No. 12-

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a nonunanimous jury verdict.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Corey Miller respectfully petitions for a writ of certiorari to the Louisiana Fifth Circuit Court of Appeal in *State v. Miller*, No. 10-KA-718.

OPINIONS BELOW

The judgment of the Louisiana Fifth Circuit Court of Appeal (Pet. App. 1a) is reported at 83 So. 3d 178 (La. App. 2011). The Louisiana Supreme Court's order denying review of that decision (Pet. App. 52a) is reported at 89 So. 3d 1191 (La. 2012).

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fifth Circuit Court of Appeal was entered on March 24, 2010. The Louisiana Supreme Court denied review of this decision on May 18, 2012. Pet. App. 52a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 17(A) of Article I of the Louisiana Constitution provides in relevant part: "A criminal

case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict."

Article 782 of the Louisiana Code of Criminal Procedure provides, in pertinent part: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."

STATEMENT OF THE CASE

This case raises an issue that goes to the heart of our Constitution's guarantee that individuals accused of a crime receive certain fundamental procedural protections: whether a jury may convict a defendant of a crime based on a less-than-unanimous jury verdict. Forty years ago, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court held in a 4-1-4 decision that the Sixth and Fourteenth Amendments do not prohibit States from securing criminal convictions in this manner. Subsequent legal developments and academic studies call this result into serious question.

1. One night in 2002, hundreds of people flocked to a nightclub in Louisiana, where petitioner Corey Miller, a well-known recording artist from New Orleans, was scheduled to appear. Petitioner, a rapper who also goes by the name C-Murder, appeared as scheduled and performed. Among those in attendance was Steve Thomas, a sixteen-year-old

who idolized petitioner and wanted to be a rapper himself.

After midnight, a group of people surrounded Thomas for unknown reasons and began kicking him on the ground. Someone then fired a single gunshot and killed him.

Several people called 911, and Jefferson Parish police officers arrived within minutes. None of the 911 calls identified the shooter, and none of the dozens of patrons whose names the police gathered that evening could do so either.

A bouncer at the club later testified that he told the police that night that he had seen petitioner shoot Thomas in the midst of the fight. But the police reports do not contain any such allegation and the bouncer did not mention petitioner when he called 911. To the contrary, while petitioner is 6'4" and slender, the bouncer claimed that night that the shooter was 5'10" and heavyset. At other times during the investigation, the bouncer "denied knowing who the shooter was." Pet. App. 3a.

The police nonetheless arrested petitioner, and the State eventually charged him, over his protestations of innocence, with second-degree murder. While first-degree murder in Louisiana is a capital crime and requires a unanimous verdict to convict, second-degree murder is punishable by life in prison without the possibility of parole and does not require unanimity to convict. The State in such a prosecution need only persuade ten of twelve jurors to vote guilty in order to secure a conviction. La. Const. art. I, § 17(A); La. C. Cr. P. Art. 782.

Following a trial, a jury found petitioner guilty as charged. But the trial court set aside the conviction upon learning that the State committed *four* separate violations of *Brady v. Maryland*, 373 U.S. 83 (1963). Most important, the State failed to disclose that two patrons of the nightclub told police the night of the shooting that petitioner was not involved in the shooting, or that two of the State's witnesses had testified in exchange for favorable treatment on outstanding criminal charges against them. The State appealed but the Louisiana Supreme Court sustained the trial court's order. *State v. Miller*, 923 So. 2d 625, 626-27 (La. 2005).

2. The State elected to retry petitioner. As at the first trial, petitioner maintained his innocence.

The State's case now rested almost exclusively on two witnesses who claimed to have seen petitioner shoot Thomas: the bouncer and Kenneth Jordan. Jordan was a convicted felon who stated that he received a reduction in prison time for his testimony. Unlike the bouncer, who claimed that petitioner shot Thomas in the midst of the fight, Jordan testified that he saw petitioner shoot Thomas *after the fight had broken up*. Despite the hundreds of other patrons at the nightclub and petitioner's local fame, the State did not present any other eyewitnesses claiming he was involved in the killing.

The defense presented testimony from four other patrons of the club that night, three of whom did not know petitioner. Pet. App. 7a-10a. All four testified that they had seen the shooting and that petitioner did not do it. One of these witnesses explained that she had been standing right next to petitioner (at

some remove from the altercation) when the shot rang out.

Faced not only with these conflicting accounts but also with a lack of any physical evidence supporting one version of events over another or any possible motive for petitioner to have shot a young fan who came to see him perform, the State employed two tactics in closing argument. First, the State argued that the reason that no one else among the hundreds who had been at the club that night had come forward to accuse petitioner of shooting Thomas was because everyone was scared that petitioner would somehow retaliate against them if they did so. *Id.* 22a-23a. Second, the State sought to capitalize on petitioner's nickname, never once using his real name and instead referring to him only as "C-Murder" and "a thug."

On the second day of jury deliberations, the jury returned a 10-2 guilty verdict. When polled, however, a third juror explained that she was voting guilty "under duress to get out of here." *Id.* 40a. The trial court refused to accept that vote and sent the jury back to continue deliberating. Three hours later, the jury again returned with the same 10-2 vote to convict, with the third juror voting guilty again. *Id.* 1a n.2. This time the trial court accepted the verdict. *Id.* 41a.

Petitioner moved for a new trial, arguing, among other things, that Louisiana's nonunanimity rule violates the Sixth and Fourteenth Amendments. But the trial court denied petitioner's motion and entered judgment, finding petitioner guilty as charged. The

court sentenced petitioner to life in prison without the possibility of parole.

3. The Louisiana Court of Appeal affirmed. Relying on *Apodaca* and the Louisiana Supreme Court's decision in *State v. Bertrand*, 6 So. 3d 738 (La. 2009), the appellate court held that "because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that nonunanimous 12-person jury verdicts are constitutional may someday be overturned," the 10-2 verdict in petitioner's case comported with the Sixth and Fourteenth Amendments. Pet. App. 48a-49a (quoting *Bertrand*, 6 So. 3d at 743).

4. Petitioner sought discretionary review in the Louisiana Supreme Court, arguing in part that convicting him by a nonunanimous jury verdict violated the Sixth and Fourteenth Amendments. *See* Writ of Review in La. S. Ct. 18-19. The Louisiana Supreme Court denied review without comment. Pet. App. 52a.

REASONS FOR GRANTING THE WRIT

Louisiana is one of two states that allow a person to be convicted of a felony by a less-than-unanimous jury verdict. (Oregon is the other. *See* Or. Const. art. I § 11; Or. Rev. Stat. § 136.450.) This practice contravenes centuries of common law, as well as longstanding American precedent, requiring unanimity to convict in criminal cases. Nevertheless, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a bare majority of this Court – in a 4-1-4, internally contradictory decision – held that the

Constitution does not forbid the states from securing convictions by nonunanimous verdicts.

Subsequent developments in this Court's Sixth and Fourteenth Amendment jurisprudence call the five-vote judgment in *Apodaca* into serious question. In terms of the Sixth Amendment, the plurality's assertion in *Apodaca* that the Sixth Amendment does not require a unanimous verdict is squarely inconsistent with this Court's repeated pronouncements – as recently as last Term – that the Sixth Amendment requires that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Southern Union Co. v. United States*, No. 11-94, Slip op. at 12 (quoting *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting in turn 4 William Blackstone, Commentaries on the Laws of England *343 (1769))); *accord Apprendi v. New Jersey,* 530 U.S. 466, 477 (2000); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010) ("[T]he Sixth Amendment right to trial by jury requires a unanimous jury verdict.") Concurring in the judgment in *Apodaca*, Justice Powell reasoned that even though the Sixth Amendment requires unanimity in federal cases, the Fourteenth Amendment does not demand the same in state cases. But this reasoning cannot be squared with this Court's recent holding in *McDonald* that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same

standards that protect those personal rights against federal encroachment." 130 S. Ct. at 3035, 3048 (internal quotation and citation omitted).

Nevertheless, the Louisiana Supreme Court and the Oregon courts have concluded that they are powerless to effectuate *Apodaca*'s demise. As this Court has instructed, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodrigeuez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court should exercise that prerogative now. *Stare decisis* has limited force in this case and the constitutional right at stake is enormously important. Furthermore, as Justice (then Judge) Kennedy has explained:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. 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. 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.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). This Court should not allow this fundamental and time-honored protection to be denied any longer.

I. This Court's Recent Jurisprudence Has Severely Undercut Its Fractured Decision In 1972 Permitting Convictions In State Criminal Trials By Nonunamimous Verdicts.

A comparison between *Apodaca v. Oregon*, 406 U.S. 404 (1972), and this Court's recent Sixth and Fourteenth Amendment jurisprudence demonstrates that the two are irreconcilable.

A. *Apodaca v. Oregon*

The question whether the Constitution permits a State to convict an individual of a crime based on a nonunanimous jury verdict turns on two sub-issues: (1) whether the Sixth Amendment's jury trial clause requires unanimity for criminal convictions; and (2) if so, whether that constitutional rule applies to the States by means of the Fourteenth Amendment. In *Apodaca*, five Justices answered the first sub-issue affirmatively, and eight answered the second affirmatively (or at least assumed the answer was yes). Yet because of the odd voting patterns in the Court's badly fractured 4-1-4 decision, the Court nevertheless ruled by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty."

a. The four-Justice plurality in *Apodaca* acknowledged that it had been "settled" since "the latter half of the 14th century . . . that a verdict had to be unanimous" to convict someone of a crime and that

this requirement "had become an accepted feature of the common-law jury by the 18th century." *Id.* at 407-08 & n.2. Indeed, this Court had held or assumed in numerous previous cases that the Sixth Amendment required unanimity for a criminal conviction. *See Andres v. United States,* 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required" where the Sixth Amendment applies); *accord Patton v. United States,* 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson v. Utah*, 170 U.S. 343, 351 (1898). Justice Story likewise explained in his noted Commentaries that any law dispensing with the requirement that jurors "must *unanimously* concur in the guilt of the accused before a legal conviction can be had . . . may be considered unconstitutional." 2 Joseph Story, Commentaries on the Constitution § 1779 n.2 (1891) (emphasis in original). And this Court had long since resolved that the Seventh Amendment's jury trial guarantee for civil trials required unanimity. *See American Pub. Co. v. Fisher,* 166 U.S. 464, 467-68 (1897).

The *Apodaca* plurality nonetheless stated that the unanimity requirement "was not of constitutional stature" in criminal cases. 406 U.S. at 406. It expressed this view so for two primary reasons. First, the plurality asserted that instead of following history (or even precedent), "[o]ur inquiry must focus upon the *function* served by the jury in contemporary society." *Id.* at 410 (emphasis added). After identifying the jury's function as inter-posing "the commonsense judgment of a group of laymen" between the accused and his accuser, the plurality found that "[i]n terms of this function we perceive 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 410-11 (quotation omitted).

Second, in response to Apodaca's argument that the Sixth Amendment requires jury unanimity in part "to give effect of the reasonable-doubt standard," the plurality asserted that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412.

b. Justice Powell provided a fifth vote by concurring in the plurality's preferred judgment. He did so, however, by disagreeing with the plurality on both sub-issues presented in the case. In his joint opinion in *Apodaca* and a companion case, Justice Powell stated that he believed, "in accord with both history and precedent, 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 in the judgment). But he also expressly rejected the plurality's "major premise" that "the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required by the Sixth Amendment." *Id.* at 369. "Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial," Justice Powell found "no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same

decision joined by 10 members of a jury of 12." *Id.* at 374, 376.

c. The four dissenters objected to the Court's judgment as a "radical departure from American traditions." *Johnson,* 406 U.S. at 381 (Douglas, J., dissenting). The dissenters bemoaned the plurality's decision to abandon the previously "universal[] underst[anding] that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting); *see also Johnson,* 406 U.S. at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). The dissenters also disagreed with Justice Powell's rejection of the notion that the Sixth Amendment's jury trial guarantee "is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting) (emphasis added).

As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*], when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amend-

> ment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson v. Louisiana, 406 U.S. at 395 (Brennan, J. dissenting); *see also McDonald*, 130 S. Ct. at 3035 n.14 (emphasizing that the outcome in *Apodaca* "was the result of an unusual division among the Justices").

B. This Court's Current Sixth Amendment Jurisprudence

This Court's subsequent Sixth Amendment jurisprudence renders *Apodaca* impossible to defend. In fact, this Court's recent Sixth Amendment decisions directly undercut both theoretical predicates on which the *Apodaca* plurality opinion is based.

a. While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's purposes but rather from the original understanding of the guarantees contained therein. In *Crawford v. Washington,* 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts,* 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California*, 128 S. Ct. 2678 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to

the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 2692. In *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted).

Most importantly, in a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all sentencing factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). Rather, the controlling datum is "the Framers' paradigm for criminal justice." *Id.*

This pronounced shift in constitutional methodology itself – the return to historical analysis – calls *Apodaca* into serious question. But this Court has gone further. In the *Apprendi* line of cases, this Court repeatedly and explicitly has reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies require that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the

unanimous suffrage of twelve of his equals and neighbours.'" *Southern Union Co. v. United States*, No. 11-94, Slip op. at 12 (quoting *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting in turn William Blackstone, Commentaries on the Laws of England 343 (1769))); *see also Apprendi*, 530 U.S. at 477 (same); *id.* at 498 (Scalia, J. concurring) (charges against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

Even more recently, this Court flatly stated in *McDonald* that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict." 130 S. Ct. at 3035 n.14. And last Term, this Court stated in a double jeopardy case arising from a state prosecution that "[t]he very object of the jury system is to *secure unanimity* by a comparison of views, and by arguments among jurors themselves." *Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012) (emphasis added) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)).

The *Apodaca* plurality's view of the Sixth Amendment cannot be squared with these repeated pronouncements.

b. This Court similarly has disregarded the *Apodaca* plurality's assertion that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." 406 U.S. at 412. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a

> reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re Winship*, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, 508 U.S. at 278 (second emphasis added). The *Sullivan* Court concluded that a defendant's "Sixth Amendment right to jury trial" is "denied" when a jury instruction improperly defines the concept of reasonable doubt. *Id.*

This Court likewise explained in *Cunningham v. California*, 549 U.S. 270 (2007) – another case applying the *Apprendi* rule to a state sentencing system – that "[t]his 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*, not merely by a preponderance of the evidence." *Id.* at 281 (emphasis added).

It takes little reflection to perceive that the holdings and reasoning in *Sullivan* and *Cunningham* are irreconcilable with the plurality's reasoning in *Apodaca*. The pronouncements respecting the Sixth Amendment in all three cases cannot all be right.

C. This Court's Current Fourteenth Amendment Jurisprudence

Justice Powell's partial-incorporation analysis cannot withstand current-day scrutiny either. Even when *Apodaca* was decided, Justice Powell's notion of applying a clause in the Bill of Rights in a piecemeal manner to state proceedings was difficult to square with this Court's previous "reject[ion of] the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)). But whatever its viability in 1972, this Court's modern Fourteenth Amendment jurisprudence has long since rendered Justice Powell's "partial incorporation" methodology untenable. In *Crist v. Bretz,* 437 U.S. 28 (1978), the state argued that a particular aspect of the Fifth Amendment's double jeopardy guarantee should not be incorporated against the States. Although Justice Powell agreed with this argument, this Court rejected it, holding that when a component of the Bill of Rights that applies against the States is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the States. *Id.* at 37-38.

From that point forward, this Court has never approached an incorporation issue – or any other due process issue – by taking, as Justice Powell thought entitled to do, a "fresh look" in public policy terms at whether a given right is essential. 406 U.S. at 376. Rather, the Court has made clear that "crucial

guideposts" under the Due Process Clause are now "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotation omitted); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (due process requires adherence to rights that are "deeply rooted in this Nation's history and tradition"). As even Justice Powell recognized, those historical guideposts demonstrate that at the time of the Founding, "unanimity had long been established as one of the attributes of a jury conviction." *Johnson,* 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also supra* at 11 (collecting other historical citations). That reality should settle the question.

If there were any lingering doubt about the legitimacy of Justice Powell's partial incorporation theory – whether in general terms or as applied in particular to the Sixth Amendment's unanimity guarantee – this Court dispensed with it in *McDonald.* The City of Chicago, as well as Justice Stevens in dissent, argued there that guarantees in the Bill of Rights "need not be identical in shape or scope to the rights protected against Federal Government infringement." 130 S. Ct. at 3048. Emphasizing that *Apodaca* was "not an endorsement of the two-track approach to incorporation," *id.* at 3035 n.14, this Court categorically rejected the argument. "The relationship between the Bill of Rights' guarantees and the States," this Court explained, "must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same

standards that protect those personal rights against federal encroachment." *Id.* at 3035, 3048 (internal quotation and citation omitted). This Court thus made clear that it had "abandoned the 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 3035 (internal quotation marks and citation omitted). "[I]t would be incongruous to apply different standards depending on whether the claim was asserted in a federal or state court." *Id.* (internal quotation marks and citation omitted).

Indeed, this Court's modern Sixth Amendment decisions are already fully consistent with this approach. In *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, this Court applied the *Apprendi* rule to state proceedings without even pausing to consider whether that aspect of the right to trial by jury applied to the States. This Court, in recent years, has proceeded in the same holistic manner with respect to the Sixth Amendment's Confrontation Clause, *see Crawford,* 541 U.S. 36; *Davis v. Washington,* 547 U.S. 813 (2006); the right to counsel, *Alabama v. Shelton,* 535 U.S. 654 (2002); *Strickland v. Washington,* 466 U.S. 669 (1984); and the right to compulsory process, *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). Justice Powell's controlling methodology in *Apodaca* stands as the sole exception to decades of otherwise unbroken precedent.[1]

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[1] To be sure, this Court has held that some guarantees in the Bill of Rights, such as the Fifth Amendment's Grand Jury Clause, do not apply to the States at all. *See Beck v.*

II. The Doctrine Of *Stare Decisis* Does Not Pose A Significant Impediment To Considering The Question Presented Afresh.

This Court explained in *McDonald* that "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States." 130 S. Ct. at 3036 (footnote omitted). This Court dropped a footnote attached to its reference to *stare decisis*, referencing the Fifth Amendment's Grand Jury Clause, but it did *not* mention *Apodaca.* It is hard to believe that omission was accidental. For three reasons, the doctrine of *stare decisis* should not stand in the way of this Court's reconsidering the result in *Apodaca* to bring it into line with this Court's current approach to the Sixth and Fourteenth Amendments.

1. Principles of *stare decisis* are at their nadir where a case results in a plurality opinion because no five Justices are able to muster a controlling view concerning the law. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, this Court reconsidered and overturned a prior decision – *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) – in part because a majority of the Court (the concurring opinion that provided the fifth vote, as well as the four dissenters) had "expressly disagreed with the rationale of the plurality." *Id.* at 66.

Washington, 369 U.S. 541, 545 (1962); *Hurtado v. California,* 110 U.S. 516 (1884). But Justice Powell's opinion in *Apodaca* stands alone as holding that a component of the Bill of Rights that *does* apply to state proceedings does not apply in the same manner, or with the same force, as in federal trials.

The same is true here. *Apodaca* was a deeply fractured decision. Both Justice Powell's concurrence and the four dissenters expressly disagreed with the plurality's view that the Sixth Amendment does not require unanimous verdicts to convict. Furthermore, the eight other Justices on the Court disagreed with Justice Powell's "partial incorporation" rationale. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe,* 517 U.S. at 66.

2. *Stare decisis* has minimal force when the decision at issue "involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 231 (1995). When faced with such situations, therefore, this Court repeatedly has determined that the better course is to reinstate the prior, traditional doctrine. *See id.* at 231-32; *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc.*, *v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from precedent); *Swift & Co. v. Wickham*, 382 U.S. 111,

128-29 (1965) (overruling recent decision to reinstate the "view . . . which this Court ha[d] traditionally taken" in earlier cases).

As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's" – and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414-15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Justice Powell's "partial incorporation" rationale likewise ignored this Court's prior precedent that "the Sixth Amendment right to trial by jury in a federal criminal case is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart J., dissenting) (emphasis added); *see also supra,* at 10. Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meanings of the Sixth and Fourteenth Amendments – meanings this Court has already re-embraced in other recent cases. It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

3. *Stare decisis* considerations also wane considerably "in cases . . . involving procedural and

evidentiary rules," in part because such rules generally do not induce the same kinds of individual or societal reliance as other kinds of legal doctrines. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Such is the case here. The rules governing juror voting are quintessentially procedural rules. What is more, in the forty years since *Apodaca* was decided, not a single state has retreated from its requirement that jury verdicts be unanimous to convict in criminal cases. Louisiana and Oregon remain the sole outliers, in exactly the same position as they were in 1972. And no other constitutional doctrine or legislation depends on the continued validity of *Apodaca*. To the contrary, *Apodaca* is a wholly unexplainable anomaly in this Court's constitutional criminal procedure jurisprudence.

III. The Question Whether States May Continue To Convict Individuals Of Serious Crimes Based On Nonunanimous Verdicts Is Extremely Important And Ripe for Consideration.

1. Empirical research conducted since *Apodaca* confirms the wisdom of the historical unanimity requirement and highlights the importance of enforcing that constitutional mandate.

a. A great virtue of the jury system is that it allows a defendant to benefit from "the common-sense judgment of the jury," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), formed by a "comparison of views, and by arguments among jurors themselves," *Blueford*, 132 S. Ct. at 2051 (quotation marks and citation omitted). The *Apodaca* plurality defended its decision in part based on a hypothesis that a

unanimity requirement "does not materially contribute to the exercise" of this "commonsense judgment." 406 U.S. at 410.

But evidence amassed from both mock juries and actual jury deliberations occurring over the last half-century reveals that the plurality's assumption was incorrect. Specifically, "[s]tudies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials* 24, available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. As Professors Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain:

> [Studies of real] jury deliberations reveal that some of the claims made in favor of dispensing with unanimity are unfounded. 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. Instead, the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.
>
> The primary cost frequently attributed to the unanimity requirement is that it increases the rate of hung juries, a cost that seems

> overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required. More importantly, a slight increase in hung juries and the potential for a longer deliberation may be costs outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict.

Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006). Other scholars have reached similar conclusions. *See* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment"); John Guinther, The Jury in America 81 (1988) (finding that nonunanimous juries correct each other's errors of fact less frequently than do juries required to reach unanimity).

In Louisiana and Oregeon, however, all it takes to convict is an initial 10-2 ballot in favor of a guilty verdict. *See, e.g.*, *State v. Blow*, 46 So. 3d 735, 751 (La. App. 2010) (noting that "the jury reached a 10-2 verdict in less than two hours," convicting the defendant of solicitation for murder and leading to a fifteen-year sentence). In those states, the essential "dynamics of the jury process" that Justice Kennedy described in *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978) – in which "often only one or two members express doubt as to [the] view held by a

majority at the outset of deliberations" and the jury then deliberates "by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury" – never take place.

b. The *Apodaca* plurality further assumed that allowing nonunanimous verdicts would not marginalize jurors who are members of minority groups. 406 U.S. at 413. This assumption also appears misguided. After considering the effect of nonunanimity rules on dissenting voices, the American Bar Association's American Jury Project concluded that "[a] nonunanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *See* Principles for Juries and Jury Trials, *supra*, at 25. Empirical studies corroborate the observation that jurors who have divergent views contribute more vigorously to jury deliberations when operating under a unanimous-verdict scheme. *See id.*; Reid Hastie et al., Inside the Jury 108-12 (1983). It thus comes as no surprise that members of racial and ethnic minorities are often the ones who are outvoted in nonunanimous verdicts. *See, e.g., State v. Potter*, 591 So. 2d 1166, 1167 (La. 1991) ("The vote was eleven to one with the sole 'not guilty' vote cast by one of the black members of the jury. Eleven blacks were peremptorily challenged by the state during voir dire . . . ."). Such verdicts-by-majority-rule undermine the public credibility of our judicial system. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1278 (2000).

The comprehensive empirical research affirming the wisdom of the unanimity requirement, as well as the disproportionately negative impact of non-unanimity rules on jurors of color, led the American Bar Association to conclude that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Principles for Juries and Jury Trials*, *supra*, at 23. Numerous other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (reviewing all available social science and concluding that laws allowing nonunanimous verdicts have a significant effect when prosecution's case "is not particularly weak or strong").

2. The consequences of Louisiana and Oregon continuing to allow criminal convictions based on nonunanimous jury verdicts are serious and will continue until this Court steps in. It is extremely common for defendants in these states to be convicted by nonunanimous verdicts. Over the past seven years alone, the Louisiana appellate courts have noted over one hundred cases in which defendants were convicted of felonies by nonunanimous verdicts[2] – a number that

[2] *See* Pet. App. 1a n.2; *State v. Mitchell*, 2012 WL 2476413, at *2 (La. App. 2012); *State v. Everett*, 2012 WL 2147754, at *26 (La. App. 2012); *State v. Evans*, 2012 WL 2147754, at *26 (La. App. 2012); *State v. Ott*, 80 So. 3d 1280, 1288 (La. App. 2012); *State v. Veal*, 83 So. 3d 211, 213 (La. App. 2011); *State v. Funes*, 2011 WL 6822109, at *1 (La. App. 2011); *State v. Mosley*, 80 P.3d 1164, 1173 (La. App. 2011); *State v. Jones*, 81 Sp.3d 236, 248 (La. App. 2011); *State v. V.L.G.*, 2011 WL

6077831, at *16 (La. App. 2011); *State v. Sanders*, 74 Sp.3d 284, 290 (La. App. 2011); *State v. Hardy*, 72 So. 3d 1017, 1021 (La. App. 2011); *State v. McElveen*, 73 So. 3d 1033, 1091 (La. App. 2011, *cert. pending* (Nos. 12-5163 and 12-5199); *State v. Carter*, 75 So. 3d 1, 5 (La. App. 2011); *State v. Bishop*, 68 So. 3d 1197, 1205 (La. App. 2011); *State v. Kaigler*, 2011 WL 3244803, at *14 (La. App. 2011); *State v. Bell*, 2011 WL 3444226, at *10 (La. App. 2011); *State v. Sadler*, 2011 WL 3557836, at *2 (La. App. 2011); *State v. Adams*, 68 So. 3d 1165, 1167 n.1 (La. App. 2011); *State v. Davis*, 2011 WL 2616866, at *7 (La. App. 2011); *State v. Harris*, 2011 WL 2617612, at *6 (La. App. 2011); *State v. Torregano*, 2011 WL 2617690, at *4 (La. App. 2011); *State v. Jackson*, 2011 WL 1259833, at *4 (La. App. 2011); *State v. Johnson*, 57 So. 3d 1087, 1098 (La. App. 2011); *State v. Winslow*, 55 So. 3d 910, 913 (La. App. 2010); *State v. Thomas*, 54 So. 3d 678, 685 (La. App. 2010); *State v. Samuels*, 2010 WL 4272863, at *6 (La. App. 2010); *State v. Lawrence*, 47 So. 3d 1003, 1013 (La. App. 2010); *State v. Blow*, 46 So. 3d 735, 751 (La. App. 2010); *State v. Jones*, 2010 WL 1838309, at *3 (La. App. 2010); *State v. Barbour*, 35 So. 3d 1142, 1150 (La. App. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *State v. Moody*, 38 So. 3d 451, 455 (La. App. 2010); *State v. Every*, 35 So. 3d 410, 420 (La. App. 2010); *State v. Sumrall*, 34 So. 3d 977, 990-91 (La. App. 2010); *State v. White*, 2010 LEXIS 974, at *12 (La. App. 2010); *State v. Blanchard*, Unpub. 2010 LEXIS 417, at *22 (La. App. 2010); *State v. Lomax,* 35 So. 3d 396, 403 (La. App. 2010); *State v. Jones*, 29 So. 3d 533, 540-41 (La. App. 2009); *State v. Regis,* 25 So. 3d 183, 189 (La. App. 2009); *State v. Taylor*, 21 So. 3d 421, 425 (La. App. 2009); *State v. Smith*, 20 So. 3d 501, 508 (La. App. 2009); *State v. Raymond*, 13 So. 3d 577, 593 (La. App. 2009); *State v. Tillman*, 7 So. 3d 65, 78 (La. App. 2009); *State v. Bertrand*, 6 So. 3d 738, 739 (La. App. 2009); *State v. Martin*, Unpub. 2009 LEXIS 784, at *4-5 (La. App. 2009); *State v. Malone*, 998 So. 2d 322, 327 (La. App. 2008); *State v. Johnson*, Unpub. 2008 LEXIS 448, at *3-6 (La. App. 2008); *State v. Daigle*, Unpub. 2008 LEXIS 555, at *6-8 (La. App. Oct. 31, 2008); *State v. Lloyd*, 2008 Unpub. LEXIS 579, at *2 (La. App. Nov. 14, 2008); *State v. Lee,* 964 So. 2d 967 (La. App. 2007), *cert. denied,* 129 S. Ct. 130 (2008); *State v. Ruiz*, 955 So. 2d 81, 83 (La. 2007); *State v. Elie*, 936 So. 2d 791, 794

substantially undercounts the frequency of such verdicts because many appellate decisions do not note nonunanimous verdicts. In Oregon, a recent study concluded that almost two-thirds of felony convictions involve at least one nonunanimous count. *See* Br. *Amici Curiae* of Jeffrey Abrahamson et al. at

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(La. 2006); *State v. Mizell*, 938 So. 2d 712, 713 (La. App. 2006); *State v. Mack*, 2008 LEXIS 585 (La. App. 2008); *State v. Brantley*, 975 So. 2d 849, 851 (La. App. 2008); *State v. Gullette*, 975 So. 2d 753, 758 (La. App. 2008); *State v. Linn*, 975 So. 2d 771, 772 (La. App. 2008); *State v. Carter*, 974 So. 2d 181, 184 (La. App. 2008); *State v. Ross*, 973 So. 2d 168, 171 (La. App. 2007); *State v. Baker*, 962 So. 2d 1198, 1201 (La. App. 2007); *State v. Allen*, 955 So. 2d 742, 746 (La. App. 2007); *State v. Tensley*, 955 So. 2d 227, 231 (La. App. 2007); *State v. Johnson*, 948 So. 2d 1229, 1239 (La. App. 2007); *State v. Williams*, 950 So. 2d 126, 129 (La. App. 2007); *State v. Mayeux*, 949 So. 2d 520, 535 (La. App. 2007); *State v. Brown*, 943 So. 2d 614, 620 (La. App. 2006); *State v. Payne*, 945 So. 2d 749, 750 (La. App. 2006); *State v. Riley*, 941 So. 2d 618, 622 (La. App. 2006); *State v. Chandler*, 939 So. 2d 574, 576 (La. App. 2006); *State v. Smith*, 936 So. 2d 255, 259 (La. App. 2006); *State v. Davis*, 935 So. 2d 763, 766 (La. App. 2006); *State v. Scroggins*, 926 So. 2d 64, 65 (La. App. 2006); *State v. Houston*, 925 So. 2d 690, 706 (La. App. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 2006); *State v. Newman*, 2006 LEXIS 3086, at *5 (La. App. 2006); *State v. Smith*, 952 So. 2d 1, 16 (La. App. 2006); *State v. Caples*, 938 So. 2d 147, 157 (La. App. 2006); *State v. Pitre*, 924 So. 2d 1176, 1182 (La. App. 2006); *State v. Zeigler*, 920 So. 2d 949, 952 (La. App. 2006); *State v. Wilhite*, 917 So. 2d 1252, 1258 (La. App. 2005); *State v. Hurd*, 917 So. 2d 567, 568 (La. App. 2005); *State v. Wiley*, 914 So. 2d 1117, 1121 (La. App. 2005); *State v. Bowers*, 909 So. 2d 1038, 1043 (La. App. 2005); *State v. Dabney*, 908 So. 2d 60, 65 (La. App. 2005); *State v. Jackson*, 904 So. 2d 907, 909 (La. App. 2005); *State v. Williams*, 901 So. 2d 1171, 1177 (La. App. 2005); *State v. Juniors*, 918 So. 2d 1137, 1147 (La. App. 2005), *cert. denied*, 549 U.S. 126 (2007); *State v. Jacobs*, 904 So. 2d 82, 92 (La. App. 2005).

7, *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117).

Defendants repeatedly have challenged the holding in *Apodaca* in recent years, and they continue to do so. But the Louisiana Supreme Court has made clear that it does not intend to question *Apodaca.* The Louisiana Supreme Court recently declared its nonunanimity rule "still valid" in light of *Apodaca*, *see State v. Bertrand*, 6 So. 3d 738, 741-43 (La. 2009), and, in the wake of this Court's decision in *McDonald*, it denied review in this case. Pet. App. 52a. The Oregon intermediate appellate courts likewise continually tell these defendants that only this Court can declare that *Apodaca* is no longer good law, and the Oregon Supreme Court continues to deny discretionary review of the issue.[3] And because the nonunanimity rules in both Oregon and Louisiana are based on state constitutions, defendants cannot seek change on state law grounds.

The time has come for this Court to address the disjunction between *Apodaca* and this Court's current view of the Sixth and Fourteenth Amendments. No meaningful percolation can occur in the state courts. Nor is any further empirical research necessary. Two states in our Union have simply decided to violate criminal defendants' fundamental right to jury trial until this Court tells them they may no longer do so.

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[3] *See State v. Pereida-Alba,* 189 P.3d 89 (Or. App. 2007), *rev. denied,* 197 P.3d 1104 (Or. 2008); *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 604 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007).

IV. This Case Is An Ideal Vehicle For Reconsidering *Apodaca.*

In the past few Terms, a wide array of groups have filed *amicus* briefs urging this Court to grant certiorari to reconsider *Apodaca*: the American Bar Association, the National Association of Criminal Defense Lawyers, the Louisiana Association of Criminal Defense Lawyers, the Oregon Criminal Defense Lawyers Association, the Charles Hamilton Houston Institute for Race and Justice, and various academic experts. *See Herrera v. Oregon*, No. 10-344 (currently pending); *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117); *Lee v. Louisiana,* 129 S. Ct. 130 (2008) (No. 07-1523).[4] These groups have argued in various ways that condoning nonunanimous verdicts in criminal cases severely hampers the fair administration of justice and, indeed, the public perception of justice.

The strength of the collective pleas in these cases suggest this is a pressing issue that is not going to go away. And for three reasons, this case presents an ideal vehicle for considering whether our Constitution should continue to tolerate felony convictions by less-than-unanimous verdicts.

1. This case is from Louisiana, which would allow this Court to consider the constitutionality of nonunanimous verdicts in a setting that highlights the reasons why the Fourteenth Amendment should prohibit this practice. Both the majority and the

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[4] Petitioner understands that copies of the briefs in *Lee* and *Bowen* remain available in the clerk's office. They also are available online on the Westlaw pages that report the denials of certiorari.

dissenting opinions in *McDonald* emphasized that the Fourteenth Amendment was designed to guarantee to African Americans the "full and equal benefit" of the provisions of the Bill of Rights. 130 S. Ct. at 3040, 3043 (majority opinion) (quotation and citation omitted); *see also id.* at 3112, 3125, 3133 (Breyer, J., dissenting) (emphasizing that a right should especially apply to states when it is an "*antidiscrimination*" measure designed to protect "discrete and insular minorities") (quotation and citation omitted). Put another way, it is especially imperative to apply a guarantee of the Bill of Rights against the states when the guarantee has roots in guaranteeing full citizenship to black Americans. Thus, the majority and lead dissent in *McDonald* expended considerable energy debating whether the Second Amendment right to bear arms protects African Americans from actual or potential discrimination. *Compare* 130 S. Ct. at 3039-44 (majority opinion) *with* 130 S. Ct. at 3133 (dissenting opinion).

Those concerns are directly relevant in the context of the Sixth Amendment right to a unanimous verdict. "A right to jury trial is guaranteed to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Such oppression, of course, has all-too-often in our history taken the form of race discrimination in the criminal justice system. A unanimity voting requirement thus serves as a vital protection against this insidious influence. What is more, in the Framers' view, "[t]rials were not just about the rights of the defendant but also about the rights of the

community. The people themselves had a right 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, was – and remains – a fundamental act of citizenship and suffrage. *Cf. Blakely*, 542 U.S. at 306 ("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.").

Louisiana's nonunanimity rule uniquely strikes at the heart of equality and citizenship. The State adopted its nonunaminity rule in its 1898 constitutional convention, whose "mission" was "to establish the supremacy of the white race in this state." *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana,* at 374 (1898) (statement of Hon. Thomas J. Semmes). More specifically, the convention was "called together by the people of this State to eliminate from the electorate the mass of corrupt and illegitimate voters who have during the last quarter of a century degraded our politics." *Id.* at 8-9 (opening remarks of E.B. Kruttscchnitt, President of the convention); *see also Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (discussing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Louisiana v. United States*, 380 U.S. 145, 147-48 (1965) (discussing steps taken at 1898 convention to "disenfranchise[e] Negroes"). To this end, Louisiana adopted not only a nonunanimity rule at its convention but also its infamous literacy test and one of the South's first Grandfather Clauses.

In light of this history, the Louisiana Supreme Court recently noted, and did not disagree with, the argument that "the use of nonunanimous verdicts ha[s] an insidious racial component, allow[ing] minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution has proscribed." *Bertrand*, 6 So. 3d at 743. But the Louisiana Supreme Court deemed itself powerless to consider that matter in light of *Apodoca*. *Id.* Given the reasoning in *McDonald*, this Court should directly consider the import of the connection between Louisiana's nonunanimous verdicts rule and race.[5]

2. The facts of this particular prosecution also place the problems associated with allowing less-than-unanimous verdicts in unusually stark relief. The State's case depended on two witnesses who claimed to have seen petitioner shoot the victim. But there were reasons to doubt each witness's account; one witness changed his story multiple times and the other came forward only once he had his own problems with the law. Furthermore, neither witness nor anyone else ever offered any reason why petitioner would have wanted to kill a young fan who came out to watch him perform. On the other hand, four other witnesses testified that they saw the shooting and that they were sure that petitioner did *not* do it. Because no physical evidence favored either version of events, the prosecution boiled down to a credibility dispute – exactly the kind of case in

[5] Oregon's nonunanimity rule was adopted by voter initiative in 1934. The voter pamphlet discussed the "problem" of holdout jurors but did not discuss race.

which the need for stringent procedural safeguards is at its zenith.

Yet Louisiana's nonunanimity rule provided petitioner anything but stringent protection. Jury votes that are initially 10-2 in favor to convict (the determinative tally in this case) result in guilty verdicts in unanimity regimes only *64.7%* of the time. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 692 (2001) (Table 6). Even when such ballots in unanimity regimes lead to hung juries instead of outright acquittals, statistics show that prosecutors respond by dismissing the charges over 20% of the time, and when defendants are retried, they are acquitted in 45% of bench trials and nearly 20% of jury trials. National Center for State Courts, *Are Hung Juries a Problem?*, at 26-27 (2002). Yet here, by virtue of the jury's 10-2 vote (with two of the three African American jurors voting to acquit, Pet. App. 24a), Louisiana's judicial system judged petitioner guilty of second degree murder and sentenced him to life imprisonment without the possibility of parole.

A Louisiana prosecutor recently commented that when ten of twelve jurors find a defendant guilty of a serious crime, "that's beyond a reasonable doubt." Marcia Coyle, *Divided on Unanimity,* Nat'l L.J., Sept. 1, 2008, at 1. This Court should promptly rebuke that view, which misapprehends not only legal theory but the "effect" of dispensing with the unanimity requirement "on the fact-finding process." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978).

3. Finally, this case aptly demonstrates the fact, as indicated above, that nonunanimous verdicts are an unfortunately common occurrence in Louisiana and Oregon. Unless and until this Court addresses the issue, this Court will continue to receive petitions on the subject and uncertainty over this Court's constitutional jurisprudence will reign. Better to grant review now and to put the question to rest.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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