No. 18-5924

IN THE

Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

LOUISIANA,

Respondent.

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

BRIEF OF LAW PROFESSORS AND SOCIAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAYNA J. ZOLLE**
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St. NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

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* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

TABLE OF CONTENTS

TABLE OF CONTENTS – cont'd

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and social scientists whose research and teaching address empirical and constitutional questions about jury unanimity. They have a strong interest in ensuring that this Court is fully informed about the empirical evidence that demonstrates that allowing non-unanimous verdicts in criminal cases undermines the right to a jury trial, as well as the Framers' recognition that a unanimous jury verdict is fundamental to the Sixth Amendment jury-trial right. Accordingly, they also have an interest in ensuring that the Sixth Amendment right to a unanimous jury verdict, which this Court has held is guaranteed in federal criminal trials, is fully applicable to the States through the Fourteenth Amendment.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

This case raises a question central to the Sixth Amendment's guarantee of the right to a jury trial: whether an individual may be convicted of a crime—and, in Petitioner Evangelisto Ramos's case, sentenced to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence—when two of the twelve jurors who heard his case did not concur in the guilty verdict. The Louisiana Fourth Circuit Court of Appeal answered this question in the

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

affirmative, citing this Court's splintered decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and Louisiana precedent holding that "non-unanimous twelve-person jury verdicts are constitutional," J.A. 22. These precedents are inconsistent with the text, history, and values of the Sixth and Fourteenth Amendments and should be overruled.

Modern empirical evidence underscores the wisdom of the Framers' insight that unanimity is critical to the jury right. Research has found that a unanimous jury requirement strengthens deliberations, reduces the frequency of factual error, fosters greater consideration of minority viewpoints, and increases confidence in verdicts and the criminal justice system. *See infra* at 5-13. Thus, requiring unanimous verdicts is essential to ensuring that criminal defendants receive the fair trial that the Sixth Amendment was designed to protect.

Indeed, at the time of the Founding, the jury was viewed as a critical component of any system of ordered liberty. As Sir William Blackstone emphasized, "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 William Blackstone, *Commentaries* *379. Sharing Blackstone's view, the Framers saw the right to trial by jury as sacrosanct and expressly mentioned juries no less than three times in the Bill of Rights, including in the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," U.S. Const. amend. VI.

When the Framers included this right to a "speedy and public trial, by an impartial jury" in the Bill of Rights, *id.*, it was with the understanding that jury unanimity is a fundamental component of that right, an understanding this Court has reaffirmed with

respect to federal criminal trials as recently as last Term: "[T]he Sixth Amendment requires jury unanimity in federal . . . criminal proceedings." *Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019) (citing *Apodaca*, 406 U.S. 404); *see also McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010) ("[T]he Sixth Amendment right to trial by jury requires a *unanimous* jury verdict in federal criminal trials . . . ." (emphasis added)).

This Court has held that the Sixth Amendment right to trial by jury in federal court is incorporated by the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *see id.* ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States."), and that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,'" *McDonald*, 561 U.S. at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)); *see Timbs*, 139 S. Ct. at 687 ("[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."). However, this Court in *Apodaca v. Oregon* held that the Sixth Amendment right to a unanimous jury does not bind the States.

The Court's decision in that case was fractured, with a majority unable to agree on a rationale for the rule the Court adopted. A four-justice plurality concluded that the Sixth Amendment does not require jury unanimity to convict at either the state or federal level. 406 U.S. at 406. Although these justices recognized that "the requirement of unanimity arose during

the Middle Ages and had become an accepted feature of the common-law jury by the 18th century," *id.* at 407-08, they rejected what they called the "easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution," *id.* at 408-09 (quoting *Williams v. Florida*, 399 U.S. 78, 92-93 (1970)). According to the plurality, the meaning of the Sixth Amendment should turn not on practices as they existed at common law, but rather on "the function served by the jury in contemporary society." *Id.* at 410. Engaging in that functional inquiry, the plurality concluded that unanimity was not required because, in terms of the jury's function of imposing the "'commonsense judgment of a group of laymen,'" *id.* (quoting *Williams*, 399 U.S. at 100), the justices "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one," *id.* at 411.

Justice Powell supplied the fifth vote needed to resolve the case. Unlike the plurality, he concluded that "the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial," *Johnson v. Louisiana*, 406 U.S. 366, 371 (1972) (Powell, J., concurring), but he agreed with the plurality that a jury need not reach a unanimous verdict in a state criminal trial. In his view, "all of the elements of jury trial within the meaning of the Sixth Amendment are [not] necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment." *Id.* at 369.

Since the Court decided *Apodaca*, empirical research and legal developments have undermined the reasoning of both the plurality's opinion and Justice Powell's concurrence. Empirical studies have flatly disproven the many assumptions on which both

opinions relied, and this Court's subsequent decisions have likewise rejected every other basis for the Court's conclusion. To be consistent with empirical evidence, the views of the Framers, and subsequent case law, this Court should overturn *Apodaca* and hold that criminal defendants in state court, like criminal defendants in federal court, cannot be convicted except by a unanimous verdict of their peers.

ARGUMENT

I. EMPIRICAL RESEARCH DEMONSTRATES THAT REQUIRING UNANIMOUS JURY VERDICTS IN CRIMINAL CASES IS ESSENTIAL TO THE RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT.

Empirical studies have consistently borne out what the Framers understood—that requiring unanimous jury verdicts is fundamental to the guarantee that a criminal defendant enjoys the "right to a speedy and public trial, by an impartial jury," U.S. Const. amend. VI. These studies demonstrate that requiring unanimous verdicts strengthens jury deliberations, reducing the incidence of factual errors that might lead to mistaken judgments. Moreover, a unanimity requirement increases the attention paid to minority viewpoints and ensures that all jurors are heard in the process of reaching a verdict. In addition, studies confirm that requiring unanimity bolsters people's confidence in the justice system, an important benefit of the jury-trial right. Studies also indicate that the worry that unanimity will generate more hung juries is overstated, as a unanimity requirement only marginally increases the hung jury rate.

A. More Thorough Deliberations

Empirical research has repeatedly shown that requiring unanimity fosters more thorough and

considered jury deliberations. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) [hereinafter *Jury Decision Making*] (examining eleven empirical studies). Juries requiring unanimity tend to be "evidence-driven," delaying their first vote longer and discussing the evidence more thoroughly than non-unanimous juries. *See* Reid Hastie et al., *Inside the Jury* 115, 164-65 (1983); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1, 24-25 (2001) [hereinafter *The Power of Twelve*].

When unanimity is not required, by contrast, juries tend to end their deliberations soon after obtaining enough votes to reach a verdict. *Jury Decision Making*, *supra*, at 669. This is to be expected because non-unanimous juries are typically more "verdict-driven." *See* Hastie et al., *supra*, at 165; *The Power of Twelve*, *supra*, at 24-25. They are more likely to take a formal ballot during the first ten minutes of deliberation and to continue voting with some frequency until enough jurors agree to reach a verdict. *See* Hastie et al., *supra*, at 115, 164-65. Accordingly, juries tend to take less time to deliberate, *Jury Decision Making*, *supra*, at 669, and are less thorough in their deliberations when they are permitted to reach a non-unanimous verdict, Hastie et al., *supra*, at 165.

A study of 50 real civil jury deliberations in Arizona confirmed these findings.[2] *See* Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100

[2] Researchers have found that civil and criminal juries behave consistently in this regard. *E.g.*, *The Power of Twelve*, *supra*, at 29.

Nw. U. L. Rev. 201 (2006). On post-trial questionnaires, members of juries that reached a three-fourths majority verdict rated their deliberations as less thorough and their fellow jurors as less open-minded than did members of juries that reached unanimous verdicts. *Id.* at 225. These more negative perceptions from jurors whose deliberations did not end in unanimity held true for both dissenters from the majority's decision and members of the majority. *Id.*

To be sure, not all majority-rule juries speed through deliberations or give short shrift to minority viewpoints; some of the juries in the Arizona study pressed for unanimity even though it was not required. *Id.* at 212. But many did not. *See id.* at 212-13. The majority of juries in the Arizona study pointed out early in deliberations that they needed only a majority of votes, *id.* at 214, and some jurors used the quorum requirement explicitly to suppress debate, *id.* at 215-16. In one particularly striking case, a member of a majority-rule jury expressly discounted the views of a fellow juror, stating, "All right, no offense, but we are going to ignore you." *Id.* at 216.

Experimental studies have also found that juries deliberate longer and more thoroughly when unanimity is required. For example, in one study, participants who had appeared for jury duty were shown a three-hour reenactment of an actual homicide trial. Hastie et al., *supra*, at 45-47. The jurors then deliberated under a unanimous (twelve out of twelve), five-sixths (ten out of twelve), or two-thirds (eight out of twelve) decision rule. *Id.* at 50. The juries operating under a unanimous decision rule deliberated longer and discussed key facts to a greater extent than those not required to reach a unanimous verdict. *See id.* at 76-77, 97. Consistent with these measures, jurors operating under a unanimous decision rule rated their

deliberations as more thorough than did jurors operating under non-unanimous decision rules. *Id.* at 77.

Other experimental studies have produced similar results. For example, another study involving mock criminal juries found that twelve-person juries charged with reaching a unanimous verdict spent significantly more time deliberating than did their counterparts who were permitted to reach a two-thirds majority. James H. Davis et al., *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psychol. 1, 9, 12 (1975). Moreover, most juries required to reach a two-thirds majority stopped deliberating either immediately or within ten minutes after obtaining the requisite number of votes. *Id.* at 12. Thus, deliberations are likely to be significantly more thorough when unanimity is required.

B. More Accurate Outcomes

Unanimity also reduces the likelihood of error. One study found that juries required to reach a unanimous verdict in a simulated homicide trial were less likely to reach the legally inaccurate verdict of first-degree murder than those operating under a non-unanimous decision rule. Hastie et al., *supra*, at 62, 81. They were also more likely to correct mistaken assertions. *Id.* at 88-89. This makes sense because studies have found a "strong indication that the quality of the deliberation process is in fact related to criminal jury trial outcomes." Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. Empirical Legal Stud. 273, 300 (2007); *see also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (collecting empirical studies); *id.* ("A shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment.").

A unanimity requirement, therefore, fosters more robust jury deliberations and produces more accurate outcomes, effectuating the Sixth Amendment requirement that no one be convicted of a crime unless twelve impartial jurors are convinced of his or her guilt beyond a reasonable doubt.[3] *Cf.* Diamond, *supra*, at 230 ("The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the judge agreed with the verdict favored by the holdouts in a number of these cases."). Unanimity is thus part and parcel of the Sixth Amendment right to trial by jury.

C. Increased Consideration of Minority Viewpoints

As this Court has recognized, "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Ballew v. Georgia*, 435 U.S. 223, 237 (1978) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). To that end, this Court has taken great strides through the years to ensure that prospective jurors are not excluded from the jury room on the basis of race or sex. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 213 (2005); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994). Yet allowing for non-unanimous jury verdicts may undermine these efforts and effectively deprive a criminal defendant of the fundamental right to "an impartial jury," U.S. Const. amend. VI.

Requiring unanimity ensures that jurors who share a majority viewpoint must still consider and respond

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[3] Perhaps this is why every State but one, Or. Const. art. I, § 11, now requires unanimous jury verdicts in felony cases and why even Louisiana has long required unanimous jury verdicts in capital cases, La. Const. art. I, § 17(A).

to the views of jurors in the minority. *See* Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 Chi.-Kent L. Rev. 579, 587 (2007) ("In juries required to reach unanimity, jurors understandably pay more attention to those who hold minority views; furthermore, those attempting to argue a minority position participate more in the discussion and have more influence."). This is important because, as the Founders recognized, trials are "not just about the rights of the defendant but also about the rights of the community. The people themselves had a right to serve on the jury—to govern through the jury." Akhil Reed Amar, *America's Constitution* 237 (2005). In short, serving on juries, and having one's voice heard, is a fundamental act of citizenship and suffrage, *cf. Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their ultimate control in the judiciary."), and a requirement of jury unanimity helps effectuate this aspect of the jury right by ensuring that the voices of all jurors are heard and considered. *See United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.) ("A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury.").

Absent a unanimity requirement, juries may disregard and effectively silence the views of members of historically excluded groups—namely, racial and ethnic minorities and women. Thus, "[i]f—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules [in criminal cases] can operate to eliminate the voice of difference on the jury." Taylor-Thompson, *supra*, at 1264. The marginalization of

members of racial minority groups in particular—even if unintended—can have significant consequences, as racial stereotypes and biases continue to influence jurors' judgments and their perceptions of a defendant's honesty and guilt. *See id.* at 1290-95 (collecting studies).

Indeed, a recent study of 199 serious felony guilty verdicts by non-unanimous juries in Louisiana confirmed that Louisiana's non-unanimity rule effectively suppresses the views of racial minorities. Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1599 (2018). The study demonstrated that African American jurors are disproportionately in the minority urging acquittal. *Id.* at 1599. Thus, "black jurors are more likely than white jurors to cast 'empty votes' (i.e., dissenting votes that are overridden by supermajority verdicts)." *Id.* at 1622. Moreover, the study found that African American defendants are more likely than white defendants to be convicted by non-unanimous verdicts. *Id.* This result is perhaps unsurprising given the racially motivated origins of Louisiana's rule allowing for non-unanimous verdicts. *See* Pet'r Br. 2-5. Accordingly, the author of the Louisiana study concluded that "the absence of a unanimity requirement continues to systematically weaken the voice of nonwhite jurors in contemporary criminal adjudication, just as it was originally intended." Frampton, *supra*, at 1599.

Further, allowing non-unanimous jury verdicts may diminish or eliminate the influence of women on juries. Research has shown that women tend to speak less frequently than men in jury deliberations. *See* Taylor-Thompson, *supra*, at 1299; Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 Yale L.J. 593, 594-98 (1987); Hastie et al., *supra*, at 141-42 (observing that male mock jurors made 40%

more comments than their female counterparts). Men also tend to interrupt women in deliberations or ignore their comments, further reducing women's participation. Taylor-Thompson, *supra*, at 1299 (collecting studies). In addition, women tend to take longer than men to enter these discussions. *Id.* Thus, under a majority-rule system, where deliberations typically conclude more quickly, a jury may reach a verdict before women begin to meaningfully contribute. *Id.* at 1300. "Indeed, majority rule may make it less likely that women's voices will ever be heard." *Id.*

But it is not only women and minorities whose views are more likely to be ignored when the jury need not reach unanimity. *Any* person or group who expresses a minority position may find their views ignored when their votes are not needed to reach a verdict.

D. Greater Confidence in Verdicts and the Justice System

Empirical studies have also established that requiring unanimity increases confidence in jury verdicts, thereby bolstering trust in the justice system itself. Several studies have shown that jurors who are required to reach unanimity report greater satisfaction and confidence in their verdicts. *See, e.g.*, *Jury Decision Making*, *supra*, at 669; *The Power of Twelve*, *supra*, at 26 & n.89. Individuals interviewed for one empirical study believed that twelve-person unanimous juries were "most accurate (63%), most thorough (62%), most likely to represent minorities (67%), most likely to listen to holdouts (36%), most likely to minimize bias (41%), and fairest (59%)," as compared with twelve-person majority, six-person unanimous, and six-person majority juries. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the*

Criminal Jury: Procedural Fairness, Accuracy, and Efficiency, 12 Law & Hum. Behav. 333, 337 (1988).

A unanimity requirement, therefore, shapes how jurors perceive not only the verdicts they render and their experience with jury service but also the criminal justice system itself. Permitting non-unanimous jury verdicts, and thus allowing members of the majority to dismiss minority viewpoints, reduces trust in and respect for the justice system as a whole. *Cf. J.E.B.*, 511 U.S. at 140 ("Discrimination in jury selection . . . causes harms to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."); *Powers v. Ohio*, 499 U.S. 400, 406 (1991) ("*Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large."). "The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict . . . ." *Lopez*, 581 F.2d at 1341 (Kennedy, J.).

E. Low Cost of Requiring Unanimity

Finally, the cost of requiring jury unanimity is relatively small and is outweighed by the significant benefits of the requirement, which 49 States have now implemented in felony cases.[4] While unanimous juries have been associated with somewhat higher hung jury

[4] In 2018, Louisiana amended its constitution to require unanimous jury verdicts in felony cases in which the punishment is necessarily confinement at hard labor. La. Const. art. I, § 17(A). This amendment, however, was prospective and thus did not affect this case. *See id.* (requiring unanimous jury verdicts only for certain offenses committed on or after January 1, 2019).

rates than majority juries, *see* Diamond, *supra*, at 207, the difference is modest because final votes of 10-2 or 11-1 are rare. A 1966 study found that jurisdictions requiring unanimity had a 5.6% hung jury rate, while the hung jury rate in jurisdictions allowing majority verdicts was 3.1%. Nat'l Ctr. for State Cts., *Are Hung Juries a Problem?* 13 (2002), http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/Are%20Hung%20Juries%20A%20Problem.ashx (citing Harry Kalven & Hans Zeisel, *The American Jury* 461 (1966)). A more recent study of juries in state criminal trials from 1996 through 1998 similarly found that the average hung jury rate for 30 large urban jurisdictions (all of which required unanimity) was 6.2%. *Id.* at 25. Meanwhile, the same study found that the federal hung jury rate in criminal trials from 1980 to 1997 (all of which also required unanimity, *see* Fed. R. Crim. P. 31(a)) ranged from 2.1% to 3%. Nat'l Ctr. for State Cts., *supra*, at 22. This study noted that the primary cause of hung juries in state cases was reportedly weak evidence (accounting for 63% of hung juries). *Id.* at 76. Members of these hung juries did not identify dysfunctional deliberations as a primary cause of their jury's inability to reach a verdict, although deliberation quality appears to have played a secondary role in about 30% of hung juries. *Id.*

Thus, unanimity requirements have been associated with an increase in hung jury rates of only a few percentage points. Moreover, one cannot reasonably contend that a unanimity requirement would prove unworkable in state courts, as 49 out of 50 States—including Louisiana itself—currently require unanimous jury verdicts in felony cases. Accordingly, even if a unanimity requirement results in a modest

increase in hung juries, the benefits of such a requirement well outweigh that cost.

II. THE FRAMERS UNDERSTOOD THAT JURY UNANIMITY IS ESSENTIAL TO THE FUNDAMENTAL RIGHT TO TRIAL BY JURY IN CRIMINAL CASES.

Even without the benefit of this empirical evidence, the Framers regarded unanimity as crucial to the Sixth Amendment right to trial by jury—a right that they deemed sacrosanct. Featured expressly in three of the first ten amendments to the Constitution, the jury is "a paradigmatic image underlying the original Bill of Rights." Akhil Reed Amar, *The Bill of Rights* 96 (1998); *see, e.g.*, U.S. Const. amends. V, VI, VII. To the Founders, the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." Amar, *The Bill of Rights*, *supra*, at 97.

The Founding generation's focus on the jury as a central feature of a system of ordered liberty was strongly rooted in English common law. As Sir William Blackstone emphasized, "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 William Blackstone, *Commentaries* *379; *see* 4 *id.* at *343-44 (calling the jury a "sacred bulwark" of liberty). Blackstone's understanding was that trial by jury "is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the *unanimous consent* of twelve of his neighbours and equals." 2 *id.* at *379 (emphasis added). Blackstone later explained that it was important that a trial by jury include "the *unanimous suffrage* of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." 4 *id.* at *343 (emphasis added).

The Founders shared this view that jury unanimity was implicit in the fundamental right to trial by jury in criminal cases. In 1786, several years prior to ratification of the Constitution and the Sixth Amendment, John Adams reflected that "it is the *unanimity* of the jury that preserves the rights of mankind." Letter from John Adams to William Stephens Smith (Dec. 21, 1786), in 7 *The Adams Papers: Adams Family Correspondence, January 1786-February 1787* (Margaret A. Hogan et al. eds., 2005) (emphasis added). In fact, the original draft of the Sixth Amendment, which James Madison introduced in the House of Representatives, expressly provided for trial "by an impartial jury of freeholders of the vicinage, with the *requisite of unanimity* for conviction, of the right of challenge, and other accustomed requisites . . . ." *Apodaca*, 406 U.S. at 409 (emphasis added) (quoting 1 Annals of Cong. 435 (1789)).[5]

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[5] The absence of this language in the final version of the Amendment in no way indicates that the Framers rejected the unanimity requirement. After Madison's original draft passed the House, members of the Senate objected to the draft's "vicinage" language. *See Apodaca*, 406 U.S. at 409; Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), in 5 *The Writings of James Madison* 424 (1904) (recounting that the Senate was "inflexible in opposing a definition of the *locality* of Juries" and that it regarded "vicinage" as "either too vague or too strict a term" (emphasis added)). A conference committee also opposed an equally vague alternative that would have defined juries as simply possessing "the accustomed requisites." *See Apodaca*, 406 U.S. at 409 (quoting 1 Annals of Cong. 435 (1789)). The final version thus omitted both of these disputed terms, a result that this Court has "conceded[]" is "open to the explanation that the 'accustomed requisites' were thought to be already included in the concept of a 'jury.'" *Williams*, 399 U.S. at 97; *accord Apodaca*, 406 U.S. at 409-10. Although the *Apodaca* plurality suggested that the "more plausible" interpretation "is that the deletion was intended to have some substantive effect," 406 U.S. at 410, the

Later, as the States debated and ratified the Sixth Amendment, Justice James Wilson expressed in his 1790-91 *Lectures on Law* that "[t]o the conviction of a crime, the undoubting and the *unanimous* sentiment of the twelve jurors is of indispensable necessity." 2 James Wilson, *The Works of the Honourable James Wilson* 350 (1804) (emphasis added). In 1803, St. George Tucker, author of the 1803 edition of *Blackstone's Commentaries* stated his view that the Sixth Amendment secured "the trial by jury" as described in Blackstone's text, 5 St. George Tucker, *Blackstone's Commentaries* 348-49 n.2 (1803), later commenting that "without [the jurors'] *unanimous verdict*, or consent, no person can be condemned of any crime," 1 *id.* at App. 34 (emphasis added).

State practice at the time the Sixth Amendment was adopted also supports the view that unanimity had become an essential element of trial by jury for criminal trials in the United States. Even the *Apodaca* plurality conceded that "unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems." 406 U.S. at 408 n.3.

The view that jury unanimity was an essential component of the right to trial by jury did not change between the ratification of the Sixth Amendment and the ratification of the Fourteenth Amendment. In

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historical context suggests otherwise, *see infra* at 15-16, and this Court necessarily recognized as much in holding that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials," *McDonald*, 561 U.S. at 766 n.14 (citing *Apodaca*, 406 U.S. 404); *see, e.g.*, *Timbs*, 139 S. Ct. at 687 n.1 ("the Sixth Amendment requires jury unanimity in federal . . . criminal proceedings"); *Blakely*, 542 U.S. at 301; *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

1833, Justice Joseph Story embraced the unanimity requirement in his *Commentaries on the Constitution*, explaining that "[a] trial by jury is generally understood to mean . . . 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." 1 Joseph Story, *Commentaries on the Constitution of the United States* § 1779, at 559 n.2 (The Lawbook Exch., Ltd. 2008) (4th ed. 1873).

And in 1868, Thomas Cooley stated in an influential treatise that the "common-law incidents to a jury trial" that were "preserved by the constitution" included the requirement that "[t]he jury must unanimously concur in the verdict." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 319-20 (The Lawbook Exch., Ltd. 1999) (1868). Other prominent legal commentators of the time accepted this view as well. *See* 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 897, at 546 (2d ed. 1872) ("[I]n 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" is "void."); John Norton Pomeroy, *An Introduction to Municipal Law* § 135, at 78 (1864) ("[T]he jury [must] be unanimous in rendering their verdict. . . . The principle once adopted has continued as an essential part of the jury trial . . . ."); Joel Tiffany, *A Treatise on Government and Constitutional Law* § 548, at 367 (1867) ("And a trial by jury is understood to mean—generally—a trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had.").

Thus, the Framers recognized what the *Apodaca* plurality did not—that a requirement of jury unanimity is critical to ensuring the fair jury deliberations that the Sixth Amendment requires. As demonstrated above, more recent empirical research has confirmed the Framers' intuitions and makes clear why it is so important that this Sixth Amendment right be fully enforced.

III. EMPIRICAL RESEARCH, COUPLED WITH THIS COURT'S RECENT DECISIONS, UNDERMINES THE *APODACA* PLURALITY'S REASONING AND CONCLUSIONS.

In holding that the Constitution does not require States to guarantee unanimous jury verdicts in criminal cases, the *Apodaca* plurality embraced erroneous assumptions about juries and relied heavily on three other premises that this Court has since rejected: (1) that the proper inquiry for determining the Sixth Amendment's protections is functional rather than historical, (2) that the Sixth Amendment does not require proof beyond a reasonable doubt, and (3) that the Sixth Amendment does not apply to the States in the same way it applies to the federal government, a position unsupported by the historical record and this Court's precedent. Accordingly, *Apodaca* cannot stand. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (plurality) (considering whether change in precedent's "factual underpinning ha[d] left its central holding obsolete"); *id.* at 855 (prior precedent must give way when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine").

To begin, the fractured decision in *Apodaca* rested on faulty assumptions. As limited research on the subject existed at the time, the justices cited only one empirical study in their decisions in *Apodaca* and its

companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972): a 1966 study by Harry Kalven, Jr. and Hans Zeisel. *See Apodaca*, 406 U.S. at 411 n.5 (citing Kalven & Zeisel, *supra*). The plurality cited this study to support the proposition that "[r]equiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit." *Id.* at 411; *see id.* at 411 n.5 ("The most complete statistical study of jury behavior has come to the conclusion that when juries are required to be unanimous, 'the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it.'" (quoting Kalven & Zeisel, *supra*, at 461)). Likewise, in his concurrence, Justice Powell cited the same study's findings that the difference between the rate of hung juries in cases requiring unanimity and in those allowing majority verdicts was only a few percentage points. *Johnson*, 406 U.S. at 374 n.12 (citing Kalven & Zeisel, *supra*).

With only this one study in hand, the *Apodaca* plurality and Justice Powell relied heavily on wishful assumptions that have since been disproven by empirical evidence. As explained above, the *Apodaca* plurality stated that it "perceive[d] no difference" in a jury's deliberative and decisionmaking function "between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." 406 U.S. at 411. The plurality presumed that, "in either case," the defendant "is equally well served." *Id.* It cited no support for this proposition. Similarly, the plurality rejected the notion that a majority-verdict rule, unlike a unanimous-verdict rule, would allow juries to disregard the views of jurors who belong to minority groups, declaring—again, without citing any support—that members of minority groups "will be

present during all deliberations, and their views will be heard." *Id.* at 413.

In the same vein, Justice Powell relied on the Kalven and Zeisel study to conclude that "[t]he available empirical research indicates that the jury-trial protection is not substantially affected by less than unanimous verdict requirements." *Johnson*, 406 U.S. at 374 n.12 (citing Kalven & Zeisel, *supra*); *id.* at 379 (stating that he found "nothing . . . to justify the apprehension that juries not bound by the unanimity rule will be more likely to ignore their historic responsibility"). Justice Powell also noted the existence of other safeguards of the jury-trial right, such as the availability of peremptory challenges and the ability to change venues, and concluded that "[i]n light of such protections it is unlikely that the Oregon 'ten-of-twelve' rule will account for an increase in the number of cases on which injustice will be occasioned by a biased or prejudiced jury." *Id.* at 380.

Similarly, this Court in *Johnson* stated that it saw "no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict." *Johnson*, 406 U.S. 356, 361 (opinion of the Court). It also pointed to a lack of "evidence that majority jurors simply ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction." *Id.* at 362.

As described above, however, empirical evidence unavailable to the Court at the time of *Apodaca* and *Johnson* belies each of these assumptions. In particular, the evidence sharply refutes the notion that no functional difference exists between juries required to reach unanimity and those permitted to reach

majority verdicts, as well as the presumption that members of the minority "will be heard" simply by virtue of being in the room, *Apodaca*, 406 U.S. at 413. In short, empirical evidence confirms the Framers' fundamental insight that "it is the *unanimity* of the jury that preserves the rights of mankind," Letter from John Adams, *supra* (emphasis added), and ensures a fair trial by jury. For purposes of evaluating the Sixth Amendment right to a jury trial, speculation about how juries might behave must be replaced with accurate understanding about how jurors do behave, as informed by actual jury behavior.

The *Apodaca* plurality also relied heavily on three premises that this Court has since rejected. First, the *Apodaca* plurality expressly rejected the relevance of the common law to understanding the meaning of the Sixth Amendment and instead considered the "function served by the jury in contemporary society." 406 U.S. at 410. But in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court recognized that "the historical foundation for our recognition of [the rights in the Sixth Amendment] extends down centuries into common law," *id.* at 477, and it is thus appropriate to look to the common law as it existed at the Framing to determine how the Sixth Amendment's guarantee should apply in the context of sentencing, *see id.* at 478-83; *see also, e.g.*, *Blakely*, 542 U.S. at 313 (what matters is not "whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice," but rather "the Framers' paradigm for criminal justice"); *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004) (looking to history to determine the meaning of the Confrontation Clause).

In other words, under this Court's precedents, the outcome of this case should not turn on whether empirical evidence demonstrates that a unanimity

requirement is *functionally* critical to the Sixth Amendment jury-trial right (although empirical evidence plainly establishes that it is). Instead, the relevant inquiry is whether the jury-trial right at common law required unanimity, and it did. Empirical evidence merely underscores the wisdom of the common law unanimity requirement and explains why the Framers were justified in believing that unanimity was essential to the Sixth Amendment right to trial by jury. In light of this Court's more recent decisions making clear the importance of the relevant common law history, the *Apodaca* plurality's disregard for this history cannot stand.

Second, the *Apodaca* plurality rejected the argument that jury unanimity is necessary to safeguard the requirement of proof beyond a reasonable doubt, concluding that the latter is not required by the Sixth Amendment at all. 406 U.S. at 412. This Court, however, has since rejected that conclusion. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."); *Cunningham v. California*, 549 U.S. 270, 281 (2007) ("This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt . . . .").

Third, and finally, the rationale of Justice Powell's concurrence—that the Sixth Amendment applies differently to the States than the federal government—also conflicts with this Court's decisions both preceding and following *Apodaca*. Indeed, even at the time *Apodaca* was decided, Justice Powell readily acknowledged that his view on incorporation conflicted with this Court's decision in *Duncan v. Louisiana*, 391 U.S. 145, which had just four years earlier fully

incorporated the Sixth Amendment through the Fourteenth Amendment's Due Process Clause. *Johnson*, 406 U.S. at 375 (Powell, J., concurring).

The incorporation analysis of *Duncan* has stood the test of time, as this Court has repeatedly recognized that the critical rights and liberties of the Bill of Rights must be protected against state infringement just as robustly as they are protected against federal encroachment. *See, e.g.*, *Malloy*, 378 U.S. at 10 (holding that the protections of the Bill of Rights "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment"). And the Court has abandoned Justice Powell's "notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights," *id.* at 10-11 (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)), explicitly rejecting such an argument in *McDonald*, 561 U.S. at 765. Indeed, just last Term, this Court emphasized that "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs*, 139 S. Ct. at 687.

Thus, as this Court explained in *McDonald*, "it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" 561 U.S. at 765 (quoting *Malloy*, 378 U.S. at 10-11). Indeed, the Court acknowledged in both *Timbs* and *McDonald* that *Apodaca* is the "one exception to this general rule," while making clear that *Apodaca* was "*not* an endorsement of the two-track approach to incorporation." *Id.* at 766 n.14 (emphasis added). Rather, it was simply "the result of an unusual division among the Justices." *Id.*; *accord Timbs*, 139 S. Ct. at 687 n.1.

The Court's modern Sixth Amendment cases also reflect this approach to incorporation, uniformly applying the same rules in federal and state courts rather than considering whether it is appropriate to do so on a rule-by-rule basis. *See, e.g.*, *Apprendi*, 530 U.S. 466; *Blakely*, 542 U.S. 296; *Cunningham*, 549 U.S. 270. Justice Powell's controlling approach in *Apodaca* conflicts with these more recent decisions.

* * *

In sum, the central premises underlying the *Apodaca* plurality decision have all been undermined by more recent factual and legal developments, including the emergence of empirical evidence that confirms the Framers' fundamental insight that unanimity is essential to the Sixth Amendment right to trial by jury.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Court of Appeal should be reversed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAYNA J. ZOLLE**
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St. NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

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* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

APPENDIX:
LIST OF *AMICI*

Shari Seidman Diamond, Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University, Pritzker School of Law; Research Professor, American Bar Foundation

Phoebe C. Ellsworth, Frank Murphy Distinguished University Professor of Law and Psychology Emerita, University of Michigan Law School

Valerie P. Hans, Charles F. Rechlin Professor of Law, Cornell Law School

Reid Hastie, Ralph and Dorothy Keller Distinguished Service Professor of Behavioral Science, Chicago Booth School of Business, University of Chicago

Richard O. Lempert, Eric Stein Distinguished University Professor of Law & Sociology Emeritus, University of Michigan Law school

Nancy S. Marder, Professor of Law, Director of the Justice John Paul Stevens Jury Center, Chicago-Kent College of Law

Steven D Penrod, Distinguished Professor of Psychology, John Jay College of Criminal Justice and Graduate Center, The City University of New York

LIST OF *AMICI* – cont'd

Mary Rose, Associate Professor of Sociology, The University of Texas at Austin

Michael Saks, Regents' Professor, Sandra Day O'Connor College of Law, Arizona State University

Samuel R. Sommers, Professor of Psychology, Tufts University