No. 12-162

IN THE

Supreme Court of the United States

COREY MILLER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL has a membership of almost 40,000. NACDL's members include private criminal defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. *Amicus* has a keen interest in having this Court revisit its fractured and historically unsound determination in *Apodaca v. Oregon,* 406 U.S. 404 (1972) and *Johnson v. Louisiana,* 406 U.S. 356 (1972), that non-unanimous jury verdicts in criminal cases satisfy the Sixth Amendment's jury trial guarantee. As we demonstrate below, non-unanimous jury verdicts in criminal cases create a qualitatively lesser form of justice and hold the potential to marginalize the views of women and people of color as they fulfill their obligation to serve on juries. Given that the analytical basis for

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[1] Pursuant to Rule 37.2, both parties received notice of the filing of this brief more than 10 days prior to the due date. A letter of consent from each party accompanies this filing. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

these decisions is fundamentally out of step with this Court's modern Sixth Amendment jurisprudence, to delay resolution of the unanimity question raised in the Petition for Certiorari ("Petition") will perpetuate confusion and facilitate injustice in a substantial number of cases in Louisiana and Oregon, the only two states that continue to permit non-unanimous jury verdicts in criminal cases, and continue to thwart meaningful appellate review in unanimous verdict jurisdictions.

The Louisiana Association of Criminal Defense Lawyers ("LACDL") is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated.

The Oregon Criminal Defense Lawyers Association ("OCDLA") is a non-profit organization of private criminal defense attorneys, public defenders, investigators and others engaged in criminal and juvenile defense. OCDLA advocates for the interests of its members, the criminal defense bar, and criminal defendants, and provides education and training on criminal defense law and practice.

SUMMARY OF ARGUMENT

The Court should grant the Petition to decide the important question of whether the Sixth Amendment, as applied to the states by means of the Fourteenth Amendment, requires unanimity in state criminal cases. The Petition focuses largely on demonstrating why the jurisprudential approach utilized in *Apodaca* and *Johnson* cannot be squared with the legal analysis the Court has relied upon in recent cases such as *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *Giles v. California*, 554 U.S. 353 (2008), *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), *Blakely v. Washington*, 542 U.S. 296 (2004), *Crawford v. Washington*, 541 U.S. 36 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. at 7, 13-16. Petitioner is correct that the disparity between the approach taken by the Court in the *Apodaca* and *Johnson* decisions—in which a centuries-old tradition of jury unanimity was swept aside based on judicial estimates about the functional importance of the unanimity requirement—and the approach to the Sixth and Fourteenth Amendments taken by the Court in recent cases creates considerable legal uncertainty about the validity of criminal jury verdicts in jurisdictions like Louisiana and Oregon. *Amicus* fully supports Petitioner's argument that certiorari should be granted to address the continued viability of *Apodaca* and *Johnson* in light of the modern approach adopted in cases like *Southern Union, McDonald*, *Blakely*, *Crawford*, *Gonzalez-Lopez* and *Apprendi*.

Amicus writes separately to emphasize the practical necessity of granting the Petition. This necessity stems from the real-life effect that a non-unanimous regime has on the criminal justice system, not only in Oregon and Louisiana, but also in jurisdictions that do not permit non-unanimous verdicts. Non-unanimous verdicts occur regularly in cases resulting in harsh penalties, including life imprisonment without the possibility of parole. The prospect of non-unanimous verdicts also enables prosecutors to manipulate charging decisions based on the feasibility of obtaining a unanimous verdict and obtain additional leverage in plea negotiations. Finally, the reach of *Apodaca* has extended beyond Oregon and Louisiana and led to a denial of appellate review in other states of decisions where verdict unanimity was questionable.

These actual effects are particularly alarming in light of the considerable evidence that non-unanimous verdicts increase the risk of error and unfairness in jury deliberations. According to the Court in *Apodaca*, there is no functional difference between a unanimous jury verdict and a verdict rendered by a vote of 11 to one or 10 to two. *Apodaca*, 406 U.S at 410-11. If this were correct, then the question presented by the Petition would be largely an academic one. However, empirical research conducted over the past 40 years has demonstrated that the unanimity requirement matters significantly because it fundamentally alters the jury dynamic. In short, it is now apparent that there is a real difference between trial by jury in Louisiana and Oregon and the traditional jury trial guarantee that existed at the

time of the Founding and is still applied elsewhere throughout the Nation.

In particular, as we discuss in detail below, modern empirical research has demonstrated that unanimous juries are more careful, more thorough, and return verdicts that are more in line with what experienced observers of the criminal justice system (generally judges) view to be the correct verdict. Unanimous juries are, in other words, demonstrably more reliable. In addition, and of critical concern to *Amicus*, the historic unanimity requirement ensures that the viewpoints of *every* juror are carefully considered by fellow jurors, and the resulting unanimous verdict is viewed as more legitimate by all members of the Community.

By contrast, eliminating the traditional unanimity requirement has been shown to produce a situation in which a majority of jurors can marginalize the viewpoints of other jurors by refusing to deliberate further once the majority threshold has been reached. This concern applies to all juries and all jurors, but its effects can be particularly stark when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities. In such cases, a state law provision permitting non-unanimous criminal verdicts can serve as a *de facto* means of allowing majorities of jurors to prevent minority jurors from jury participation, thereby undermining important Constitutional principles regarding equality in jury service that this Court has taken considerable measures to protect in recent years.

Although the arguments discussed at length in the Petition demonstrate why the question presented is worthy of the Court's attention, the actual impact of *Apodaca* on the criminal justice system and the empirical evidence on jury decision making shows why it is critical that this Court confront the question now. The traditional unanimity requirement serves as a basic component of the Sixth Amendment's jury guarantee, which is not currently being afforded to accused persons in Louisiana and Oregon. The Court's corrective intervention is urgently needed.

ARGUMENT

I. Non-Unanimous Verdicts Significantly Undermine the Administration of Criminal Justice.

Although only Louisiana and Oregon currently permit non-unanimous verdicts in felony criminal cases, the practice continues to have a significant effect, both in those two states and elsewhere. Convictions by non-unanimous juries in Louisiana and Oregon are common and recurring, and defendants in other states have been denied relief from errors that have produced or may have produced non-unanimous verdicts.

Actual Effect on Criminal Prosecutions. Non-unanimous verdicts continue to occur on a regular basis in Louisiana and Oregon. *See* Pet. at 27 n.2 (listing over 100 cases from Louisiana in the past seven years in which defendants were convicted of

felonies by non-unanimous verdicts).[2] Indeed, these figures almost certainly understate the actual number of convictions by non-unanimous juries, because they do not account for cases in which verdicts were not appealed and reported in decisions by appellate courts.

Moreover, defendants found guilty by non-unanimous juries often receive harsh sentences, including life in prison. In considering Louisiana's rules governing jury unanimity, this Court observed
that the state legislature "obviously intended to vary
the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." *Johnson*,

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[2] A number of non-unanimous verdicts have also occurred in Oregon in the past two years alone. *See, e.g., Oregon v. Fowler*, 252 P.3d 302, 303 (Or. 2011); *Oregon v. Jay*, No. A145218, 2012 Ore. App. LEXIS 1015, at *1 (Or. Ct. App. Aug. 15, 2012);*Oregonv. Arreola*, 250 Ore. App. 496, 503 n.2 (Or. Ct. App. 2012); *Oregon v. Curnutte*, 250 Ore. App. 379, 381 (Or. Ct. App. 2012); *Oregon v. Codon*, 270 P.3d 409, 410 (Or. Ct. App. 2012); *Oregon v. Robledo*, 248 P.3d 447, 448 (Or. Ct. App. 2011); *Oregon v. Burgess*, 251 P.3d 765, 766, n.1 (Or. Ct. App. 2011); *Oregon v. Cordova-Contreras*, 254 P.3d 147, 147 (Or. Ct. App. 2010); *Oregon v. Fish*, 243 P.3d 873, 874-75 (Or. Ct. App. 2010); *Oregon v. Hartman*, 243 P.3d 480, 481 n.1 (Or. Ct. App. 2010); *Oregon v. Cole*, 242 P.3d 734, 735 (Or. Ct. App. 2010); *Oregon v. Sanchez*, 242 P.3d 692, 693 (Or. Ct. App. 2010); *Oregon v. Bainbridge*, 241 P.3d. 1186, 1187 (Or. Ct. App. 2010); *Oregon v. Claborn*, 240 P.3d 66, 66–67 (Or. Ct. App. 2010); *Oregon v. Banks*, 234 P.3d 1084, 1085 (Or. Ct. App. 2010); *Oregon v. Eilers*, 232 P.3d 997, 997 (Or. Ct. App. 2010).

406 U.S. at 365. But Louisiana permits non-unanimous juries to convict defendants of second-degree murder, which carries a mandatory sentence of life imprisonment without the possibility of parole. *See* La. Rev. Stat. § 14:30.1(B).

Indeed, the Louisiana Court of Appeals affirmed the mandatory life sentences of at least six Louisiana defendants in 2012 alone when at least one juror voted to acquit. *See Louisiana v. Smith*, No. 2011-KA-0091, 2012 La. App. LEXIS 951, at *2, 45 (La. Ct. App. July 11, 2012); *Louisiana v. Mitchell*, No. 11-KA-1018, 2012 La. App. LEXIS 928, at *2, 5 (La. Ct. App. June 28, 2012); *Louisiana v. Everett*, No. 2011-KA-0714, 2012 La. App. LEXIS 863, at *3, 72 (La. Ct. App. June 13, 2012); *Louisiana v. Lewis*, No. 2010-KA-1775, 2012 La. App. LEXIS 469, at *2-3 (La. Ct. App. Apr. 4, 2012); *Louisiana v. Clarkson*, 86 So. 3d 804, 811, 817 (La. Ct. App. 2012);*Louisiana v. Anderson*, 85 So. 3d 747, 749, 759 (La. Ct. App. 2012). One other received a life sentence at trial but had his conviction reversed on other grounds on appeal. *Louisiana v. Wilkins*, No. 11-1395, 2012 La. App. LEXIS 893, at *3-7 (La. Ct. App. June 20, 2012). In another case, the defendant was sentenced to life imprisonment when two of the 12 jurors voted in favor of a manslaughter verdict. *Louisiana v. Ott*, 80 So. 3d 1280, 1281, 1288 (La. Ct. App. 2012).

Actual Effect on Charging Decisions and Plea Agreements. The specific regime governing non-unanimous verdicts in Louisiana also encourages prosecutors to manipulate charging decisions to ease their burden of obtaining a conviction in

murder cases where capital punishment is sought. A conviction for first-degree murder where the state seeks capital punishment requires a unanimous verdict. *See* La. Rev. Stat. § 14:30(C); La. C. Cr. P. Art. 782(A). A conviction for first-degree murder where the state seeks life imprisonment and a conviction for second-degree murder do not. Although a defendant convicted of second degree murder is ineligible for the death penalty, the defendant still faces a mandatory sentence of life imprisonment without the possibility of parole. In *Louisiana v. Raymond*, 13 So. 3d 577 (La. Ct. App. 2009), the prosecution amended a first-degree murder charge to one for second-degree murder on the day of trial–nearly four years after the defendant pleaded not guilty to the original charge. *Id*. at 580–81. The defendant was ultimately convicted by a vote of 11–1. *Id*. at 592. Likewise, in *Louisiana v. Williams*, 901 So. 2d 1171 (La. Ct. App. 2005), the state amended the charge from first-degree murder to second-degree murder the day before trial– two years after the defendant's original not-guilty plea. *Id*. at 1172. The defendant was ultimately convicted by a vote of 10–2. *Id*. at 1177.

Furthermore, *Apodaca* affects even cases that do not actually result in divided verdicts. As in other contexts, a rule about jury decisions "affect[s] every
case": "It would affect decisions about whether to go to trial. It would affect the content of plea negotiations." *United States v. Booker*, 543 U.S. 220, 248 (2005). The ability to obtain a conviction by a non-unanimous verdict gives the prosecution

additional leverage that unfairly harms all defendants in Louisiana and Oregon.

Actual Effect on Jurisdictions Requiring Unanimity. Finally, *Apodaca* has compelled federal courts to reject habeas claims that challenge potentially non-unanimous verdicts from states other than Louisiana and Oregon. *See, e.g.*, *Moore v. Clark*, No. 2:07-cv-423, 2010 WL 3125979, at *7 (E.D. Cal. Aug. 6, 2010) (denying relief even though trial court's unanimity instruction was "limited inexplicably" to only certain counts).[3] For instance, a federal court reviewing a criminal conviction and 35-year sentence from Texas state court was forced to deny habeas relief even though a juror averred that she had been absent during

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[3] *See also, e.g.*, *Barreto v. Martel*, No. C 08-2008, 2010 WL 546586, at *12–13 (N.D. Cal. Feb. 10, 2010) ("Since a criminal defendant in a state prosecution is not entitled to a unanimous verdict at all under the federal Constitution, the state court's determination that an instruction on jury unanimity was unnecessary under state law in the circumstances of the case cannot possibly be considered a violation of federal due process."); *Sullivan v. Kernan*, No. Civ. S-02-1148, 2009 WL 2985494, at *6 (E.D. Cal. Sept. 16, 2009) (relying on *Apodaca* to reject claim that jury instruction violated right to unanimous jury verdict); *Acosta v. N.H. State Prison*, No. 07-cv-181-PB, 2007 WL 2790734, at *4 (D.N.H. Sept. 25, 2007) (rejecting argument challenging non-unanimous verdict on one count because it "fails to identify any federal claim"); *cf. Berry v. Grigas*, 171 F. App'x 188, 189–90 (9th Cir. 2006) (*Apodaca* foreclosed claim of petitioner, convicted by a vote of 11–1 in Nevada state court, that counsel was ineffective for advising him to accept a non-unanimous verdict in exchange for the prosecutor's promise to forego the death penalty); *Lanza v. Sec'y, Dep't of Corr.*, No. 8:06-cv-380-T-30MSS, 2008 WL 3889628, at *7 (M.D. Fla. Aug. 20, 2008) (same).

the final vote. *See Washington v. Quarterman*, No. 3:05-CV-1932-N, 2007 WL 869015, at *1–2 (N.D. Tex. Mar. 22, 2007). Citing *Apodaca*, the court explained that "neither the United States Constitution nor any law of the United States mandate a unanimous verdict in a State criminal action." *Id.* at *13.[4]

In sum, the decision in *Apodaca* has permitted scores of defendants in both Louisiana and Oregon to be convicted by non-unanimous juries and imprisoned for decades or even life. It has also affected defendants in other states, who lack recourse to habeas corpus even if irregularities taint jury deliberations or otherwise produce divided verdicts. These troubling and recurring consequences warrant the Court's review.

[4] Federal courts reviewing habeas petitions brought by defendants from Louisiana and Oregon must routinely affirm non-unanimous convictions as well. *See, e.g.*, *Wells v. Howton*, 409 F. App'x 86, 87 (9th Cir. 2009); *Remme v. Hill*, 370 F. App'x 855, 856 (9th Cir. 2010); *Divers v. Warden, La. St. Penitentiary*, No. 07-2030, 2010 WL 4291330, at *1, *13 (W.D. La. Aug. 17, 2010); *Reedy v. Hill*, Civ. No. 04- 545, 2008 WL 441690, at *6 (D. Or. Feb. 13, 2008), *aff'd*, 383 F. App'x 689 (9th Cir. 2010); *Watson v. Cain*, No. 06-613, 2007 WL 1455978, at *8 (E.D. La. May 17, 2007).

II. Non -Unanimous Verdicts Increase the Risk of Error and Unfairness.

A. *Non-Unanimous Verdicts Produce Shorter, Less Thorough Deliberations.*

Most of the empirical research on jury dynamics, which has occurred in the past 40 years since *Apodaca*, has cast doubt on the plurality's reasoning with regard to the purported functional equivalence of unanimous and non-unanimous juries.[5]

Studies comparing the quality of the deliberation of unanimous juries with non-unanimous juries have consistently found that non-unanimous juries are less thorough, take fewer polls and take less time to reach a verdict. *See* Hastie *et al., supra*, at 85 (finding that the farther the jury gets from a unanimity rule, the fewer key categories of evidence are discussed) ("Hastie study"); Devine *et al.*, *supra* at 669 (summarizing

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[5] *See, e.g.,* 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) (summarizing numerous studies); Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 227-33 (1983) (supporting unanimity in criminal trials); American Bar Ass'n, American Jury Project, *Principles for Juries and Jury Trials* 24 (2005), http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/final_commentary_july_1205.pdf (citing Devine *et al.*); Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 Nw. U.L. Rev. 201, 229-30 (2006) (questioning assumptions in *Apodaca* and related cases and recommending unanimous juries in civil cases).

several studies); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (" [T]he evidence that jury researchers have amassed directly contravenes the [*Apodaca* and *Johnson*] majority opinions' contentions that these decision rules have no effect on the reliability of jury decisions. A shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment"). In addition, non-unanimous juries also tend to cease deliberations when the required quorum is reached. Devine *et al*., *supra*, at 669.

In the Hastie study, citizens called for jury duty in Massachusetts trial courts were separated into 69 juries, shown a three-hour reenactment of a murder trial, and then divided into three groups of 23 juries each for deliberations. Hastie *et al*., *supra*, at 46, 59-60. The groups were divided by decision rule, with one group required to reach a unanimous verdict among all 12 jurors, the second required to reach a 10-person majority verdict, and the third required to reach an 8-person majority verdict. *Id*. at 59-60.

The study illustrated that the amount of deliberation that occurs in 12-person juries diminishes after the majority faction reaches eight jurors. *Id*. at 95. In 10-2 quorum juries, 10% of the jury's total deliberation time takes place after the majority faction reaches eight jurors, as compared with 20% in unanimous juries. *Id*. at 95-96.[6]

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[6] Non-unanimous juries also reach the eight-juror majority faster than do unanimous juries. Hastie *et al*., *supra*, at 113.

There is also evidence that the last 20-30 minutes of deliberation can be outcome determinative. In almost a third of the unanimous juries monitored in the Hastie study, the verdict initially favored by the eight-juror majority was not the verdict delivered by the jury. *Id*. at 96. In addition, almost 30% of the requests for information from the trial judge, a quarter of the corrections of the evidentiary or legal errors made during deliberation, and over one-third of the discussions of the reasonable doubt standard occurred during the period after an initial eight-juror majority had been established. *Id*.

The Hastie study yielded two significant results: a statistically significant increase in the number of hung juries under the unanimity rule, and a statistically significant number of "incorrect" first-degree murder verdicts under the 10-2 majority rule. *Id*. at 60.[7] The three hung juries under the unanimity rule seemed to prevent the "wrong" result from occurring, as they would have also delivered the "wrong" verdict if the majority faction had prevailed. *Id*. at 63. Also, when unanimous juries did come to the "wrong" result, their verdicts were often less harsh than those delivered by non-unanimous juries, which tended to deliver excessively harsh verdicts. *Id*. at 102.

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[7] Though picking the "right" verdict is impossible, second-degree murder was considered the "right" verdict because it was the verdict delivered at the original trial, and legal experts who viewed the reenactment largely agreed that second-degree murder was the proper verdict. Hastie *et al*., *supra*, at 62.

Unanimous juries also took more time to deliberate between votes than did non-unanimous juries. *Id*. at 90. This greater length of time between votes is associated with the "integrative evidence-driven" deliberation style, while the shorter length of time between votes in the non-unanimous juries is attributed to the "discounting verdict-driven deliberation style." *Id.* *Accord* Diamond, *et al*., *supra*, at 208.

Moreover, evidence suggests that when deliberations are cut off prematurely based on majority reliance on the quorum rule, the reliability of the verdict suffers. In several cases, the result favored by the minority jurors was the same as the result favored by the judges in those cases. Diamond, *et al., supra*, at 222.[8] Evidence also suggests that unanimity is central to whether jury verdicts are seen to be legitimate. *See id.* at 227 (citing research indicating that "community residents viewed unanimous procedures for arriving at jury verdicts in criminal cases as more accurate and fairer than majority procedures").

Thus, the research indicates that the decision rule has a demonstrated effect on the quality of deliberations and the accuracy of the delivered verdict. These results are reflected in Louisiana and Oregon, where cases have

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[8] The Diamond study reviewed videos of the deliberations of 50 actual civil juries in Arizona. Diamond, *et al*., *supra*, at 210-12. Arizona civil juries consist of eight jurors, six of whom must agree in order to reach a verdict. *Id*. at 205. In the study, the judges presiding over the 50 reviewed cases revealed what they thought to be the proper verdict after having heard the evidence. *Id.* at 222.

demonstrated that non-unanimous juries often deliberate for abbreviated periods of time, even where the evidence is complex and the consequences are severe.

In *Louisiana v. Sumrall*, for instance, the Louisiana defendant appealed his conviction for second degree murder in a case that turned on a credibility battle between the defendant and the chief prosecution witness. *See* 34 So. 3d 977, 988 (La. Ct. App. 2010). Although the trial featured "lengthy and detailed testimony from both of them," *id.*, the jury reported itself deadlocked after just a little over three hours, *id.* at 992. The jury then reached a 10–2 verdict after the trial judge assured the jury that it was close to "the ten you need to reach a verdict" and instructed it to continue. *Id. See also, e.g.*, *Louisiana v. Blow*, 46 So. 3d 735, 751 (La. Ct. App. 2010) (upholding 10–2 conviction for murder solicitation resulting from less than two hours of deliberation); *Louisiana v. Dabney*, 908 So. 2d 60, 63–65, 68 (La. Ct. App. 2005) (reversing 10–2 armed-robbery conviction resulting from less than four hours of deliberation).

In some cases, the fact that unanimity is not required has led to confusion regarding whether ten jurors have even reached a verdict, further demonstrating the inadequacy of deliberations. In *Louisiana v. Jones*, No. 2009 KA 2261, 2010 WL 1838309 (La. Ct. App. May 7, 2010), for example, the trial court recorded convictions on both counts as resulting from 10–2 votes, but review of the record indicated that only nine jurors had voted to convict on one count, as one juror had "changed

both of her 'guilty' votes to 'not guilty' votes" during the second poll. *Id*. at *2.

An especially troubling example from Oregon is *Fischer v. Hill*, No. CV. 06-1625-MA, 2009 WL 87603 (D. Or. Jan. 12, 2009). The defendant was indicted for attempted murder and three counts of assault. Initially, the jury reported that it had found the defendant not guilty on Counts 1 and 2 and guilty on Counts 3 and 4. *See id*. at *1. Yet when the jury was polled, the respective votes were 11–1 to acquit on Count 1, only 7–5 to acquit on Count 2, 11–1 to convict on Count 3, and 11–1 to convict on Count 4. *See id*. In a subsequent poll, to clarify whether the jury had enough votes to acquit on Count 2, the respective votes were 10–2 to acquit on Count 1, 6–6 on Count 2, 8–4 to convict on Count 3, and 11–1 to convict on Count 4. *See id*. at *2. The jury's position changed further after additional deliberations: it returned the next day with 11-1 guilty verdicts on both Counts 2 and 3. *Id*. at *3. Such confusion and shifting positions would be unlikely if Oregon required unanimity.

B. Valid Minority Opinions Can Be Easily Marginalized When Unanimity is Not Required.

The *Johnson* majority concluded that changing the rule of decision would have little or no effect on the consideration given to the viewpoints of the minority jurors in a quorum jury and that the strength of the deliberations would not be significantly diluted. *Johnson v. Louisiana*, 406 U.S. 356, 361 (1972). The research contradicts this conclusion and, instead, indicates that, while jurors

debate the issues in both unanimous and quorum juries, the jurors' knowledge that they do not have to resolve all disagreement to reach a verdict in quorum juries often leads to "dismissive" treatment of minority jurors whose votes are not needed to reach a verdict. Diamond, *et al.*, *supra*, at 205. Indeed, one study found that juries with eventual holdouts were twice as likely to mention the quorum rule early in deliberations as were juries that ended up delivering a unanimous verdict, and in 40% of the juries studied, the jurors highlighted the quorum requirement before or during the first vote. *Id.* at 214.

Resort to the use of non-unanimous juries raises concerns that the views of racial and ethnic minorities and women may be marginalized. Though the Court has proscribed exclusion of people of color, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), and women, *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), from juries, research indicates that a quorum decision rule may contribute to a *de facto* exclusion of their viewpoints. Taylor-Thompson, *supra,* at 1264. The data indicate that women and minorities are underrepresented on juries. *Id.* at 1276-77, 1298 (citing evidence that women and people of color are underrepresented in the venire and on juries, and that prosecutors disproportionately use peremptory strikes on people of color, despite the prohibitions of *Batson v. Kentucky*, 476 U.S. 79 (1986)). It also cannot be ignored that, as the Petitioner documents extensively, Pet. at 33-34, the Louisiana Constitutional provision permitting non-unanimous juries was adopted as part of the 1898 Louisiana Constitutional convention—the same convention

that adopted various Jim Crow provisions specifically intended to limit African American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." *See* Constitutional Convention of the State of Louisiana, Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 380-81 (H.J. Hearsey, 1898).

While the underrepresentation of women and people of color on juries is no guarantee that they will end up in the minority faction of a quorum jury, *see* Hastie *et al.*, *supra*, at 149; Diamond, *et al.*, *supra*, at 220, there are indications in the data that suggest that *de facto* exclusion of underrepresented groups is an important concern. For example, race and gender are negatively correlated with juror persuasiveness and deliberation performance. *See* Hastie *et al.*, *supra*, at 149 (finding that to the extent the juror has characteristics that are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout). *See also* Taylor-Thompson, *supra*, at 1299-1300 (citing studies observing that women speak less than men during deliberations, and that men often interrupt women and ignore their arguments). These factors indicate an increased likelihood that women and people of color may end up being outvoted by the majority on a non-unanimous jury.

Any marginalization of women and people of color from juries created by a quorum rule of decision may have collateral consequences for racial and ethnic minority defendants and crime victims. For example, a 1996 study found that

when the prosecutor's evidence was weak, majority white juries were more likely to convict black defendants than were majority black juries. Devine *et al.*, *supra*, at 673-74. Moreover, the verdicts of the majority white juries were harsher than those of the majority black juries. *Id.* Other studies have found that majority white juries are similarly punitive when the defendant is Latino. Taylor-Thompson, *supra*, at 1293. In addition, interviews conducted with 360 actual jurors for rape trials in Indianapolis revealed that the mostly middle-class white jurors tended to disbelieve African American rape complainants. *Id.* at 1294.

In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court stated that "meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. 'It 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.'" *Id.* at 236-37 (citation omitted). In addition, part of the Court's rationale in examining the role of jury size on verdict outcome was to minimize "imbalance[s] to the detriment of one side, the defense." *Id.* at 236. The Court has also made significant efforts in recent years to ensure that jurors are not excluded from jury participation on the basis of their race or gender. *J.E.B. v. Ala. ex rel. T.B.,* 511 U.S. 127 (1994); *Medellin v. Dretke*, 544 U.S. 660 (2005) and *Snyder v. Louisiana.*, 552 U.S. 472 (2008). The evidence suggests that to the extent the views of women and people of color are marginalized within them, non-unanimous juries undermine these important constitutional principles.

C. Magnified Risk of Prejudicial Error.

When the jury need not be unanimous, leading to reduced deliberation time and the marginalization of minority voices, the risks and costs of error are magnified. Defendants that might have faced a hung jury notwithstanding trial errors instead face a greater risk of conviction.

Verdicts based on insufficient evidence. Non-unanimous verdicts increase the risk of convictions based on insufficient evidence. *See, e.g.*, *Louisiana v. Johnson*, 948 So. 2d 1229, 1238 (La. Ct. App. 2007) (non-unanimous jury "abused its vast discretion in finding that [d]efendant committed second degree murder"); *Louisiana v. Houston*, 925 So. 2d 690, 698 (La. Ct. App. 2006) (non-unanimous conviction for child molestation based on insufficient evidence amended to lesser offense). Although even unanimous juries sometimes convict based on insufficient evidence, the possibility of a non-unanimous verdict ensures that dissenting voices will receive less consideration and weaknesses in the state's proof less scrutiny.

Even where the evidence may have been sufficient as a matter of law, a non-unanimous verdict resulting from sharply conflicting evidence raises serious concerns about the strength of the state's case. In *Louisiana v. Brantley*, 975 So. 2d 849 (La. Ct. App. 2008), the defendant was convicted of attempted unlawful possession of a firearm, by a 10–2 vote. The appellate court acknowledged the lack of any eyewitnesses, forensic evidence, or anything beyond mere circumstance connecting the defendant with the gun, and noted

several facts linking the firearm to other parties. *See id*. at 852. Yet the majority upheld the verdict, *id*. at 853, notwithstanding the dissent's warning that the verdict should be overturned because the "state's circumstantial evidence gives rise to competing inferences" and "[t]he state presented no evidence that defendant exercised actual possession of the gun." *Id*. (Caraway, J., dissenting). Other non-unanimous convictions have been upheld even though they hung from similarly slender threads.[9]

This case too presents a vivid example of a non-unanimous verdict based on slim evidence, and thus presents an excellent vehicle for addressing the constitutional issues surrounding non-unanimous juries. Here, the defendant was sentenced to life in prison based on no physical evidence and contradictory eyewitness testimony. Pet. at 4-5. The 10–2 verdict in this case highlights the concerns that make jury unanimity so important.

Introduction of inadmissible and prejudicial evidence. When the jury verdict need not be unanimous, it is also harder to undo the taint from the introduction of evidence that is inadmissible and unduly prejudicial. *See, e.g*., *Oregon v. Fish*, 243 P.3d 873, 880 (Or. Ct. App. 2010) (reversing

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[9] *See, e.g., Louisiana v. Mack*, 981 So. 2d 185, 186, 190 (La. Ct. App. 2008) (affirming 11–1 conviction for second degree murder and mandatory life sentence even though critical eyewitness "might have been less than forthcoming"); *Louisiana v. Gullette*, 975 So. 2d 753, 760 (La. Ct. App. 2008) (affirming 11–1 aggravated rape conviction in a "classic case of 'he said, she said'").

non-unanimous conviction for second degree murder where trial court admitted prejudicial statement with little probative value that "easily could have been misused by the jury"). Oregon courts, for instance, have reversed a series of non-unanimous child sex abuse convictions unsupported by physical evidence that appeared to rest primarily upon an expert witness's impermissible vouching for the child's credibility.[10] As the appellate court recognized in *Simpson v. Coursey*, 197 P.3d 68 (Or. Ct. App. 2008), the non-unanimous vote made "the possibility that [improper] testimony vouching for the credibility of the victim affected the verdict . . . very real." *Id*. at 73. Although appellate review will sometimes correct these errors, there are inevitably cases in which such errors go uncorrected—making it important to adopt rules that prevent them in the first place.

Racially Motivated Peremptory Challenges. The permissibility of non-unanimous convictions also increases the risk of undetected *Batson* violations. When prosecutors need not convince the full jury, they may exercise race-based peremptory challenges more selectively, counting on the supermajority to render irrelevant the views of jurors who are racial minorities. *See, e.g*., *Louisiana v. Elie*, 936 So. 2d 791, 794, 797–801 (La. 2006) (affirming an 11–1 manslaughter conviction after the state exercised peremptory challenges against eight African American jurors, leaving a

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[10] *See, e.g., Oregon v. Bainbridge*, 241 P.3d 1186 (Or. Ct. App. 2010); Oregon v. *Cordova-Contreras*, 245 P.3d 147 (Or. Ct. App. 2010).

jury with only two African Americans, one of whom was an alternate).

Such trial errors and procedural unfairness can be more effectively prevented by requiring unanimous verdicts in all criminal trials. And, indeed, there can be no serious question that when the Framers adopted the jury trial guarantee, they did so with a *unanimous* jury in mind. *See United States v. Booker*, 543 U.S. 220, 238-39 (2005); *Apprendi v New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J. concurring). At the time when *Apodaca* and *Johnson* were decided, the importance of this time-honored procedural mechanism may not have been apparent to the Court. In light of a generation of empirical research, however, the importance of the unanimity requirement is now undeniable. Unanimous juries protect the quality and integrity of the verdict, ensure full participation of all jurors, and prevent marginalization of the views of underrepresented groups. Non-unanimous juries, as a practical matter, constitute a very different deliberative body than the one the Framers of the Sixth Amendment had in mind. *Amicus Curiae* respectfully requests that the Court grant the Petition in order to address whether the *Apodaca* and *Johnson* Courts properly interpreted the Sixth Amendment jury trial guarantee to permit non-unanimous juries, unknown at the time of the Founding.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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