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 Appeals of Louisiana, Fourth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

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

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A. Factual Background

On the morning of November 26, 2014, Trinece Fedison was found stuffed in a trash can, dead from multiple stab wounds to the neck and abdomen, with her pants around her ankles and her shirt pulled up to her chest. JA 5. A code enforcement officer found the trash can behind a house in an alley during a routine inspection of blighted property. *Id.* He discovered her body when he attempted to move the trash can, only to find that it was much heavier than expected. *Id.*

There was overwhelming evidence that Evangelisto Ramos committed the murder. Ramos conceded that he was sexually involved with Trinece, and his DNA was found in her vagina and on the handles of the trash can in which her body was found. JA 9. Trinece's nephew also identified Ramos as having entered a house with his aunt on the day she was murdered. JA 6. This was the last time Trinece Fedison was seen alive. It was also determined that the garbage can belonged to a church located across the street from Ramos's house. JA 8.

Ramos suggested that Trinece was a prostitute and had been killed by "two black men" who appeared in a car as she was leaving his house after they had sex. JA 7. But the details of this story changed each time Ramos told it. When speaking to a co-worker, he said that the "two black men" were in an SUV and were harassing Trinece, *id.*, but when he later spoke to detectives he did not mention harassment and said the alleged perpetrators were in a Buick, JA 9-10.

Moreover, Ramos was the only person interviewed by the police who asserted that Trinece was a prostitute; the investigation revealed that she had a drug problem but had never been arrested for prostitution, and no other witness corroborated Ramos's accusations. JA 10. Finally, Ramos made the implausible assertion that his DNA was on the handle of the garbage can in which Trinece was found (which did not belong to him) because he had put a bag of trash in it shortly after having sex with her. JA 9.

B. Procedural History

A grand jury indicted Ramos on one count of second-degree murder. After a two-day trial that highlighted the DNA evidence, the testimony of the witness who last saw Trinece alive, and Ramos's inconsistent and implausible defenses, he was convicted of second-degree murder by a 10-2 vote. JA 4. Ramos was sentenced to life in prison without the possibility of parole. *Id.* at 5.

On appeal, Ramos raised four assignments of error. He first argued that the evidence was insufficient to support the conviction because it "was circumstantial and failed to exclude every reasonable hypothesis of innocence." JA 12. The court of appeals rejected that contention, finding that a rational jury could have found Ramos guilty beyond a reasonable doubt. JA 12-16. After carefully reviewing the DNA and eyewitness evidence—and Ramos's "conflicting stories regarding what transpired"—the appellate court found that "the evidence presented by the State including the testimony of the witnesses provided sufficient

evidence … to support the jury's verdict of guilty." JA 15-16.

Second, Ramos argued that the prosecution made improper remarks during opening and closing statements suggesting he had raped or sexually assaulted Trinece; Ramos asserted that those remarks undermined his defense that any sexual contact was consensual. JA 16-18. But, as the court of appeals explained, sufficient evidence supported the prosecution's theory that Trinece was sexually assaulted before being killed. *Id*. Ramos was free to argue that "the sexual contact was consensual," but it was not unduly prejudicial for the prosecution to advance its own reasonable interpretation of the evidence. *Id.*

Third, Ramos argued (in a supplemental *pro se* brief) that he had been racially profiled because Trinece's nephew—who was African-American—told the police he believed a "Spanish guy" must have committed the crime. JA 19-20. The court of appeals rejected that contention, noting that there was no evidence any of the police officers had engaged in racial profiling and that the police did not even consider Ramos a suspect until his DNA was found on Trinece's body and the handles of the trash can. *Id.*

Finally, Ramos asserted (also *pro se*) that "the trial court erred in denying his motion to require a unanimous jury verdict" because his conviction "violate[s] the equal protection Clause." JA 20 "Unlike the familiar Sixth Amendment challenge to this State's non-unanimous jury regime," Ramos's supplemental *pro se* brief argued, "the Equal Protection challenge

presented in this case has not been addressed on the merits by any court." *Pro Se* Brief (on file with Fourth Circuit). Only in passing did he mention the Sixth Amendment. *Id.* The court of appeals rejected all his arguments. JA 20-22.

In his writ application to the Supreme Court of Louisiana, Ramos again focused primarily on an equal-protection challenge to his conviction by a non-unanimous jury. Ramos expressly emphasized he was *not* presenting "the familiar Sixth Amendment challenge to this State's non-unanimous jury regime." Application at 19, *State v. Ramos*, 2017-KO-2133 (La. 2017). The Supreme Court of Louisiana denied review without dissent or written opinion. Pet. App. A11.

In his petition for certiorari, Ramos (now represented by counsel) asked this Court to overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See* Pet. for Cert. 10-28. Ramos abandoned the equal-protection claim he had pursued in the Louisiana courts. On April 29, 2019, the Court granted the petition.

SUMMARY OF ARGUMENT

Ramos correctly notes that this case presents "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." Pet. Br. 15. But Petitioner's arguments on each of those issues are unavailing.

I. The Sixth Amendment's Jury Trial Clause does not require criminal convictions by a unanimous jury. Ramos's core theory is that the Sixth Amendment must be deemed to require unanimity because that was the

common-law practice at the time of the Founding. But, in holding that the Sixth Amendment did not implicitly adopt the common-law rule mandating twelve jurors, this Court rejected "the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Williams v. Florida*, 399 U.S. 78, 92 (1970). Not "every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'" *Id.* at 91.

Thus, the proper starting point is not the English common law, but the U.S. Constitution's text. Neither Article III nor the Sixth Amendment—the two provisions of the Constitution that address juries in criminal cases—mentions a unanimity requirement. That omission is telling because those provisions *do* expressly mention other attributes of the jury system; Article III requires that a jury trial take place in the "state where the said crimes shall have been committed," and the Sixth Amendment further restricts the location of the trial to the "State and district" where the crime occurred.

The history of the Sixth Amendment eliminates any doubt that the omission of a unanimity requirement was intentional. Madison's original draft of the Sixth Amendment expressly guaranteed a jury trial that included "the requisite of unanimity" and the "other accustomed requisites" of the jury. But the Senate *rejected* that proposal and the Conference Committee adopted a modified proposal—minus any mention of

unanimity or "other accustomed requisites"—that ultimately became the Sixth Amendment. Those omissions are especially notable given that State constitutions at the time—which were often drafted by the Framers of the U.S. Constitution—took a variety of approaches to the jury right. Some expressly required unanimity; some expressly incorporated the English common law; and others merely preserved an unadorned right to a "jury trial." There is accordingly no reason to read an *implicit* unanimity requirement into the Sixth Amendment's general reference to an "impartial jury."

Ramos's other historical arguments fare no better. True, many of the sources Ramos cites (such as Blackstone, Story, Dane, and Hale) acknowledge unanimity was a requirement of the English common law. But those sources generally mention unanimity only in passing and give it no more prominence than other features of the common-law jury that have never been deemed requirements of the Sixth Amendment—such as the requirements that juries consist of *twelve male property owners* who would be held without food and drink until they returned a unanimous verdict. Again, it has never been the law that a certain jury practice must be read into the Sixth Amendment merely because it comports with historical or common-law practice.

Ramos's purpose-based arguments also fail (to the extent they are relevant to the constitutional inquiry at all). The core purpose of a jury trial "obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen,

and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams*, 399 U.S. at 100. Regardless of whether the jury's final vote is 12-0, 11-1, or 10-2, no defendant can be convicted and deprived of his liberty until a body of his peers has independently reviewed the evidence against him and found him guilty beyond a reasonable doubt. Indeed, recognizing that unanimity is not essential to the purposes underlying the jury right, a large majority of countries that provide for jury trials do not require unanimity, including several (such as England) that share common-law roots.

Nor is there any merit to Ramos's accusations that the non-unanimity rule is the product of racial animus. Ramos did not present an equal protection challenge in his certiorari petition, and the record does not even disclose the racial makeup of the jury vote in this case. Moreover, although the non-unanimity rule was adopted in Louisiana's 1898 Constitution—which did include several provisions that were the unfortunate product of racial animus—all available evidence suggests that the non-unanimity rule was motivated by concerns for judicial efficiency rather than an improper racial purpose. In all events, this rule has been the subject of extensive public debate over the intervening 120 years and has been modified several times in a pro-defendant direction—including in the most recent constitutional amendment, which now *requires* unanimity on a prospective basis. Ramos cannot plausibly suggest that the rule, in its current, highly limited form, is the product of racial animus.

Finally, Ramos incorrectly asserts that a unanimity requirement is ingrained in this Court's early precedents as well as its more recent decisions. Some early cases alluded to unanimity in passing but never squarely addressed or analyzed that issue. Indeed, as recently as 1970, the Court had noted that this was still an open question. *See Williams*, 399 U.S. at 101 n.46. Similarly, in the wake of *Apodaca*, the Court occasionally stated that the Sixth Amendment required unanimity but never addressed the reasoning or validity of that proposition. A holding that the Sixth Amendment does not require unanimity would have minimal, if any, impact on this Court's pre-*Apodaca* or post-*Apodaca* jurisprudence.

II. Nothing in the Fourteenth Amendment imposes a mandatory unanimity requirement on the States. There is nothing to "incorporate" against the States under the Due Process Clause because, as noted, there is no underlying right to a unanimous jury.

Nor is there a "freestanding" due process right to unanimity. Petitioner did not raise such an argument below or in his certiorari petition, and for good reason. The Fifth and Fourteenth Amendments afford the same due process protections, and the Fifth Amendment has never been construed as requiring unanimity. *See Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) (explaining "this Court has never held jury unanimity to be a requisite of due process of law"). And this Court has been hesitant to "suddenly constitutionalize" an issue via the Due Process Clause when "[t]he elected governments of the States are actively confronting" it. *District Attorney's Office for*

Third Judicial Dist. v. Osborne, 557 U.S. 52, 72-73 (2009). Louisiana's non-unanimity rule has been the subject of exhaustive public debate in recent years—which has led to significant pro-defendant amendments—and Ramos offers no compelling reason to short-circuit this robust democratic process.

Ramos's brief invocation of the Privileges or Immunities Clause is also unavailing. This argument was forfeited below; was not raised in the certiorari petition; and may not apply to Ramos himself depending on his citizenship status. More fundamentally, however, Ramos offers no support for this theory other than repeating his historical and common-law arguments, which lack merit for all the reasons discussed above.

III. Finally, there is no "special justification" for this Court to abandon nearly 50 years of precedent holding that States have discretion to permit convictions by a non-unanimous vote. *See Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). The doctrine of *stare decisis* is about whether this Court should "maintain[] settled law" or instead abandon it for a different legal rule. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

Ramos offers no good reason for the Court to change course at this late stage. The text of the Constitution and history of the Sixth Amendment strongly support Louisiana, and the historical evidence upon which Ramos places so much weight is no better than "middling." *Gamble*, 139 S. Ct. at 1969. Moreover, there is considerably less need for the Court to discard precedent and change course on these issues given that

Louisiana now requires unanimity on a prospective basis and Oregon is considering similar changes.

Overturning *Apodaca*, moreover, would lead to significant practical problems and would unsettle related areas of the law. The ink will not even be dry on this Court's opinion before the lower courts begin receiving thousands of petitions for habeas relief seeking to apply a mandatory unanimity rule retroactively to long-final convictions in Louisiana and Oregon. Indeed, such petitions are already being filed. And, given that unanimity and a 12-person jury share similar historical and common-law roots, this Court should be prepared to reconsider the constitutionality of less-than-12-person juries if it endorses Ramos's approach to the Sixth Amendment. Although just two States have allowed convictions by a non-unanimous vote, at least 40 States allow juries smaller than 12 in some types of criminal cases. In short, overturning *Apodaca* has little to recommend it but could have serious negative consequences for both the criminal justice system and this Court's jurisprudence. The decision below should be affirmed.

ARGUMENT

I. THE SIXTH AMENDMENT'S JURY TRIAL CLAUSE DOES NOT REQUIRE UNANIMITY.

Ramos argues that the Sixth Amendment requires a unanimous jury verdict to convict based on the "the history and purpose of the Jury Trial Clause." Pet. Br. 18. That is incorrect. The Constitution's text, structure, history, and purpose show that unanimity is "not a necessary ingredient of 'trial by jury.'" *Williams*, 399 U.S. at 86.

A. A "Trial By Jury" Under the Sixth Amendment Does Not Require Every Feature of the Common Law Jury.

1. The judicial inquiry must "start with the text" of the Constitution. *Gamble*, 139 S. Ct. at 1965. The Constitution references the right to a jury trial in three places:

- Article III provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."
- The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

- The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Nothing in the Constitution's text, then, indicates that a "trial by jury" means a unanimous guilty verdict is necessary to convict the accused. "The Constitution does not mention unanimous juries." *Johnson v. Louisiana*, 406 U.S. 380, 381 (1972) (Douglas, J., dissenting). The Court should always hesitate before creating a right that is not anchored in the Constitution's text.

To his credit, Ramos does not attempt to argue that the Constitution expressly creates a right to a unanimous jury. He instead claims that the right to unanimity is *implicit* in the Sixth Amendment. It is less clear, however, why Ramos holds that view. At times, he appears to argue that a "trial by jury" necessarily requires unanimity simply because that is what the common law would have required at the Founding. *See* Pet. Br. 20-22. If that is Ramos's argument, it is mistaken. Although the common law required juries to consist of twelve members, this Court refused to import that requirement into the Sixth Amendment, rejecting "the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Williams*, 399 U.S. at 92.

For good reason. The Constitution's structure confirms that not "every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'" *Id.* at 91. At common law, a jury trial required far more than unanimity. It required "the size of that body to be generally fixed at 12," *id.* at 87, the trial be held in the "vicinage" where the crime occurred, *id.* at 96, and limited the jury pool to male "freeholders" (*i.e.*, property owners), *see* 4 William Blackstone, Commentaries on the Laws of England *344 (1769). Yet Ramos does not suggest each of these common-law features is essential to a "trial by jury" under the Constitution.

If every common-law feature of a jury trial (including unanimity) were required, moreover, logically it would be Article III—not the Sixth Amendment—that safeguarded those rights. It is Article III, after all, that creates a federal right to a jury trial. Yet Ramos barely mentions Article III, let alone develops an argument that it swept in every feature of a common-law jury. That is a warning sign. It would be "strange" if the Constitution used "the same words" in two places yet the second reference had an implicit meaning the first did not. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127-28 (2019).

The Court does not need to venture beyond the text to discern the relationship between Article III and the Sixth Amendment. As noted above, Article III requires a jury trial "to be held in the state" where the crime was committed. The Sixth Amendment was needed,

therefore, to "guarantee a right to a trial *within the district* of the crime" because "Article III had not specified jury trial of 'the vicinage,' as per the prevailing common law." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1197 (1992) (emphasis added).[1]

The textual differences between the Sixth and Seventh Amendments bolster the conclusion that the former does not require every common-law feature of a jury. Unlike its neighbor, the Seventh Amendment expressly references the "common law" *twice*; first, in describing the cases covered by the amendment and, second, in requiring that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." The drafters of the Bill of Rights thus "knew how" to incorporate common-law rules when they so desired. *Sveen v. Melin*, 138 S. Ct. 1815, 1826 (2018) (Gorsuch, J., dissenting). That they did so in the Seventh Amendment, which likewise requires jury trials, is

[1] In passing, Ramos claims "[t]he Sixth Amendment's codification of the common-law conception of trial by jury accords" with Article III. Pet. Br. 21 n.8 (citing *Callan v. Wilson*, 127 U.S. 540, 549-50 (1888)). As explained, though, the issue here is not whether the Sixth Amendment *accords* with Article III. If the words "trial by jury" required all common-law features, the Sixth Amendment would not have needed to confront the vicinage issue because the right would have already been secured by Article III. Any suggestion that *Callan* held otherwise would be misplaced. Like many decisions predating *Williams*, *see infra* at 40-41, the Court assumed that Article III wholesale incorporated the common law in a case that did not require it to decide that issue. *See Callan*, 127 U.S. at 547-57 (holding that the appellant had been charged with a "crime" and that the Sixth Amendment applied in the District of Columbia).

especially telling. *See Williams*, 399 U.S. at 97 & n.44 (citing *Capital Traction Co. v. Hof*, 174 U.S. 1, 5-8 (1899)).

2. It also would have been news to those who drafted and ratified the Constitution that codifying the right to a "trial by jury" in Article III was enough to impose every common-law feature. "With respect to the jury trial in particular, while most of the colonies adopted the institution in its English form at an early date, more than one appears to have accepted the institution at various stages only with 'various modifications.'" *Id.* at 98 n.45 (quoting Reinsch, *The English Common Law in the Early American Colonies*, in 1 Select Essays in Anglo-American Legal History 367, 412 (1907)).

Unsurprisingly, this led to notable variation in the State constitutions that were adopted in the aftermath of our separation from England. Some State constitutions, for example, expressly incorporated the common law. *See* New York Constitution of 1777, Art. XLI ("[T]rial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate"); New Jersey Constitution of 1776, Art. XXII ("[T]he common law of England . . . shall still remain in force . . . [and] the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony.").

Others expressly imposed a unanimity requirement. *See* Delaware Declaration of Rights of 1776, §14 (requiring "unanimous consent" of "an impartial jury"). Maryland Constitution of 1776, Art. XIX ("unanimous consent" of "an impartial jury"); North Carolina

Constitution of 1776, Art. IX ("unanimous verdict of a jury of good and lawful men"); Pennsylvania Constitution of 1776, Art. IX ("unanimous consent" of "an impartial jury of the country"); Vermont Constitution of 1778, Art. X ("unanimous consent" of "an impartial jury of the country"); Virginia Constitution of 1776, Bill of Rights, §8 ("speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty").

Still others referenced neither the common law nor unanimity. *See* Massachusetts Constitution of 1780, Art. XII ("And the legislature shall not make any law that shall subject any person to a capital or infamous punishment . . . without trial by jury."); Georgia Constitution of 1777, Art. LXI ("Freedom of the press and trial by jury to remain inviolate forever.").[2]

In sum, although unanimity was the general rule at the time of the Founding, there were significant differences in how the States addressed the jury right in their constitutions, with at least six States adopting an explicit unanimity requirement. Of course, such

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[2] Louisiana's first constitution was ratified in 1812 and incorporated language originating from the Acts of Congress related to the Territory preceding its admission as a State. None of these Acts required unanimity. *See* Act of Congress March 26, 1804, c. 38, 2 U.S. Stat. 283 ("…trial shall be by a jury of twelve good an lawful men of the vicinage…"); Act of Congress March 3, 1805, c. 23, 2 U.S. Stat 322 (same); Act of Congress March 3, 1805, c. 31, 2 U.S. Stat. 331 (same); Act of Congress Feb. 20, 1811, c. 21, 2 U.S. Stat. 641, Enabling Act, (republican constitution shall be formed "consistent with the constitution of the United States; …that it shall secure to the citizen the trial by jury in all criminal cases...").

differences are tough to explain if, as Ramos argues, a "'trial by jury' necessarily required a unanimous verdict." Pet. Br. 19. True, "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." *Apodaca*, 406 U.S. at 408 n.3 (plurality op.). But what matters is that Founding-era practice contradicts the notion that the Framers expected the words "trial by jury" in any constitution (state or federal), without more, to automatically trigger a unanimity requirement. When those who framed and ratified the Constitution wanted to enshrine unanimity as a constitutional guarantee, the law expressly so provided.

The Sixth Amendment's framing history eliminates all doubt. As this Court has recounted:

> pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a 'jury of the vicinage.' That concern, as well as the concern to preserve the right to jury in civil as well as criminal cases, furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments.

Williams, 399 U.S. at 93-94.

James Madison, who was then a member of the House of Representatives, introduced the first draft of what would become the Sixth Amendment. It provided:

"The trial of all crimes . . . shall be by an impartial jury of freeholders . . . of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites." *Id.* at 94. The proposal passed the House but met resistance in the Senate. *See id.* at 95-96. "The version that finally emerged from the [Conference] Committee was the version that ultimately became the Sixth Amendment . . . . Gone were the provisions spelling out *such common-law features of the jury as 'unanimity,' or 'the accustomed requisites.'* And the 'vicinage' requirement itself had been replaced by wording that reflected a compromise between broad and narrow definitions of that term, and that left Congress the power to determine the actual size of the 'vicinage' by its creation of judicial districts." *Id.* at 96 (emphasis added).

This framing evidence confirms what the Constitution's text and structure already make clear. First, "the mere reference to 'trial by jury' in Article III" did not sweep in every common-law feature. *Id.* Indeed, "even though the vicinage requirement was as much a feature of the common-law jury as was the 12-man requirement . . . Article III was not interpreted to include that feature." *Id.* at 96. Second, the removal of "provisions that would have explicitly tied the 'jury' concept to the 'accustomed requisites' of the time" underscores that the Framers understood the common law had not been adopted wholesale by the Sixth Amendment. *Id.* at 96-97. And, third, "contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury

system, it knew how to use express language to that effect." *Id*. at 97.

This is not inappropriate reliance on drafting history. *See* Pet. Br. 22-23. Here, the framing evidence illuminates the compromises reached in adopting and amending the Constitution. *See Haywood v. Drown*, 556 U.S. 729, 743-48 (2009) (Thomas, J., dissenting). This evidence helps show why Ramos's argument that the Sixth Amendment "constitutionalized" the common law of jury trials, Pet. Br. 20, is so misplaced: it "would have come as a surprise to those who penned and ratified the Constitution." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1812 (2015) (Thomas, J. dissenting). That is why *Williams* firmly rejected the same argument nearly fifty years ago.

In short, the *Apodaca* plurality correctly applied settled law in concluding that the Sixth Amendment does not mandate unanimity. Whether "the Framers codified [the] common-law understanding in the Sixth Amendment" was not up for debate. Pet. Br. 13. *Williams* had already held that the Sixth Amendment inquiry does not turn on whether a "'given feature existed in a jury at common law in 1789.'" *Apodaca* 406 U.S. at 409 (quoting *Williams*, 399 U.S. at 92-93). The issue in *Apodaca* was whether unanimity, "a feature commonly associated with" the common law, "is constitutionally required." *Id*. at 410. Unless the Court is willing to overturn *Williams*, that is also the issue here, and the answer should be the same.

B. A Unanimous Verdict Is Not an Indispensable Component of a "Trial By Jury."

Ramos argues, in the alternative, that the "Jury Trial Clause guarantees the integral components of the common-law right" and that unanimity is a "critical component of the common-law right to trial by jury." Pet. Br. 24. But that, too, misstates this Court's approach. The question is not just whether a feature was required at common law, but whether it is an "indispensable component of the Sixth Amendment" based on "the function that the particular feature performs and its relation to the purposes of the jury trial." *Williams*, 399 U.S. at 99-100. Ramos fails to show that unanimity was "indispensable" to the function of the jury.

1. There is inadequate historical support for unanimity being indispensable to a jury trial.

Ramos proclaims that unanimity is "'mandated by history.'" Pet. Br. 18-19 (quoting *Johnson*, 406 U.S. at 370 (Powell, J., concurring in the judgment)). That is incorrect. He cannot show that, at common law, unanimity was any *more* important than other features of a jury—like the 12-man and freeholder requirements—that were likewise standard practice at the time but were never imported into Article III or the Sixth Amendment. *See Williams*, 399 U.S. at 102-03.

Blackstone: Ramos points first to Blackstone, who indeed said that "the protection against conviction absent the 'unanimous consent' of the jury 'is the most

transcendent privilege which any subject can enjoy, or wish for.'" Pet. Br. 24-25 (quoting 3 Blackstone, Commentaries *379). But the full sentence from the passage Ramos selectively quotes paints a different picture. Blackstone wrote that "trial by jury" *itself*—not the unanimity requirement specifically—is "the most transcendent privilege which any subject can enjoy" because no person can "be affected in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, Commentaries *379.

In Blackstone's discussions of trial by jury, unanimity is featured no more prominently than any other common-law features of the jury. He described the jury as "a tribunal composed of twelve good men and true, 'boni [h]omines,' usually the vasals or tenants of the lord, being the equals or peers of the parties litigant." 3 Blackstone, Commentaries *349. He also characterized the jury as composed of "twelve free and lawful men . . . of the body of [the] county, by whom the truth of the matter may be better known . . . ." *Id.* at *352. The jury, he explained, formed the "principal bulwark of [English] liberties" because "no freeman [could] be hurt in either his person or property," except by lawful judgment of his peers or equals, or by the law of the land. *Id.* at *350. Blackstone also identified indictment by grand jury as a critical protection for defendants: "the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury . . . ." 4 Blackstone, Commentaries *343.

In fact, Blackstone downplayed the importance of the unanimity requirement as compared to the other features of the common-law jury tradition. For example, he described the requirement that the jury be composed of "twelve good men" as having roots in "the laws of all those nations which adopted the fe[u]dal system." 3 Blackstone, Commentaries *349. By contrast, he described the "necessity of a total unanimity" as "peculiar to [the English] constitution." *Id*. at *376. He noted that "in the nembda or jury of the an[c]ient Goths, there was required (even in criminal cases) only the consent of the major part, and in case of an equality, the defendant was held to be acquitted." *Id*.

Founding-Era Sources: Ramos fails to buttress his case with other Founding-era sources, *see* Pet. Br. 24-25, as most of those authorities mention unanimity only in passing or have been taken out of context.

John Adams, according to Ramos, "declared that the jury unanimity requirement 'preserves the rights of mankind.'" Pet. Br. 24. But the quotation ignores the context. In this letter, Adams criticizes the idea of vesting a single assembly with all legislative, executive, and judicial power. *See* 1 John Adams, A Defence of the Constitutions of Government of the United States of America 372 (1794). It is in this context that Adams discusses the jury, but it is a stray remark made seemingly with the purpose of showing the absurdity of the proposal:

> Shall every criminal be brought before this assembly and tried? Shall he be there accused before five hundred men? Witnesses introduced,

> counsel heard? This again would take up more than the whole year and no man, after all, would consider his life, liberty or property, safe in such a tribunal. These all depend upon the disquisitions of the counsel, the knowledge of the law in the judges, the confrontation of parties and witnesses, the forms of proceedings, by which the facts and the law are fairly stated before the jury for their decision . . . . An assembly of five hundred men are totally incapable of this order, as well as knowledge; for, as the vote of the majority must determine, every member must be capable, or all is uncertain; besides, it is the unanimity of the jury that preserves the rights of mankind—*must the whole five hundred be unanimous*?"

Id. at 376 (emphasis added). Though Adams discusses the proposal at length, he does not mention unanimity again.

Ramos also cites Matthew Hale's treatise for the proposition that "leading Founding-era treatises and scholars all agreed that 'trial by jury' necessarily required a unanimous verdict." Pet. Br. 19. But the cited passage is from a chapter titled "Concerning the defect of idiocy, madness and lunacy, in reference to criminal offenses and punishments." In the relevant excerpt, Hale discusses the difficulty of trying an individual who was incapacitated at the time he committed the crime (by "drunkenness" or "an habitual or fixed phrenzy"). 1 Matthew Hale, The History of the Pleas of the Crown 32 (1736). Hale explains that bringing such a person to judgment is difficult due to

the "easiness of counterfeiting the disability" and because of the "variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses." *Id*. at 32-33.

It is in this context that Hale brings up trial by jury, stating that, despite the difficulty in conducting such a trial: "the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge." *Id*. at 33. He says nothing more on the matter. His comment regarding unanimity is merely one brief reference within his general praise of the English jury system. Hale then moves on to the specifics of "trials of idiocy, madness, or lunacy." *Id*.[3]

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[3] Ramos's reliance on more recent treatises discussing the Founding-era evidence is likewise misplaced. Ramos cites Douglas Smith for the proposition that the "unanimity requirement was established in 1367 and became the norm in England during the fifteenth century." Pet. Br. 19. But Smith does not address the question at issue here: whether this common-law right was implicitly mandated by Article III or the Sixth Amendment. For its part, the Langbein treatise, *see* Pet. Br. 19-20, devotes a mere three sentences to discussion of unanimity, stating that, at common law: "The twelve jurors had to agree upon their verdict in order to convict. In theory, if they disagreed a so-called mistrial resulted and a new trial would be held before another jury at another session. In practice, we have almost no evidence of such cases. The pressure for agreement must have been strongly felt in a system that processed such large trial caseloads so rapidly." 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).

Post-Founding Sources: Ramos's post-Founding sources are no more helpful to his position. *See* Pet. Br. 25-27. According to Ramos, Justice Story "considered the issue in his 'famous Commentaries' and concluded 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.'" *Id*. at 26 (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 1779 (1891) (cleaned up). That is correct, except for one thing: Story did not say any of this.

To be sure, this language appears in a footnote in the fifth edition of the Commentaries, which Ramos correctly cites. But it appears nowhere in the first edition (1833) or the second (1851). In fact, the passage first appears in the third edition of the Story Commentaries, published in 1858—thirteen years after Story's death—and the quoted language appears in brackets to indicate that it was an insertion by the editor. *See* 2 Story, Commentaries §1779 (3d ed. 1858). To make clear which text was Story's and which was his own, the editor helpfully included a note explaining his method, writing that "[n]o change has been made in the original text, and all the additions by the editor are included within brackets, so that the reader may not give the weight of the author's judgment to any passages not written by him." *Id*. at iii. Taking the editor at his own word, there is no reason to give his

insertions the weight afforded Justice Story's original commentary.[4]

Regardless, the full passage is not as helpful to Ramos as the fragment he quotes. The full passage states: "[A] trial by jury is generally understood to mean *ex vi termini*, a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." 2 Story, Commentaries §1779 (1891). Unanimity and the 12-man requirement were therefore deemed equally important to the 19th-century understanding of the jury trial, at least according to this editor. Certainly nothing in the passage suggests that unanimity was any *more* essential than the 12-man requirement, which, again, has never been deemed a mandatory component of Article III or the Sixth Amendment. *See Williams*, 399 U.S. at 102-03.

Ramos also points to "Nathan Dane's oft-cited 1824 treatise," which "observed that the Constitution demanded that 'the jury in criminal matters must be unanimous.'" Pet. Br. 26 (quoting 6 Nathan Dane, *A General Abridgment and Digest of American Law* 226 (1824)). However, the Dane treatise makes this statement merely in passing. Here is the full quote:

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[4] It is easy to see how this oversight occurred—the fifth edition includes the relevant passage without brackets, so there is no way to know that it was not part of the original text. Likewise in the fourth edition. Indeed, Ramos is not the first one to make this error—it appears as though Justice Douglas did the same in his dissenting opinion in *Johnson*. *See* 406 U.S. at 382 n.1 (Douglas, J. dissenting).

> §1. By the constitution of the United States, article 3, section 2, 'the trial of all crimes, except in cases of impeachment, shall be by jury;" and by the 12th article of amendments to the said constitution, it is provided: 'In all suits at common law, the right of trial by jury shall be preserved;' and in the 11th article of said amendments, it is provided, that not 'any fact triable by a jury according to the course of the common law shall be otherwise examinable than according to the rules of the common law.' By the 10th article of said amendments, the jury in *criminal* matters must be unanimous.

Id. Dane seems, in this section, to be paraphrasing what he believes the Sixth Amendment requires. Whereas he directly quotes portions of Article III and the Seventh Amendment, he offers no quote or authority for the proposition that "the jury in criminal matters must be unanimous." *Id*. There is nothing further in that section regarding unanimity or its importance to the common-law jury trial.

When Dane discusses jury unanimity elsewhere in the treatise, it is more of the same. In one instance, he recites some points from Blackstone's discussion of the jury trial and notes, as Blackstone did, that an English common-law jury "must be kept together without meat or drink, till agreed . . . . They may propose questions to the judge or judges; and may ask a witness a question after retired from the bar; but this must be done in open court: must in all cases be unanimous." *Id*. at 230. Dane provides nothing further on unanimity in that section.

In sum, the Dane treatise merely notes that juries at the time rendered their verdicts unanimously. Missing, though, is any elaboration of why the unanimity requirement matters, or why it is any more essential a feature of the common-law jury than the 12-man requirement (or, for that matter, the requirement that the jury be kept without food and drink until they render a verdict). As with the other 19th-century treatises, all the Dane treatise shows is that, at common law, the jury was required to reach a unanimous verdict—a point not in dispute.

Ramos's reliance on the Bishop treatise falls short for similar reasons. *See* Pet. Br. 26. Ramos cites it for the idea 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.'" Pet'r.Br.26 (quoting 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure §897 (1866)). But Bishop begins with the importance of the 12-man requirement and then merely equates the importance of unanimity to it. As he explains:

> From time immemorial a jury of trials has consisted of twelve men. And it is a point upon which the authorities agree, that, within the meaning of our constitutional provisions, a jury of less than twelve men is not a jury; and a statute authorizing a jury of less, in a case in which the constitution guarantees a jury trial, is void. And the same consequence comes, it appears, if the statute authorizes them to find a

> verdict upon anything short of the unanimous consent of the twelve jurors.

1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure §762 (1866). If anything, therefore, the Bishop treatise sees the 12-man requirement—a feature since "time immemorial"—as even more fundamental to the common-law jury-trial right than unanimity.

The same goes for Ramos's reliance on the views of the First Justice Harlan, who held the view 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.'" Pet. Br. 26 (quoting Brian L. Frye, *et al.*, *Lecture from March 12, 1898, in* Justice John Marshall Harlan: Lectures on Constitutional Law, 1897-98, 81 Geo. Wash. L. Rev. Arguendo 244, 252 (2013)). Before this passing reference to the unanimity requirement, however, Harlan extensively discussed the 12-man requirement. He said that an accused "must be tried by a jury of twelve men, and not less than twelve men," and that "an act of Congress which should provide for the trial of crimes in this District by a jury composed of less than twelve people would be void." 81 Geo. Wash. L. Rev. Arguendo at 251. He elaborated: "I believe that there is no feature of our Anglo-Saxon civilization today that lies more nearly to the liberty of man than the right of a trial by the old-fashioned jury composed of twelve honest men, and I would not dispense with any feature of that system." *Id*. at 251-52. Concluding his discussion of the jury trial, he noted: "I think that a unanimous verdict is required under this Constitution in the Courts of the

United States." *Id.* at 252. Though Harlan had opined at length on the 12-man requirement, he did not discuss the unanimity requirement any further in the lecture.

In another lecture on April 23, 1898, Harlan again discussed the common-law trial by jury and mentioned the unanimity requirement only briefly, noting that "at common law, and under the Constitution, it takes the unanimous verdict of twelve men to convict a man of a crime." *Id.* at 318. The Harlan lecture, like the other cited sources, fails to show that the common law deemed unanimity any more important or fundamental than the requirement of a 12-person jury that has never been read into the Sixth Amendment. Ramos's historical evidence in support of the notion that the Sixth Amendment incorporated all features of the common-law jury wholesale is certainly no "better than middling." *Gamble*, 139 S. Ct. at 1969.

2. Louisiana law fulfills all of the purposes animating the jury trial requirement.

In deciding whether the Sixth Amendment mandates a certain feature of the jury, the Court has also considered the "function" it "performs and its relation to the purposes of the jury trial." *Williams*, 399 U.S. at 99-100. As explained, unanimity is no more essential to "the great purposes which gave rise to the jury in the first place," *id.* at 89-90, than the common law's 12-man and freeholder components, *see supra* at 13. That leaves Ramos to argue that the "function served by the jury in contemporary society" requires unanimity. *Apodaca*, 406 U.S. at 410 (plurality op.)

(citation omitted); *see* Pet. Br. 27-33. Assuming that this even has relevance to the constitutional inquiry, *but see Johnson*, 406 U.S. at 366 (Blackmun, J., concurring), Ramos's arguments miss the mark.

The "essential feature" of a jury trial "obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams*, 399 U.S. at 100; *see also Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."). Unanimity is not essential to those core purposes. Under Louisiana law, a body of citizens will be appropriately interposed between the prosecution and the defendant in every case, even if the final vote is 11-1 or 10-2. *Apodaca*, 406 U.S. at 410-14 (plurality op.); *see Johnson*, 406 U.S. at 365-66 (Blackmun, J., concurring).

Allowing non-unanimous convictions also advances other important interests. Most notably, eliminating the requirement of unanimity will reduce the chance of a hung jury. In their frequently cited study, "Kalven and Zeisel noted that jurisdictions which allow nonunanmious verdicts have forty-five percent fewer hung juries than those that compel unanimity." Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Verdicts in Criminal Trials*, 24 Fla. St. U. L. Rev. 659, 675 (1997); Jacob Tanzer,

Nonunanimous Verdicts in Criminal Cases: The Oregon Experience, 14 Judges J. 4, 6 (1975) ("The Chicago Jury Study reported that the mistrial rate from hung juries is 5.6 percent in unanimous-verdict states and 3.1 percent in majority-verdict states.").

Reducing the number of hung juries—and, in turn, mistrials—is a legitimate government purpose. Hung juries impose significant costs on the court system, the parties, and the local community more broadly. They delay the final disposition of the charges, leaving both the defendant and the victim in limbo. They also require a subsequent retrial, which burdens the judiciary with duplicative work even as evidence may be lost and witnesses' memories fade. "When a jury is unable to reach [a unanimous] verdict," in short, "a mistrial wastes both time and resources and further debilitates faith in the judicial system." Jere W. Morehead, *A 'Modest' Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. Kan. L. Rev. 933, 935 (1998) (footnote omitted).

Recognizing the importance of these policy concerns, numerous other countries that employ a jury system—even those that share our common-law heritage—allow juries to return non-unanimous verdicts. In fact, "among the class of countries that embraces the jury, the unanimous decision rule for guilt and acquittal generally enforced by the American system is very much an anomaly." Ethan J. Lieb, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio St. J. Crim. L. 629, 642 (2008). "Although Canada and some jurisdictions in Australia maintain unanimity as a requirement (for

conviction and acquittal)," this is far from the majority rule; instead, "more relaxed majoritarian and supermajoritarian rules clearly dominate the global jury system landscape." *Id.* at 642. "Avoiding hung juries seems to be a priority among the world jury systems and very few world jury systems allow for them." *Id.*

Notably, England no longer requires juries to render verdicts unanimously. "In England . . . the requirement of a unanimous verdict was dropped in 1967 by the Criminal Justice Act, which permitted verdicts of ten to two." 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). Ireland likewise has no unanimity requirement. Echoing *Williams* and *Duncan*, the Supreme Court of Ireland has persuasively explained that, "[t]he essential feature of a jury trial is to interpose, between the accused and the prosecution, people who will bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused." *O'Callaghan v. Attorney General*, [1993] 2 I.R. 17, 26. "A requirement of unanimity is not essential to this purpose." *Id.*

Ramos correctly notes that a core purpose of the jury is "checking prosecutorial power" and serving as a "bulwark" against the state. Pet. Br. 28. But, as noted above, a jury serves as an important independent check on prosecutorial power regardless of whether the final vote is 12-0, 11-1, or 10-2. In all cases, a body of disinterested and impartial citizens has been interposed between the prosecution and the defendant.

And, so long as the court properly instructs the jury about the burden of proof for returning a conviction (which Ramos does not dispute happened here), it is baseless to suggest that a less-than-unanimous vote will lighten the prosecution's "burden of persuasion." Pet. Br. 28.

Ramos is also wrong to suggest that mandatory unanimity is needed to ensure "effective deliberation." Pet. Br. 28-30. In some circumstances—such as the (fictional) *Twelve Angry Men* deliberation, *see id*. at 30—unanimity might promote better deliberation by ensuring that the majority considers and responds to the reasonable concerns of a holdout. In many other situations, though, a unanimity requirement will degrade the quality of jury deliberations and instead will promote delay, frustration, and gridlock. Even under the old version of Louisiana's law—which allowed convictions by a 9-3 vote rather than the current 10-2 minimum, this Court explained that the "mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt." *Johnson*, 406 U.S. at 361. This Court found "no grounds for believing" that jurors in the majority would "simply refuse to listen" to reasonable arguments in support of acquittal. *Id.* But when a holdout juror "continues to insist upon acquittal without having persuasive reasons in support of [his] position," then "there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision . . . as being beyond a reasonable doubt." *Id.*

As Akil Amar has put it: "unanimity cannot guarantee mutual tolerance," especially where there is an "eccentric holdout who refuses to listen to, or even try to persuade, others ('you can't make me, so there!')." Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1191 (1995). The holdout juror may be noble and a vessel for justice. But it is equally likely that he may be motivated by an irrational interpretation of the evidence, an improper bias for or against the prosecution or defendant, or a desire to nullify the charges notwithstanding compelling evidence of guilt. Maybe this juror is refusing to convict because the prosecutor seemed "mean" or the defense attorney seemed "nice." Or perhaps he refuses to believe a key eyewitness from Smithtown because "everyone knows that people from Smithtown are no-good liars." Or maybe he distrusts science and thus disregards overwhelming ballistics or DNA evidence.

The people, through their legislatures, of course may decide that these costs are outweighed by the defendant-friendly benefits of requiring unanimity. But it would impose a considerable federalism harm to override Louisiana's policy judgment that one or two jurors should not have the power to hijack the proceeding and block a conviction based on irrational, idiosyncratic, or irrelevant considerations.

In arguing that unanimity is needed to ensure effective deliberations, Ramos relies heavily on *Blueford v. Arkansas*, 566 U.S. 599 (2012). *See* Pet. Br. 29. In that case, the Court held that double jeopardy did not attach to an oral report from the foreperson to

the judge during deliberations stating that the jury had unanimously voted against a finding of capital murder. This Court concluded that the mid-deliberation report was "not a final resolution of anything" because "[t]he jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report," and were "free to reconsider a greater offense." *Id.* at 606-07. *Blueford* stands for the unremarkable proposition that a jury speaks only through its final verdict—not through any tentative or preliminary votes—and that the jury must continue to deliberate until it reaches its final verdict (or hangs). But nothing in that decision opines on whether jury deliberations in that case (or any other) would have been more effective under a unanimity or non-unanimity rule.

Finally, Ramos argues that Louisiana's rule was racially motivated and would "prevent members of racial minorities from serving and expressing their views." Pet. Br. 30-33. Those arguments fail on several levels. To begin, Ramos did not bring an equal-protection claim to this Court; indeed, the record in this case does not even disclose the racial composition of the jury's vote. This would accordingly be a poor case for the Court to opine on the alleged racial implications of Louisiana's law.[5]

Ramos notes that the non-unanimity policy was originally enacted in Louisiana's 1898 Constitution.

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[5] Moreover, the most recent revision to Louisiana's Constitution *eliminated* the non-unanimity rule but did not make that change retroactive. *See infra* at 39. There is absolutely no evidence that this pro-defendant decision was racially motivated. *Accord Johnson v. Governor of State of Fla.*, 405 F.3d 1214 (11th Cir. 2005).

Pet. Br. 31. Several provisions of that constitution (including its imposition of grandfather clauses, poll taxes, and literacy tests) were the unfortunate product of racial animus. But there is no indication from the historical record that the non-unanimity rule was as well. One contemporaneous reporter—who was quite candid about the explicit racial motivation of the voting provisions—noted that the 1898 judiciary reforms were "directed toward making the system less expensive both to the public and to the litigant, while at the same time improving its efficiency." Thomas J. Kernan, *The Constitutional Convention of 1898 and Its Work*, Proceedings of the La. B. Ass'n 54, 63 (1898-99). The purpose of the judiciary reforms was to "lay down certain broad lines of judicial procedure that would insure the economical and expeditious administration of justice both civil and criminal." *Id.*

In fact, an 1877 treatise described an ongoing debate on the subject. *See* John Proffatt, *A Treatise on Trial by Jury* §§78-79 (1877). "Whatever general acquiescence," the "rule requiring unanimity in the verdict" had obtained "in former times," Proffatt noted that it was "quite evident that many able writers and investigators . . . question the expediency and reasonableness of the rule, and condemn it as impracticable and an impediment to a due administration of justice." *Id*. §78. He recited a number of reasons 19th-century thinkers had criticized the rule: "in the majority of cases the unanimity is unreal, and is only obtained as a compromise"; a "corrupt or stupid juror may obstinately or willfully hold out, and compel a disagreement, and a consequent failure of justice"; it is "practicably and obviously impossible, in

a large number of cases, to impress twelve men with exactly the same view of a state of contested facts"; and "this method of decision is entirely singular and anomalous" because "in all deliberative bodies, in courts, in legislative assemblies, a decision of a majority is accepted." *Id.* §79. Proffatt, himself, ultimately sided with those favoring unanimity. *See id.* But the suggestion that Louisiana's decision in 1898 to make a different policy choice *must* have been the product of racial animus is wrong.

In all events, "history did not end" in 1898, *Shelby County v. Holder*, 570 U.S. 529, 552 (2013), and the 1898 Constitution's non-unanimity provision was amended and updated in 1913, 1921, and 1974. Over that span, there was considerable public debate about this issue. The American Law Institute's Model Code of Criminal Procedure, published in 1930, and Orfield's treatise on criminal law, published in 1947, both recommended abolishing the requirement of unanimity and reducing the size of juries. *See* Dale E. Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 La. L. Rev. 11, 27 & nn. 67-68 (1953) (discussing recent commentary regarding unanimity). The Records of the Louisiana Law Institute in the 1940s and 1950s similarly reflect a continuous review of criminal law and procedure, including jury size and voting rules. *Id.* at 27 & n. 66. The Law Institute ultimately recommended that "the quasi-felony should be tried by an eight-man jury with six concurring in any verdict," so as to "eliminate many of the presently large number of mistrials." *Id.* at 27.

Louisiana's 1974 Constitution further revised the rule in a defendant-friendly direction by requiring convictions by a minimum vote of 10-2 (rather than 9-3). This change "was the subject of a fair amount of debate" at the constitutional convention, and "[i]n that debate no mention was made of race." *State v. Hankton*, 2012-0375 (La. App. 4 Cir. 2013) 122 So.3d 1028, 1038. The rule's "stated purpose" was "judicial efficiency." *Id.* Nor was there any "objectionable appeal on the basis of race" to the voters during the campaign urging the adoption of the 1974 Constitution. *Id.*

So too in 2018. After another exhaustive public debate, the people of Louisiana again amended their Constitution in a defendant-friendly direction by requiring unanimity for offenses committed after January 1, 2019. *See* 2018 La. Reg. Sess., Act 722. The measure passed by a 64-36% margin. Ramos does not—and cannot—even suggest that this significant pro-defendant change to the Louisiana Constitution was somehow the product of racial animus.[6]

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[6] Ramos relies on *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist. Oct. 11, 2018), which held that Louisiana's non-unanimity rule violates the Equal Protection Clause, Pet. Br. 31-32. Ramos oddly suggests that he is invoking *Maxie* "only for its factual findings, not any legal conclusions." *Id.* at 3 n.1. But the unpublished trial-court decision in *Maxie* should carry no weight for *any* purpose, legal or factual. In Louisiana, a trial court ruling has no precedential value even in the same court. *See Shreveport v. Baylock*, 107 So. 2d 419, 422 (La. 1958). Nor is the record in that case an appropriate subject of judicial notice by a federal court. *See* Fed. R. Evid. 201(b) (facts may be judicially noticed only if they are "not subject to reasonable dispute" and are drawn from "sources whose accuracy cannot reasonably be questioned").

3. A unanimity rule is not ingrained in this Court's Sixth Amendment precedent.

Ramos is also wrong to assert that "this Court has repeatedly held that the Sixth Amendment's Jury Trial Clause requires unanimous verdicts in criminal trials." Pet. Br. 16. If that were true, there would have been no reason for the Court in *Williams* to express "no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial." 399 U.S. at 100 n.46. The Court said that in 1970 because, in fact, the issue had not yet been decided. *See Apodaca*, 406 U.S. at 406-09.

None of the pre-*Apodaca* decisions cited by Ramos directly addressed whether the Sixth Amendment required unanimity. *American Publishing Company v. Fisher*, 166 U.S. 464 (1897), was a Seventh Amendment case. *Thompson v. Utah*, 170 U.S. 343 (1898), addressed whether federal law required a jury in the territory of Utah to consist of twelve members. *Maxwell v. Dow*, 176 U.S. 581 (1900), and *Patton v. United States*, 281 U.S. 276 (1930), were likewise cases addressing whether the Constitution requires a jury to consist of twelve members. The closest Ramos comes to a relevant decision is *Andres v. United States*, 333 U.S.

Moreover, as Ramos concedes, the opinion was never subject to appellate review because the case was mooted when Maxie reached a plea agreement. Pet. Br. 3 n.1. More fundamentally, the court's analysis was largely based on newspaper reporting and data sets that were produced and examined by unknown third parties who did not testify in court and whose work could not be independently verified. *Maxie* is irrelevant to the Court's disposition of this case.

740 (1948). Even there, however, the parties assumed that the Sixth Amendment required the jury verdict to be unanimous and confined their dispute to the proper interpretation of a federal law governing capital sentencing and the instructions given to the jury concerning that statute. *See id*. at 746.

At most, these cases (or at least some of them) address whether the Sixth Amendment incorporates wholesale the common law of 1789—an issue that was definitively settled before *Apodaca*. *See supra* at 12-19; *Williams* 399 U.S. at 91-92. Several of these decisions include statements suggesting the Sixth Amendment requires unanimity. But none of them held that. *See Johnson*, 406 U.S. at 370 (Powell, J., concurring in the judgment) (explaining that "these cases" had "presumed that unanimous verdicts are essential in federal jury trials"). In short, "the issue of unanimous juries in criminal cases simply never arose." *Id*. at 382 (Douglas, J., dissenting).

Ramos's reliance on cases that postdate *Apodaca* is equally misplaced. *See* Pet. Br. 17-18. Most of them mention unanimity only in passing, referencing the same line from Blackstone that Ramos has misread. *See*, *e.g.*, *Blakely v. Washington*, 542 U.S. 296, 301, 313-14 (2004); *United States v. Booker*, 543 U.S. 220, 238-39 (2005); *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Moreover, those decisions—which were addressing distinct questions about what types of *facts* must be tried to a jury—do not even cite *Apodaca* and *Johnson*, much less evaluate whether they were rightly decided. And in *United States v. Gaudin*, 515 U.S. 506,

510 (1995), the Court cited the Blackstone and Story statements discussed above, before pointing to *Apodaca* in a footnote for the proposition that "jury unanimity is not constitutionally required," *id.* 510 n.2.

Ramos also cites *Richardson v. United States*, 526 U.S. 813 (1999), which addressed whether a jury must agree about which specific "violations" make up the "continuing series" of violations under the federal continuing criminal enterprise statute, 21 U.S.C. §848. While addressing that issue, the Court noted that "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Id.* at 817. The Court further noted, however, that unanimity in federal trials is independently required by Federal Rule of Criminal Procedure 31(a). *See id.*; *see infra* at 50. *Richardson* cited *Johnson* in passing, and did not discuss the Sixth Amendment at all.[7]

Finally, *McDonald v. Chicago*, 561 U.S. 741, 766, n.14 (2010), and *Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019), merely summarized the *Apodaca* decision, noting the "unusual division among the Justices." Neither *McDonald* nor *Timbs* addressed the Court's reasoning in those cases, and nothing in them turned on whether the Sixth Amendment requires unanimity. This Court's post-*Apodaca* decisions, at bottom, offer no

[7] In *Descamps v. United States*, 570 U.S. 254 (2013), the Court stated that the Sixth Amendment requires unanimity, *see id.* at 269 (citing *Richardson*, 526 U.S. at 817). But the Court's holding did not turn on that issue. The Court did not even cite *Apodaca* or *Johnson*—let alone substantively address those decisions.

more support for Ramos's position than the earlier cases.

II. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE A UNANIMOUS JURY VERDICT TO CONVICT.

Ramos offers various reasons why Louisiana's rule violates the Fourteenth Amendment. *See* Pet. Br. 34-38. Each of these arguments is either misplaced, undeveloped, or both. The Fourteenth Amendment does not require unanimity.

Ramos first argues that "the Fourteenth Amendment's Due Process Clause 'incorporates' . . . the Sixth Amendment's unanimity requirement against the states." *Id.* 34 (quoting *Timbs*, 139 S. Ct. at 687). As explained, however, his argument is built on a false premise. The Sixth Amendment does not require unanimity. Accordingly, there is nothing to incorporate.

Alternatively, Ramos argues for a "freestanding due process right to unanimity" because it is "so rooted in the traditions and conscience of our people to be ranked as fundamental." Pet. Br. 36-37 (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)). As an initial matter, this argument is forfeited because it was not pressed below. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). Nor was it raised in the certiorari petition, which would have given Louisiana the opportunity to lodge an objection to this "late-blooming argument" in its brief in opposition. *American Nat. Bank and Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606, 608 (1985). And even in his merits brief, Ramos treats the issue as afterthought, devoting barely a page

to it. The Court should "not decide this question based on such scant argumentation." *Turner Broad. System, Inc. v. FCC*, 520 U.S. 180, 224 (1997).

Regardless, Ramos's "freestanding" due process argument is baseless. The Due Process Clause is not a repository for an implied right to unanimity that Ramos is unable to squeeze into the Sixth Amendment. *See Apodaca*, 406 U.S. at 411-414 (plurality op.). The Fifth and Fourteenth Amendments afford the same due-process rights; the former "applies this limitation to the Federal Government" while the latter "imposes the same restriction on the States." *In re Winship*, 397 U.S. 358, 378 n.3 (1970) (Black, J., dissenting). This Court "has never held jury unanimity to be a requisite of due process of law." *Johnson*, 406 U.S. at 359; *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) ("In criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict.").

That nearly every State, including Louisiana, has since adopted a unanimity requirement, Pet. Br. 37, underscores why the Court should *not* write it into the Due Process Clause as a one-size-fits-all command. "The elected governments of the States are actively confronting" this issue; thus, to "suddenly constitutionalize" a due-process right to a unanimous verdict "would short-circuit what looks to be a prompt and considered legislative response." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72-73 (2009). Allowing a conviction by a 10-2 vote simply is not "fundamentally unfair." *Kansas v. Carr*,

136 S. Ct. 633, 644 (2016) (cleaned up); *see Johnson*, 406 U.S. at 360-63.[8]

Finally, and in passing, Ramos asserts that unanimity is protected by the Fourteenth Amendment's Privileges or Immunities Clause. *See* Pet. Br. 37-38. This newly-minted argument is not presented for the same reasons as the freestanding due-process argument. If anything, this issue is an even poorer candidate for review given that the Clause protects only "citizens of the United States," U.S. Const. amend. XIV, §1, and Ramos hedges on whether he is a citizen, *see* Pet. Br. 38 n.13. Recognizing the barrier this raises, he asks the Court—in the first instance—to hold that Louisiana is violating the privileges or immunities of "citizens of the United States," U.S. Const. amend. XIV, §1, and then to invalidate that law as to noncitizens on severability or equal-protection grounds, Pet. Br. 38 n.13. Ramos's suggestion that this Court should address a basis for relief not pressed or passed on below, not raised at the certiorari stage, barely briefed on the merits, that may not apply to Ramos himself, in order to then reach a novel remedial question that itself has never been pressed or passed on is self-refuting.

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[8] Whether a non-unanimous conviction by closer margins would cross this constitutional line is a different question that is not presented here. *See Apodaca v. Oregon*, 406 U.S. at 411 (plurality op.); *Johnson*, 406 U.S. at 366 (Blackmun, J., concurring). The Court has previously reviewed idiosyncratic unanimity issues when warranted. *See Burch v. Louisiana*, 441 U.S. 130, 133-39 (1979). But given that 49 out of 50 States now require unanimity, and Oregon requires a 10-2 vote to convict and is also considering changes to its policy, the issue is unlikely to arise again in the foreseeable future, if ever.

Regardless, the "privileges or immunities" argument is not meritorious. Those willing to hear this argument have, to this juncture, limited the Clause's reach to those "rights enumerated in the Constitution." *McDonald*, 561 U.S. at 853 (Thomas, J., concurring in part and concurring in the judgment); *Timbs*, 139 S. Ct. at 698 (Thomas, J., concurring in the judgment) ("As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment's prohibition on excessive fines applies in full to the States."). Again, as explained, the right to a unanimous jury is neither itself enumerated nor within the ambit of the Sixth Amendment.

III. *APODACA V. OREGON* SHOULD NOT BE OVERRULED.

There is no reason to overrule *Apodaca*. As the Court recently explained, "even in constitutional cases, a departure from precedent demands special justification." *Gamble*, 139 S. Ct. at 1969 (cleaned up); *see also id.* at 1989 (explaining that the Court "should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous"). But, according to Ramos, "considerations of *stare decisis* need not play any role" in deciding whether to overrule *Apodaca* because it "consists of a splintered set of opinions." Pet. Br. 39. That is wrong for several reasons.

Apodaca was not a summary affirmance that was decided without briefing and argument. Whether or not it has "questionable precedential value," *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66 (1996), it warrants

respect.[9] Even under these circumstances, the Court demands a "special justification when departing from precedent." *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring) (cleaned up).

That makes sense. The doctrine of *stare decisis* is about "maintaining settled law" or abandoning it for a different legal rule. *Leegin*, 551 U.S. at 899. Here, the "settled law" is the prevailing rule that States may allow criminal convictions based on jury verdicts that are not unanimous. *Accord Alleyne*, 570 U.S. at 134 n* (Alito, J., dissenting). That has been the rule since the Founding and has been explicit in this Court's precedent for nearly 50 years. It *should* take a special justification, such as a showing of demonstrable error, to reverse course at this point.

In any event, neither party is asking the Court to accord Justice Powell's solo opinion in *Apodaca* precedential force. *See* Pet. Br. 40-43. Louisiana believes that the plurality correctly interpreted the Sixth Amendment and that the Court's judgment was correct. Ramos believes, in contrast, that the dissenters correctly interpreted the Sixth Amendment and that the Court's judgment was incorrect. Having granted review notwithstanding the issue's rapidly diminishing importance, *see supra* at 39, the Court must now decide which party has the better of the argument.

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[9] Indeed, Louisiana *expressly* relied on *Apodaca* in 1974 when it readopted its rule and revised the minimum vote to 10-2. *See* Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Vol. 7, pp. 1184-1189 (La. Constitutional Convention Records Commission 1977).

This should be an especially easy choice if Ramos must make *any* additional showing to succeed in his challenge. His argument finds no home in the Constitution's text or structure, and he oversold the history. Ramos needs "historical evidence" that is "better than middling" for the Court to reverse course on this important issue. *Gamble*, 139 S. Ct. at 1969. "And it is not." *Id.*

Worse, siding with Ramos may not only disrupt the law of Louisiana and Oregon as to non-unanimous jury verdicts. It would be difficult to rule for Ramos here without undermining the *Williams* framework and its validation of juries with fewer than twelve people. Abandoning the settled understanding that the Sixth Amendment did not codify every common-law feature of the jury would lead to a cottage industry of litigation, flooding the courts with myriad claims about what the common law required in 1789.

Reopening the seemingly settled debate about the twelve-juror requirement would be especially problematic. Approximately 40 States allow some types of criminal convictions by juries consisting of fewer than twelve people. *See Bureau of Justice Statistics, State Court Organizatio*n (2004), Table 42. And several States—including Arizona, Florida, Indiana, Massachusetts, and Utah—allow juries of fewer than twelve people for certain types of felonies. *Id.* In short, discarding this Court's longstanding approach to the Sixth Amendment will have "mischievous consequences" that the Court endeavors to avoid. *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965).

Furthermore, in addition to casting doubt on every *pending* felony trial in Louisiana for crimes committed before January 1, 2019, a mandatory unanimity rule will have serious consequences for post-conviction review. Thousands of final convictions in Louisiana and Oregon could be upset if such a new rule were later declared retroactive. Indeed, even the Court's grant of certiorari in this case has already prompted some petitioners to seek habeas review on this ground, arguing for the retroactive application of a rule not yet decided—and claiming ineffective assistance of counsel for not challenging non-unanimous convictions notwithstanding controlling precedent.

Of course, Louisiana would argue against retroactive application of a new unanimous-jury rule. Win or lose, though, the flood of motions has already begun, and the burden on the court system will be severe. Apparently, "the number of [Oregon] juries rendering verdicts with one or two holdouts is 25 percent of all juries." Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy*, 199 (1994). The potential that about one out of every four jury trials in two States would need to be retried is deeply concerning and should give this Court pause about opening the door to such claims.

There are no countervailing reasons that justify imposing a unanimity requirement on States. Ramos emphasizes the issues with Justice Powell's approach to incorporation. *See* Pet. Br. 40-43. But Louisiana is not defending State law on the ground that the Sixth Amendment should not apply to it. Louisiana is instead

arguing that its jury system complies with the Sixth Amendment in all respects.

Agreeing with Louisiana may cast doubt on whether unanimity is constitutionally required at the federal level. But any tension is hypothetical given that federal law requires unanimity irrespective of the Sixth Amendment. *See* Fed. R. Crim. P. 31(a). Even if the Court one day must confront this aspect of *Apodaca*, however, that is not nearly good enough a reason to impose unanimity on the States. The "rule's infidelity to the text, structure, and history of the Constitution counsels against extending the principle any further than our precedent requires." *Haywood*, 556 U.S. at 764 (Thomas, J., dissenting). Far from requiring a mandatory unanimity rule, precedent will need to be overturned here to extend this ill-considered rule. That would be unfortunate. "Two wrongs don't make a right." *Utah v. Strieff*, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting).

CONCLUSION

The Court should affirm the judgment below.

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