No. 10-689

IN THE

Supreme Court of the United States

TROY BARBOUR,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

STEPHEN N. ZACK
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@abanet.org

Of Counsel
LISA S. BLATT
ANTHONY FRANZE
VICTOR A. RORTVEDT

Counsel for Amicus Curiae American Bar Association

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the states by the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* the American Bar Association ("ABA") respectfully submits this brief in support of Troy Barbour's petition for a writ of certiorari concerning his conviction for second-degree murder on a less than unanimous jury verdict. Specifically, the ABA requests that this Court reconsider its conclusion in *Apodaca v. Oregon*, 406 U.S. 404 (1972), that the Constitution does not require unanimous jury verdicts for state criminal convictions. While Justice Powell, in his concurrence that controlled the outcome in *Apodaca*, relied in part on the 1968 ABA STANDARDS FOR CRIMINAL JUSTICE, the ABA changed its standard on jury verdicts in 1976, based on overwhelming empirical data. For the last thirty-plus years, the ABA has continued to evaluate this standard and has consistently concluded that unanimity should be required in all—federal and state—criminal jury trials. Moreover, the ABA notes that, on January 7, 2011, this Court will consider the petition for a writ of certiorari in *Herrera v. State of Oregon*, No. 10-344, a case that also involves the issue of jury unanimity in state criminal trials. The ABA requests that both writs be granted.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. It has nearly 400,000 members spanning all 50 states and other jurisdictions, and its members include prosecutors, defense counsel, members of the federal and state judiciaries, private attorneys, legislators, academics, and students.[2]

One of the ABA's most prominent efforts has been its development of the ABA STANDARDS FOR CRIMINAL JUSTICE. Over the last forty years, through the work of broadly representative task forces, the ABA has drafted, refined and then approved these Standards as ABA policy.[3] As Chief Justice Burger wrote in 1974 when the first full edition of the Standards was published in seventeen volumes, "[t]he Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Warren E. Burger, *Introduction: The ABA*

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] Standards become official ABA policy when they are adopted by vote of the ABA House of Delegates, which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Dec. 23, 2010).

Standards for Criminal Justice, 12 AM. CRIM. L. REV. 251, 252 (1974).[4]

Another of its prominent efforts has been the work of the ABA Commission on Standards for Judicial Administration. Established in 1970, this Commission produced the ABA STANDARDS RELATING TO TRIAL COURTS, the first edition of which was published in 1976. In that first edition, as in the current edition, Standard 2.10 states, in pertinent part, that "the verdict of the jury [in criminal cases] should be unanimous."[5]

More recently, in 2004, the ABA established the American Jury Project. In 2005, this Project produced the ABA PRINCIPLES FOR JURIES AND JURY TRIALS, in which the same conclusion was reached in Principle 4.B: "A unanimous decision should be required in all criminal cases heard by a jury."[6]

Each of these endeavors is discussed below. With its deep and long-standing commitment to examining whether criminal jury verdicts should be unanimous, the ABA believes its unique and informed perspective may be of assistance to the Court in this matter.

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[4] The current ABA STANDARDS FOR CRIMINAL JUSTICE and a history of their development are available on the ABA website at http://www.abanet.org/crimjust/standards/home.html (last visited Dec. 23, 2010). *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (2009), *available at* http://www.abanet.org/crimjust/standards/marcus.pdf (last visited Dec. 23, 2010).

[5] The 1976 ABA STANDARDS FOR JUDICIAL ADMINISTRATION are available from the ABA.

[6] The ABA PRINCIPLES FOR JURIES AND JURY TRIALS are *available at* http://www.abanet.org/juryprojectstandards/ (last visited Dec. 23, 2010).

SUMMARY OF ARGUMENT

1. Justice Powell, in his concurrence in *Apodaca v. Oregon*, 406 U.S. 404 (1972), determined that the Constitution does not require unanimous jury verdicts in state criminal trials. While this determination was based in part on a 1968 ABA standard that accepted less-than-unanimous verdicts, the ABA changed its Standard in 1976 to affirm that jury verdicts in criminal trials should be unanimous.

Throughout the thirty-plus years since *Apodaca*, the ABA has reaffirmed that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial. Most recently, in 2005, as the result of its American Jury Project, the ABA adopted nineteen core jury trial principles, one of which provides that a unanimous decision should be required in all criminal cases heard by a jury.

2. The ABA's standards have always been based on comprehensive review of research and empirical data on the jury's role in the criminal justice system. This work, some of which is discussed below, has led the ABA to conclude that a non-unanimous decisional process reduces the reliability of jury determinations, silences minority viewpoints, erodes confidence in the criminal justice system, and does not significantly contribute to a reduction in hung juries and retrials.

Because each member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints, and community confidence in jury verdicts, and because the ABA's review of research and empirical data—as well as the consensus of the legal community—has concluded that a non-unanimous decision process does not

secure those aims, the ABA supports petitioner's request that the Court revisit *Apodaca*.

ARGUMENT

I. ABA STANDARDS AFTER 1976 AND ITS 2005 PRINCIPLE ON JURY UNANIMITY FOR CRIMINAL TRIALS SUPPORT THIS COURT'S RECONSIDERATION OF *APODACA*.

A. *Apodaca* Relied On The 1968 ABA Standards.

As petitioner explains, this Court's decision in *Apodaca* permitting non-unanimous jury verdicts in state criminal trials was the product of an unusual combination of disparate positions, in which five Justices agreed that the Sixth Amendment requires unanimous jury verdicts, and eight Justices agreed that the Sixth Amendment applies in full to the states. *See* Pet. 8-12. Notwithstanding this agreement, Justice Powell's concurrence, and thus this Court's judgment, concluded that the Constitution does not require states to convict by unanimous verdicts.

Justice Powell viewed the unanimity question as requiring "a fresh look at the question of what is fundamental in jury trial." *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972) (Powell, J., concurring in judgment). Justice Powell determined that deviation from the constitutional standard of unanimity for federal convictions was appropriate in part because "[l]ess-than-unanimous verdict provisions . . . have been viewed with approval by the American Bar Association's Criminal Justice Project." *Id.* at 377 & n.19 (citing ABA STANDARDS FOR CRIMINAL JUSTICE,

TRIAL BY JURY, Standard 1.1 (Approved Draft 1968) ("1968 CRIMINAL JUSTICE STANDARDS")).

In 1972, when *Apodaca* was decided, Standard 1.1 of Volume 15, *Trial by Jury*, of the 1968 CRIMINAL JUSTICE STANDARDS provided, in relevant part:

> 1.1 Right to jury trial.
>
> Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited in one or more of the following ways:
>
> * * *
>
> (d) by permitting less than unanimous verdicts, without regard to the consent of the parties.

In the Commentary to Standard 1.1, the Advisory Committee, on reviewing current thinking on jury unanimity, "concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, as now permitted in six states." *Id.* at 28.[7]

B. By 1976, The ABA Had Concluded That Unanimous Juries Should Be Required In Criminal Trials.

However, in 1976, another ABA commission, the Commission on Standards of Judicial Administration, presented its final draft of the ABA STANDARDS RELATING TO TRIAL COURTS ("1976 JUDICIAL STANDARDS"), in which its Standard 2.10 stated, in

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[7] The 1968 CRIMINAL JUSTICE STANDARD 1.1 and its Commentary are available from the ABA.

pertinent part, "[t]he verdict of the jury [in criminal cases] should be unanimous."[8]

In the Commentary to Standard 2.10, the Commission acknowledged that this was an enlargement of the scope of the jury trial right stated in Volume 15, Standard 1.1 of the 1968 CRIMINAL JUSTICE STANDARDS, but concluded, "[i]f the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, these qualifications [in Standard 1.1] appear to be both unnecessary and unwarranted by our legal traditions." 1976 JUDICIAL STANDARDS, *supra*, at 24.

The 1976 JUDICIAL STANDARDS were adopted as ABA policy at the ABA's Midyear Meeting in February 1976. In the course of their adoption, the ABA also authorized amendment to Standard 1.1 to conform to Standard 2.10 of the 1976 JUDICIAL STANDARDS, specifically affirming that, "[i]n criminal cases, the verdict of the jury should be unanimous." ABA SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, MIDYEAR MEETING, REPORT OF THE COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, at 18 (1976).

Accordingly, when the 1978 edition of Volume 15, *Trial by Jury*, of the ABA STANDARDS FOR CRIMINAL JUSTICE ("1978 CRIMINAL JUSTICE STANDARDS") was published, its Introduction stated: "Incorporating the

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[8] The 1976 JUDICIAL STANDARD 2.10 and its Commentary are available from the ABA.

ABA Standards of Judicial Administration, this updated standard [now 15-1.1] has been changed by deletion of . . . (1) recogni[tion] [of] the propriety of nonunanimous jury verdicts." *Id.* at 15-4.[9]

Any support that the ABA's 1968 CRIMINAL JUSTICE STANDARDS had lent to a position that permitted non-unanimous verdicts had thus ended by 1976.

C. In 2005, The ABA Reaffirmed Its Commitment To Unanimous Verdicts In Criminal Trials.

Throughout the next thirty-plus years, the ABA has repeatedly reaffirmed its conclusion that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial.[10] Most recently, in 2004, the ABA established the American Jury Project, which promulgated nineteen core jury trial principles that define the ABA's "fundamental aspirations for the management of the jury system." ABA PRINCIPLES FOR JURIES AND JURY TRIALS, Preamble, at 1 (2005) ("2005 JURY TRIAL PRINCIPLES").[11] Principle 4.B provides that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Id.* at 23.

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[9] The 1978 CRIMINAL JUSTICE STANDARDS and their Introduction are available from the ABA.

[10] *See, e.g.*, ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 17, at 150 (1983); ABA STANDARDS RELATING TO TRIAL COURTS, Standard 2.10, at 19 (1992); ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 17, at 156 (1993 update); and ABA CRIMINAL JUSTICE STANDARDS, Standard 15-1.1, at 121 (1996).

[11] The 2005 JURY TRIAL PRINCIPLES and their Preamble are available from the ABA.

The ABA's long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury's role in the criminal justice system. As this Court noted in 2005, it "long ha[s] referred to the [] ABA Standards as guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (internal punctuation and quotation marks omitted)). The ABA now offers its accumulated experience, study, and the evolved consensus of the legal community in support of its conclusion that the "fresh look" authorized by *Apodaca* in 1972 should be reconsidered and replaced with the requirement that, in jury trials, all criminal defendants—in federal and state courts—should have the right to unanimous verdicts.

II. EMPIRICAL RESEARCH, WHICH IS THE HEART OF ABA STANDARDS, SUPPORTS RECONSIDERATION OF *APODACA*.

Little empirical research on jury behavior existed when this Court decided *Apodaca* that might have confirmed or disproved the predictions underlying the decision. Since that time, however, extensive studies have been conducted that support reconsideration of the decision.

When the ABA revised its CRIMINAL JUSTICE STANDARDS in 1978, it explained that several changes in the standards, including the shift to unanimous jury verdicts, were made "to reflect the experience gained in the past decade and new perspectives in the wide-ranging topic of jury trial." 1978 CRIMINAL JUSTICE STANDARDS, *supra*, Introduction at 15-4. In its 2005 JURY TRIAL PRINCIPLES, the ABA discussed

empirical studies showing that a non-unanimous decision process reduces the reliability of jury determinations, silences minority viewpoints, and erodes confidence in the criminal justice system. 2005 JURY TRIAL PRINCIPLES, *supra*, at 24-25. The ABA also concluded that studies had demonstrated that another justification for non-unanimity—a reduction in hung juries and retrials—was overstated. *Id.* at 25.

In light of this amassed research, which shows that the non-unanimous process in criminal jury trials fails to foster thorough jury deliberations, attention to minority viewpoints, or community confidence in jury verdicts, the ABA suggests that *Apodaca*'s holding should be reconsidered.

A. Non-Unanimous Verdicts Reduce The Reliability Of Jury Determinations.

Empirical research since *Apodaca* calls into question the plurality's prediction that, from a functional standpoint, there would exist "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." *Apodaca*, 406 U.S. at 411 (plurality opinion).

In the Commentary to Principle 4.B of the 2005 JURY TRIAL PRINCIPLES, for instance, the ABA concluded that empirical data had shown that non-unanimous decision rules materially alter jury deliberations and decrease the reliability of verdicts:

> Implicit in [the historical preference for unanimous juries] is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions—ones that address and persuade every juror. Empirical assessment tends to

> support this assumption. Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots . . . . In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached.

Id. at 24 (citing 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)); *see also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 HARV. L. REV. 1261, 1273 (2000) (citing empirical research demonstrating that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable"); JEFFREY B. ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 205 (2000) ("Majority verdicts signal an entirely different type of behavior, where jurors ultimately remain free to assert their different interests and opinions against one another. The distinctive genius of the jury system has been to emphasize deliberation more than voting and representation."); REID HASTIE ET AL., INSIDE THE JURY 60 tbl. 4.1 (1983) (finding that twelve-member jurors required to reach a unanimous verdict deliberated for 138 minutes on average, whereas those required to reach an eight-member majority deliberated for an average of seventy-five minutes).

Further, research has shown that individual jurors themselves are less confident in the decisions they reach under non-unanimous decision rules. *See* Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6

S. CAL. INTERDISC. L.J. 1, 41 (1997) ("[T]he existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict."). Further, the wisdom of a unanimous verdict requirement is shown by research on group decision-making, in that better outcomes are produced after full consideration of a truly dissenting viewpoint, as compared with those produced when a member of the majority simply plays "devil's advocate." *See* Charlan J. Nemeth et al., *Devil's Advocate Versus Authentic Dissent: Stimulating Quantity and Quality*, 31 EUR. J. SOC. PSYCHOL. 707 (2001).

B. Non-Unanimous Verdicts Allow Juries To Reach A Quorum Without Seriously Considering Dissenting Viewpoints.

Empirical studies also do not support the *Apodaca* plurality's prediction that dissenting viewpoints "will be heard" even under non-unanimous decision rules. *Apodaca*, 406 U.S. at 413 (plurality opinion); *see also Johnson*, 406 U.S. at 361 ("We have no grounds for believing that majority jurors . . . would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.").

As the ABA found, "[u]nanimous verdicts also protect jury representativeness—each point of view must be considered and all jurors persuaded." 2005 JURY TRIAL PRINCIPLES, *supra*, at 24 (citing HASTIE ET AL., *supra*, at 45-58; Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 2, 23 (2001); Devine et al., *supra*, at 669). The ABA concluded that "minority jurors participate more actively when decisions must be unanimous." *Id.*

In contrast to the "deliberate, ponderous atmosphere" characteristic of deliberations of unanimous juries, researchers have found that "larger factions in majority rule juries adopt a more forceful, bullying, persuasive style," possibly "because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." HASTIE ET AL., *supra*, at 112; *see also* Saks, *supra*, at 40 ("Compared to unanimous rule juries, quorum rule juries have been found to deliberate less equitably (that is, the distribution of talking is skewed more extremely, with the talkative jurors talking more and the untalkative talking less than in unanimous rule juries).").

Researchers also have found that permitting non-unanimous verdicts "discourage[s] meaningful examination of opposing viewpoints" and thus "impoverishes deliberations." Taylor-Thompson, *supra*, at 1264. When jurors are required to reach unanimity, however, "jurors at the extremes may be driven to a compromise which they would otherwise reject, and a fairer verdict may result." ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 15-1.1 Commentary, at 126 (1996) (citing Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992)).[12]

Notably, "[i]f—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference on the

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[12] The 1996 ABA STANDARDS FOR CRIMINAL JUSTICE and their Commentary are available from the ABA.

jury." Taylor-Thompson, *supra*, at 1264. As Justice Stewart warned, "[u]nder [*Apodaca* and *Johnson*], nine jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting); *cf. also* Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1028-29 (2008) (examining the threat to justice posed by the unconscious prejudices of jurors). In related areas implicating Sixth Amendment rights, this Court has stringently protected the participation of women and minorities on juries. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

As Justice (then-Judge) Kennedy recognized in 1978, unanimous decision rules facilitate deliberation by ensuring that dissenting voices are heard and accepted or rejected, thus lending "particular significance and conclusiveness to the jury's verdict." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978).

C. Non-Unanimous Verdicts Undermine The Community's Confidence In The Justice System.

Empirical evidence similarly undercuts Justice Powell's prediction in *Apodaca* that unanimous jury verdicts would not be "entitled to greater respect in the community." *Johnson*, 406 U.S. at 374 (Powell, J., concurring in judgment). Instead, research has demonstrated that a non-unanimous decision rule "fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system." 2005 JURY TRIAL PRINCIPLES, *supra*, at 24-5 (citing Taylor-Thompson, *supra*, at 1315). *See*

also Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 L. & HUM. BEHAV. 333, 337-38 & tbl.1 (1988) (citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer); Barbara A. Babcock, *A Unanimous Jury is Fundamental to Our Democracy*, 20 HARV. J.L. & PUB. POL'Y 469, 472 (1997) (the need to reach consensus promotes the credibility of the judgment because "[a] unanimous verdict is a major accomplishment and carries with it moral authority that a split decision lacks"); ABRAMSON, *supra*, at 182 (unanimity serves as a "pillar of popular faith in the legitimacy and accuracy of jury verdicts"). By contrast, "[b]oth the defendant and society can place special confidence in a unanimous verdict." *Lopez*, 581 F.2d at 1341 (Kennedy, J.).

D. The Connection Between Unanimity And Hung Juries Has Been Overstated.

Justice Powell's opinion in *Apodaca* suggested that eliminating unanimity requirements "could well minimize the potential for hung juries occasioned either by bribery or juror irrationality." *Johnson*, 406 U.S. at 377 (Powell, J., concurring in judgment). Studies of hung juries largely negate those concerns, however, and instead bolster arguments favoring unanimity.

Research shows that juries rarely hang because of one or two obstinate jurors. 2005 JURY TRIAL PRINCIPLES, *supra*, at 25 (citing Taylor-Thompson, *supra*, at 1317). To the contrary, "[g]enerally, when deadlocks occur, they reflect genuine disagreement

over the weight of the evidence and arise within juries that had substantial differences in verdict preference at the outset of deliberations." *Id.* (citing PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? 67 (2002); HASTIE ET AL., *supra*, at 166-67; and Saks, *supra*, at 41).

As other research shows, eccentric or irrational holdout jurors do not normally derail unanimity. Instead, "[t]he majority of hung juries in criminal cases in which unanimity is required do not reflect a lone holdout or even two dissenters, but rather a more evenly divided final vote." Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 228 (2006). Juries tend to deadlock only when there is a "massive minority of 4 or 5 jurors"—rather than just one or two holdouts—at the beginning of the deliberative process, even if the number of dissenters is later reduced. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 462 (1966).

Further, it is the complexity of the case that affects the likelihood of jury deadlock: one study found the incidence of hung juries to be 10% in close, difficult cases, but only 2% in clear, easy cases. *Id.* at 457. In fact, in a study of civil cases, the judges agreed with holdout jurors over 40% of the time when a non-unanimous verdict was rendered, and disagreed with the jury in approximately 20% of the cases in which the verdict was unanimous. Seidman Diamond et al., *supra*, at 222. "[T]he agreement between the judge and the holdout jurors on a substantial number of cases suggests that the conflict on some of these juries posed precisely the kind of challenge to the

majority position that a deliberative process should welcome." *Id.*

Finally, research has shown no significant increase in the number of hung juries when jury unanimity is required. A survey of trial judges conducted in the 1950s found that, where unanimous verdicts were required, 5.6% of juries ended in deadlock, compared with 3.1% where majority verdicts were permitted. 2005 JURY TRIAL PRINCIPLES, *supra*, at 25 (citing KALVEN & ZEISEL, *supra*, at 461). A more recent review found that in the federal court system, which requires juror unanimity for all criminal verdicts and presumes a unanimity requirement for civil trials, the jury hung in only 1.2% to 2.0% of cases between 1980 and 1997. *See* Paula L. Hannaford *et al.*, *How Much Justice Hangs in the Balance?*, 83 JUDICATURE 59, 63 (1999). For federal criminal trials, the hung jury rate never surpassed 3.0% during that period. *Id.*

The costs of hung juries also are exaggerated, as shown by a study of California cases in which jury deadlocks resulted in retrials in only 26% of cases; all other cases were disposed of by guilty plea or dismissal. *See* Leo J. Flynn, *Does Justice Fail When the Jury is Deadlocked?*, 61 JUDICATURE 129, 133 (1977).

As a comprehensive study of hung juries reported, eliminating unanimous decision rules for jury verdicts "would address the symptoms of disagreement among jurors without necessarily addressing the actual causes—namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases." HANNAFORD-AGOR ET AL., *supra*, at 86.

Because research reveals that the non-unanimous jury process does not reduce hung juries, the ABA urges the Court to revisit the *Apodaca* holding.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN N. ZACK
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@abanet.org

Of Counsel
LISA S. BLATT
ANTHONY FRANZE
VICTOR A. RORTVEDT

Counsel for Amicus Curiae American Bar Association

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