation by ensuring that the majority considers and responds to the reasonable concerns of a holdout" (or two). Resp. Br. 34; *see also McCoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring in the judgment) ("Unanimity, it is true, is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room."). Indeed, a robust literature—which the State does not question—supports not only this proposition but also the related point that the unanimity requirement produces more accurate outcomes. *See* Br. of Law Professors & Social Scientists 5-12; Br. of ABA 16-23.

The State says this does not matter, though, because the unanimity requirement sometimes produces "delay, frustration, and gridlock" in the jury room. Resp. Br. 34. This criticism misunderstands the purpose of the Jury Trial Clause. "[L]ike much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty." *Haymond*, 139 S. Ct. at 2384. Put another way, if a constitutional criminal procedure rule sometimes staves off rash or faulty convictions, yet other times merely produces aggravating friction, then the rule is doing its job. The beyond-a-reasonable-doubt requirement, for example, could easily be described this way.

Nor does "reduc[ing] the chance of a hung jury" (Resp. Br. 31) justify dispensing with the unanimity requirement. The State says that "nothing" in *Blueford v. Arkansas*, 566 U.S. 599 (2012), speaks to whether holdout jurors should be able to force deliberation on pain of threatening deadlock. Resp. Br. 35. But, in truth, *Blueford* explains that "[t]he very object of the jury system . . . is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." 566 U.S. at 608 (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)). To accomplish that end, a "single juror[]" must have the power to insist upon continued conversation. *Id.*

In any event, the State's concerns regarding hung juries are overblown. Unanimity systems result in only one or two more hung juries for every 100 trials. *See* Br. of Law Professors & Social Scientists 14; Resp. Br. 32.[2] Forty-eight states and the federal government have long shown the incremental costs of dealing with such mistrials are modest. *See* Br. of New York et al. 22-25. Furthermore, the authors of the very study the State cites emphasize that this marginal burden is well worth the effort. Juries almost never hang unless "four to five jurors" initially voted to acquit—and when that happens, there is often good reason to question the prosecution's case. Harry Kalven, Jr. & Hans Zeisel, *The American Jury: Notes for an English Controversy*, 48 Chi. B. Rec. 195, 201 (1967); *see also* William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*,

---

[2] In the State's telling, nonunanimity systems produce "forty-five percent" fewer hung juries. Resp. Br. 31 (citation omitted). But that is merely the difference between three and five cases per one hundred. *See* Resp. Br. 32.

25 Int'l Rev. L. & Econ. 1, 17 (2005) (nonunanimous verdicts are more likely to produce "wrongful conviction[s]"); Br. of Innocence Projects 11-30.

c. The State does not contest that juries should be "truly representative of the community," *Smith v. Texas*, 311 U.S. 128, 130 (1940), or that unanimity rules ensure that the voices of racial minorities are not discounted or ignored in the jury room. Instead, the State insists that its nonunanimity rule was not "the product of racial animus." Resp. Br. 38. But the record of the State's 1898 constitutional convention speaks for itself. *See* Petr. Br. 3-5, 31-32. And the State's subsequent enactments cannot be divorced from the rule it established in 1898. The decision whether to continue an existing practice is always different from the decision whether to institute a new one.

Besides, what matters most here is *effect*, not purpose. As the State itself stresses, petitioner is not making an equal protection argument. The question here is simply whether the State's nonunanimity rule undermines the objective of securing a verdict from "a representative cross-section of the community," *Ballew v. Georgia*, 435 U.S. 223, 230 (1978). There is no doubt it does. *See* Petr. Br. 33.

d. Nor does the State seem to quarrel with the proposition that unanimity bolsters public confidence in the criminal justice system. *See* Petr. Br. 33; Br. of New York et al. 20-22. The most the State can say is that some "other countries" have seen fit over the years to alter their unanimity rules. Resp. Br. 32-33. But as this Court has observed, "many of the rights that our Bill of Rights provides for persons accused of criminal offenses"—including the "right to a jury trial"—"are virtually unique to this country."

McDonald, 561 U.S. at 781. Those rights are nonetheless "fundamental to *our* scheme of ordered liberty and system of justice." *Id.* at 764.

At any rate, the foreign developments the State references do not undermine the salience of unanimity in this country. As the State's own source cautions, relatively few countries share our common-law tradition of allowing juries to determine guilt. Ethan J. Lieb, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio St. J. Crim. L. 629, 634-41 (2008), *cited in* Resp. Br. 32-33. And pertinent countries that have backed away from strict unanimity rules have instituted other important safeguards—including close judicial management of jury deliberation—in their place. Under the English and Irish reforms, the jury is first required to deliberate for at least two hours, while "try[ing] . . . to reach a unanimous verdict." Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62-SPG Law & Contemp. Probs. 7, 36 (1999). Thereafter, judges have discretion to grant permission to reach a majority verdict. *Id.*; *see also* Juries Act 1974, § 17 (Eng.); Criminal Justice Act 1984, § 25 (Ir.); *O'Callaghan v. Att'y Gen.* [1993] 2 I.R. 17, 26 (Ir.).

There is no comparable vehicle for judicial micromanaging of jury deliberations in America (or even within Louisiana). Instead, juries—as *ad hoc* modules of self-government—are generally allowed to structure their own internal decision-making processes. *See* Petr. Br. 29. Moreover, the American populace has long viewed this autonomy, coupled with a mandate of unanimity, as a cornerstone of our criminal justice system.

II. The unanimity requirement applies to the states.

The State does not ask the Court "to accord Justice Powell's solo opinion in *Apodaca* precedential force." Resp. Br. 47. Neither does Oregon or any of the other states that appear as amici. Louisiana and Oregon nevertheless assert that they have settled expectations in *Apodaca*'s persistence. The States are incorrect. *Apodaca*'s Fourteenth Amendment holding is an indefensible anomaly, and the doctrine of *stare decisis* provides no shelter to the States.

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

1. "Louisiana is not defending [its nonunanimity rule] on the ground that the Sixth Amendment should not apply to it." Resp. Br. 49. That is a wise—indeed, necessary—concession. This Court's due-process incorporation jurisprudence makes clear that there can be "no daylight" between the way the Sixth Amendment applies to the federal government and to the states. *Timbs*, 139 S. Ct. at 687; *see also* Petr. Br. 34-36, 38-47. Thus, if the Court adheres to the settled understanding that the Jury Trial Clause requires unanimity, the Court need go no further to reverse the judgment below; it ineluctably follows that the Due Process Clause of the Fourteenth Amendment applies that requirement to the states.

2. The State maintains the petitioner has not preserved or adequately briefed his alternative Fourteenth Amendment arguments. Resp. Br. 43-45. Neither of the State's objections has merit.

The question presented—which asks "[w]hether the Fourteenth Amendment fully incorporates the

Sixth Amendment guarantee of a unanimous verdict," Pet. for Cert. i—fairly encompasses both of the alternative theories petitioner offers. The Privileges or Immunities Clause is part of the Fourteenth Amendment and is an alternative "vehicle for *incorporation*." *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring) (emphasis added); *see also* Br. of Inst. for Justice 4-10. And the straightforward dictates of the Due Process Clause itself could be treated as a "threshold inquiry," *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009), to be addressed before turning to whether the Clause requires adherence to another provision of the Constitution. Furthermore, "[o]nce a federal claim is properly presented . . . parties are not limited to the precise arguments they made below." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

Petitioner also has adequately briefed these alternative theories. His opening brief set forth the doctrinal footing for each and explained how arguments recited at length elsewhere in his briefing support these theories. Petr. Br. 36-38 (referencing Petr. Br. 2-3, 8-9, 18-27, and 15-33). Any further exposition would have been needlessly duplicative.[3]

---

[3] The State's citations to *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), do not refute petitioner's freestanding due process argument. The issue there was whether to create a new due process right unheard of at the Founding or when the Fourteenth Amendment was adopted. The issue here is whether to recognize a core component of due process firmly entrenched in Anglo-American law for hundreds of years before the Founding and universally followed in this country in 1868.

B. The State lacks any valid reliance interest in *Apodaca*.

1. In light of its position on the merits, the State cannot lay claim to reliance interests or any other *stare decisis* value. *Stare decisis* does not apply where a party declines to defend a past decision and instead asks the Court to adopt a new legal rule. This is because "*[s]tare decisis* is a doctrine of preservation, not transformation." *Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring). Even "new arguments" in support of the *same* rule announced in a prior case "must stand or fall on their own." *Id.* at 385. There is "no basis for the Court to give precedential sway to reasoning it has never accepted." *Id.* at 384; *see also Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (similar).

All the more so here. The State does not merely offer new reasoning in support of *Apodaca*'s holding; it advances a different legal rule altogether. Instead of arguing that the Fourteenth Amendment does not require states to abide by the unanimity requirement, the State asks this Court to hold that the Sixth Amendment does not require unanimity at all. Put another way, instead of contending that unanimity is required in "federal, but not state, criminal proceedings," *Timbs*, 139 S. Ct. at 687 n.1, the State argues that unanimity is not required in *any* criminal proceedings. The notion that Louisiana or Oregon has some kind of "reliance interest," Br. of Oregon 6, in such a potentially groundbreaking holding is at war with "the rule-of-law values that justify *stare decisis* in the first place." *Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring).

2. In any event, the concrete reliance interest Louisiana and Oregon advance—the interest in avoiding retrials in cases where they procured convictions by nonunanimous verdicts—is unavailing. *Apodaca* was a splintered decision, and even Justice Powell conceded his decisive "partial incorporation" reasoning contravened existing precedent. *See* Petr. Br. 41-42. So from the very beginning, convictions obtained by nonunanimous verdicts rested on unsteady—indeed, defective—legal footing. Louisiana and Oregon relied on *Apodaca* at their own risk.

Nor is there good reason to believe ruling for petitioner will severely burden the court system. Resp. Br. 49. The array of barriers to post-conviction relief—from limitations on retroactivity, to preservation requirements, to the general bar against second or successive petitions—are well-known and need not be catalogued here. Suffice it to say those doctrines themselves are designed to credit reasonable "reliance on past judicial precedent." *Lockhart v. Fretwell*, 506 U.S. 364, 372-73 (1993). In any habeas litigation this case triggers, Louisiana and Oregon will be able to press all of these doctrines—as Louisiana successfully did when this Court ruled that the State's reasonable-doubt instruction violated the Due Process Clause. *See Tyler v. Cain*, 533 U.S. 656 (2001).

That leaves cases on direct review, and those numbers are eminently manageable. A recent filing by the State indicates that there are only 36 cases in Louisiana on direct review in which defendants are challenging nonunamimous verdicts. *See* Motion for Expedited Review at Ex. A, *State v. Hodge*, No. 2019-KA-568 (La. July 18, 2019). To be sure, the State has obtained other such convictions since this Court

granted certiorari here (and it may obtain more in coming months). *See id.*; Br. of Oregon 12 (indicating Oregon prosecutors will seek nonunanimous verdicts until "this Court [issues its] decision in this case"). But to preserve this issue in any such case, defendants must request unanimous verdicts. There is nothing preventing the States—now that they are on red alert that *Apodaca* is living on borrowed time—from consenting to such requests. If they decline to do so, it hardly seems unfair for them to absorb the consequences.

Finally, whatever exactly may unfold with respect to past convictions, the State is wrong that "[t]here are no countervailing reasons that justify imposing a unanimity requirement on States." Resp. Br. 49. As petitioner has explained, the imperative of requiring states to honor our most fundamental principles has time and again justified overruling prior cases and incorporating Bill of Rights protections against the states. *See* Petr. Br. 43-45. That the State declines even to offer any Fourteenth Amendment theory for continuing to be exempted from the unanimity principle only underscores the imperative here.

CONCLUSION

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

Respectfully submitted,

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Yaira Dubin
O'MELVENY & MYERS
LLP
Times Square Tower
7 Times Square
New York, NY 10036

G. Ben Cohen
Counsel of Record
Shanita Farris
Erica Navalance
THE PROMISE OF JUSTICE
INITIATIVE
1024 Elysian Fields Ave.
New Orleans, LA 70116
(504) 529-5955
bcohen@defendla.org

September 6, 2019