No. 08-1117

IN THE

Supreme Court of the United States

SCOTT DAVID BOWEN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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May 28, 2009

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QUESTION PRESENTED

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

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INTERESTS OF *AMICUS CURIAE*

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies.[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with more than 12,800 direct members worldwide and 94 state, local, and international affiliate organizations with another 35,000 members - including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.

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[1] Pursuant to this Court's Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified at least ten days prior to filing and have consented to the filing of this brief.

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 LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amici* in appropriate cases.

Amici share a keen interest in having this Court revisit its fractured and historically unsound determination in *Apodaca v. Oregon*, 406 U.S. 404 (1972), that non-unanimous jury verdicts in criminal cases satisfy the Sixth Amendment's jury trial guarantee.

SUMMARY OF THE ARGUMENT

Each of the *amici* filed separate amicus briefs in *Lee v. Louisiana*, 07-1523, urging the Court to revisit whether the Sixth Amendment requires unanimity in state criminal cases. This consolidated brief highlights the arguments contained in the respective *Lee* briefs, and reflects the collective belief of the undersigned *amici* that *Apodaca* was wrongly decided.

The Court should grant the Petition and overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), a fractured 4-1-4 opinion, which held that the Constitution does not compel unanimity in state criminal cases. The jurisprudential approach taken by the *Apodaca* plurality is out of step with the Sixth Amendment jurisprudence. While *Apodaca* focused on the functional role of the jury in a contemporary society, the Court has subsequently made clear that Sixth Amendment questions properly turn on the Framer's understanding of the jury trial right.[2]

Even setting aside methodology, *Apodaca* was wrongly decided because the plurality's assumption--that no functional difference exists between juries operating under a unanimity requirement and those operating under a 10-2 decision rule--is simply incorrect. Nearly four decades of empirical research on jury decision-making demonstrates conclusively

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[2] *Cf. State v. Gann*, 254 Ore. 549, 554 (Or. 1969)("The decision that the Sixth Amendment requires a twelve-man unanimous verdict, was reached by a sterile historical approach to the Bill of Rights which is now -- and in our opinion very correctly -- usually ignored by the United States Supreme Court")

that unanimous juries are more careful, more thorough, and return verdicts that are more aligned with what experienced observers of the criminal justice system (generally judges) view to be the correct verdict.

Moreover, recent historical scholarship indicates that one of the original purposes of the non-unanimous jury was to functionally silence the views of racial and ethnic minorities and women, and suggests that the current operation of non-unanimous juries *de facto* accomplishes that purpose. Eliminating the traditional unanimity requirement marginalizes the viewpoints of dissenting jurors because jurors in the majority refuse to deliberate further once the 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. Thus, non-unanimous criminal verdicts can undermine important Constitutional principles concerning equality in jury service that this Court has taken considerable measures to protect.

REASONS FOR GRANTING THE WRIT

The Court has recognized that "[its] decisions interpreting the Sixth Amendment are always subject to reconsideration." *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968); see also *Williams v. Florida*, 399 U.S. 78, 107 (1970) (Black, J., concurring in part and dissenting in part) (recognizing the Court's "duty to re-examine prior decisions to reach the correct constitutional meaning in each case"). Because *Apodaca* is a fractured plurality opinion, and its result broke with literally centuries of well-settled common law precedent requiring unanimous criminal verdicts, the decision is particularly well-suited for reconsideration. The fact that forty-eight states require unanimity, with Oregon and Louisiana as the only two outliers, also suggests the need for review. *See Burch v. Louisiana*, 441 U.S. 130 (1979) ("We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.").

Since this Court denied certiorari in *Lee v. Louisiana*, 07-1523, the Louisiana Supreme Court, in *State v. Chretien*, 2008 KA 2311 (03/17/2009), decided the question presented here, reversing a district court's ruling that Article 782 of the Louisiana Code of Criminal Procedure (which permits non-unanimous verdicts) is unconstitutional. The Louisiana Supreme Court identified *Apodaca* as the still controlling precedent, and emphasized (correctly) that the task of reconsidering that decision rests with this Court: "[W]e are not

presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned . . .." *Id.* at 10. As *Chretien* appears to foreclose challenge to non-unanimity, further developments in Louisiana are exceedingly unlikely.

Further developments are equally unlikely in Oregon. Though the Oregon Court of Appeals opinion in Petitioner's case marks the first Post-*Apodaca* treatment of the unanimity issue in the state, the Oregon Supreme Court declined Petitioner's request for review. That court has repeatedly turned down well-preserved requests to consider the issue. *See, e.g.*, *State v. Howard,* 344 Ore. 670 (Or. 2008); *State v. Cave*, A129267, *State v. Turneanu,* 2008 Ore. LEXIS 1158 (Or. 2008), *State v. Williams*, A131158, *State v. Artiago*, A137095 and *State v. Pereida-Alba*, A130594.

Apodaca is an anomaly in the Sixth Amendment jurisprudence; its concept is foreign to the Framers' understanding of the jury trial, it functions to the detriment of careful deliberation, and, in all likelihood, its operation muzzles the voices of disenfranchised and marginalized communities. Amici believe *Apodaca* to be anachronistic and outdated, but even if it is not, the Court should grant the Petition to reconsider the decision in light of the clear doctrinal and practical challenges it presents.

I. *Apodaca* was Wrongly Decided.

A. The CHHIRJ Brief Explains How Thirty-Five Years of Empirical Research Casts Grave Doubt on the *Apodaca* Court's Conclusion that No Functional Difference Exists Between Unanimous and Non-Unanimous Juries.

With admittedly little empirical or evidentiary support other than its own hunches and assumptions, the majority in *Johnson v. Louisiana*, 406 U.S. 356, 360-61 (1972), *Apodaca*'s companion case, rejected any notion that upon reaching the quorum necessary to convict, the majority jurors might simply short-circuit deliberations and ignore the reasonable doubts of their colleagues. The Court concluded that before it would alter its own perceptions of jury behavior and overturn a legislative judgment that unanimity is not essential to reasoned jury verdicts, "we must have some basis for doing so other than unsupported assumptions." *Id.* at 361-62; *cf id.* at 389-90 (Douglas, J., dissenting) ("I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.").

Subsequent empirical research on jury decision-making consistently undermines the view that non-unanimous juries protect the jury trial guarantee as well as unanimous juries do.

Unanimous juries are more thorough than non-unanimous juries. Studies demonstrate that the farther the jury gets from a unanimity rule, the fewer key categories of evidence are discussed. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 85 (1983). Non-unanimous juries also take fewer polls, tend to cease deliberation as soon as a quorum has been reached, and arrive at verdicts more quickly than unanimous juries. *Id.* at 76; *see* Devine et al. 7 Psych., Pub. Pol. & L. at 669 (summarizing numerous studies). This greater number of (and length of time between) votes is associated with what is known as an "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." Hastie et al., *supra*, at 90. Juries adopt the evidence-driven deliberation style most often in cases where the deliberative process – rather than the jurors' pre-deliberation positions – drives the ultimate verdict. Devine, et al. *supra*, at 701.

Unanimity rules are also outcome-determinative. In almost one-third of the unanimous juries monitored in the Hastie et al. study, the verdict initially favored by the eight-juror majority was not the verdict delivered by the jury. *Id.* at 96, 98. Almost 30% of the requests for information from the trial judge, one-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.* Though a small, but statistically

significant increase in the number of hung juries results from the unanimity rule, a statistically significant number of "incorrect" verdicts results from the 10-2 majority rule. Hastie et al., *supra*, at 60.[3] The research suggests, then, that the unanimity rule's prevention of the "wrong" result from occurring offsets whatever minor costs incur from an increase in hung juries. *Id.*; *see generally* Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U.L. Rev. 201, 205-06 (2006) (noting the scant empirical evidence available to the *Apodaca* Court and concluding that "the benefits of unanimity outweigh its costs").

The proof of the pudding is in the eating: Jurors operating under a unanimity rule report being more satisfied with their deliberations and more confident that they reached the correct result, while non-unanimous juries report lower ratings of the performance and decision processes of the other jurors. Hastie et al., *supra*, at 76, 82; Shari Seidman Diamond, et al., *supra*, at 205. Perhaps most importantly, unanimity rules enhance the perceived reliability and legitimacy of criminal verdicts. *Id.* at 222, 227 (citing research indicating that "community

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[3] First-degree murder was the "wrong" verdict. 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. The three hung juries under the unanimity rule would have also delivered the "wrong" verdict if the majority faction had prevailed. Hastie et al., *supra*, at 63.

residents viewed unanimous procedures for arriving at jury verdicts in criminal cases as more accurate and fairer than majority procedures").

B. The LACDL Brief Documents the Ignoble History that Colors the Use of Non-Unanimous Juries in Louisiana and Raises Concerns that Non-Unanimity Rules Marginalize the Views of Racial and Ethnic Minorities and Women.

i. The Use of Non-Unanimous Juries in Louisiana has an Ignoble Past.

Louisiana's 1898 Constitution, like the Alabama Constitution of 1901 previously examined by the Court, "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Hunter v. Underwood*, 471 U.S. 222, 229 (1985). In his opening address at 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" – the Convention President, Kruttscchnitt, captured the tone:

> I am called upon to preside over what is little more than a family meeting of the Democratic party of the State of Louisiana. We know that this convention has been called together by

> the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.

Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "Journal"].

When discussing the provisions adopted to prevent African American suffrage, a like-minded delegate explained:

> [T]he Supreme Court of the United States in the Wilson case, referring to that, said that they had swept the field of expedients, but they were permissible expedients, and that is what we have done in order to keep the negro from exercising the suffrage. What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause)

Constitutional Convention of the State of Louisiana, *supra*, at 380.

Closing the Convention, Hon. Thomas J. Semmes stated that the "mission" of the delegates

had been "to establish the supremacy of the white race in this state." *Id.* at 374. In his closing remarks, President Kruttseehnitt bemoaned that the delegates had been constrained by the Fifteenth Amendment such that they could not provide what they would have wished: "universal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins." *Id.* at 380. He went on to proclaim:

> I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system that we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.

Id. at 381.

The 1898 Convention substantially diminished the Sixth Amendment jury trial guarantee, and through non-unanimity rules, the elimination of misdemeanor juries, and the reduction of jury size for lesser felonies were said by their proponents to be driven by a desire to reduce costs, commentators have directly linked the diminution of the jury trial right to the general effort "to consolidate Democratic power in the hands of the 'right people,' thereby bypassing the poorer sorts, just as the suffrage provision did." W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993), pp. 93-109.

ii. Non-unanimity rules marginalize the views of racial and ethnic minorities and women.

Although 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 (as well as the aforementioned cases) indicates that a non-unanimous decision rule may contribute to the de *facto* exclusion of their viewpoints. Brief *Amicus Curiae* of the Charles Hamilton Houston Institute for Race and Justice at 12 *citing* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1264 (Apr. 2000).

As the delegates at the 1898 Louisiana Constitutional Convention had to have grasped, discriminatory intent can be masked by accepting one or two African-American jurors in the knowledge that their vote will not be fully effective in a system of majority verdicts. *See, e.g., State v. Cleattesm*, 07-272, 2008 La. App. LEXIS 816 (La. App. 5 Cir. May 27, 2008) ("[Defense counsel] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes."). Since only ten-out-of-twelve votes are needed to obtain a conviction, prosecutors minded to discriminate know that the inclusion of one (or two) token African-American juror(s) suffices. *State v. Collier*, 553 So. 2d 815, 819-20 & 823 (La. 1989) (footnotes omitted) ("Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to Batson's admonition that it was unacceptable to do

so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two."[4]

Thus, as Justice Stewart warned, under *Apodaca*, "[ten] jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting); Dennis J. Devine et al., *supra*, at 669) ("Unanimous verdicts protect jury representativeness - each point of view must be considered and all jurors persuaded."); *id.* ("minority jurors participate more actively when decisions must be unanimous."). Moreover, even if minorities comprise more than two spots on any given jury, 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 or experiences 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 1298-99 (citing studies observing that women speak less than do men during deliberations, and that men often interrupted the women and ignored their arguments). This means that even when minorities sit on a jury, there is an increased likelihood that women and people of color may end up being outvoted by the majority of a non-unanimous jury.

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[4] The potential for *de facto* silencing of minority viewpoints is not limited to Louisiana. Because white/non-Hispanic citizens comprise 80.5% of Oregon's population, the average jury will consist of two or fewer minority jurors. Thus, under a 10-2 decision rule, the voices of ethnic and racial minority jurors can be safely ignored.

Despite the Court's 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); *Miller-El v. Dretke*, 544 U.S. 660 (2005); *Snyder v. Louisiana*, 128 S. Ct. 1203 (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. Non-Unanimous Decision Rules Diminish the Beyond a Reasonable Doubt Standard.

Two years after *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968), which held that criminal defendants in state cases had the right to a jury trial, the Court held that the Due Process Clause of the Fourteenth Amendment protects the criminally accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). The *Winship* Court reasoned that the historic pedigree of the heightened standard of proof in criminal cases and the virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions "reflect[ed] a profound judgment about the way in which the law should be enforced and justice administered." *Id.* at 361-62 (quotation omitted). Because the criminally accused has an interest of "immense importance" and "transcending value" in his liberty and reputation at stake, the margin of error that exists in all litigation must be reduced as

to the defendant by placing on the prosecution the burden of persuading the fact-finder of his guilt beyond a reasonable doubt. *Id.* at 363-66.

With *Duncan* and *Winship* as backdrop, Petitioner *Apodaca* argued that non-unanimous verdicts in state criminal cases undermined the Sixth Amendment, which encapsulates the beyond a reasonable doubt standard, because unanimity gives substance to that standard. 406 U.S. at 406.[5] Despite the obvious interrelationship between the jury trial right and the beyond a reasonable doubt

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[5] In fact, the voters' pamphlet – distributed during the special election in which the Oregon electorate adopted the constitutional amendment that authorized the non-unanimous jury provision – explicitly endorses the non-unanimous jury verdict as an effective means to circumvent the stringent beyond a reasonable doubt standard:

> The laws of Oregon now prohibit the court from commenting on the fact that the accused in a criminal case has failed to take the witness stand and testify in his own defense, and the judge is also prevented from commenting on the value of the evidence introduced on behalf of the defendant no matter how flimsy the defense of the accused may be. Our laws also require that the evidence against the defendant must be so conclusive as to the culprit's guilt that the jury must be convinced beyond any reasonable doubt or to a moral certainty of that guilt before it is privileged to find a verdict of guilty. Twelve jurors trying a criminal case must be unanimous in their decision before the defendant may be found guilty. The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement.

Voters' Pamphlet, Special Election May 18, 1934, p. 7.

requirement, the *Apodaca* plurality found "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412 (White, J.). More specifically, in *Johnson*, the majority held that "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." *Id.* at 360; *cf. State ex rel Smith v. Sawyer*, 263 Or. 136, 138, 501 P.2d 792 (Or. 1963) (""It clearly appears from the argument in the Voters' Pamphlet that the amendment was intended to make it easier to obtain convictions.").[6]

Within a very few years of *Apodaca* and *Johnson*, the Court began to re-examine the foundation of those decisions. In *Burch v. Louisiana*, 441 U.S. 130, 138 (1979), for example, the Court held that conviction by a non-unanimous six-person jury in a Louisiana criminal trial for a non-petty offense violated the Sixth Amendment right of the defendant to a trial by jury. The *Burch* Court buttressed its determination by looking to the current jury practices of the several States:

> [i]t appears that of those States that utilize six-member juries in trials of

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[6] As other *Amici* noted in *Lee,* "A common joke in Oregon among the defense bar is that if the classic Twelve Angry Men had been filmed there, it would have been a very short film indeed. This Court has rightly refused to apportion a mathematical number for the "beyond a reasonable doubt" standard of proof. See, e.g., *Holland v. United States*, 348 U.S. 121 (1955). Yet that is what Oregon and Louisiana are *de facto* doing, they are setting the beyond a reasonable doubt as the conclusion of 84% of the jury." *Lee v. Louisiana*, Brief Amicus Curiae of the Federal Public Defender for the District of Oregon, at 23.

> non-petty offenses, only two, including Louisiana, also allow non-unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Id. (citations omitted).

Burch effectively rejected the subjective analysis embraced by *Apodaca* and *Johnson* and employed the "useful guide" that its predecessors eschewed. More recently, the Court rejected the *Apodaca* plurality's premise that the reasonable doubt standard was not tethered to the Sixth Amendment right to trial by jury. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> [i]t 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 *Winship* 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.

Id. at 278 (second emphasis added).

The Court concluded that by providing the jury with a faulty "reasonable doubt" definition during the instruction stage, the trial court denied defendant the right to a jury verdict of guilt beyond a reasonable doubt. *Id.* at 281. That deprivation amounted to "structural error," the Court concluded, because "the jury guarantee [is] a 'basic protectio[n]' whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function." *Id.* at 281-82; *see also Cunningham v. California*, 549 U.S. 270, __.; 127 S. Ct. 856, 863-64 (2007) (applying *Apprendi* to a state sentencing system and explaining 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" (emphasis added)).

A defendant could not be convicted at common law except by "the unanimous suffrage of twelve of equals and neighbours" and on proof beyond a reasonable doubt. *Blakely v. Washington*, 542 US 296, 301 (2004) *quoting* 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). It cannot be true that when one (or worse, two) jurors have heard the evidence presented and believe that a reasonable doubt as to the defendant's guilt exists, the resulting conviction is based nonetheless on proof beyond a reasonable doubt.[7] Thus, if the scope

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[7] One argument made in favor of dispensing with the traditional unanimity requirement is that the unanimity rule allows an eccentric holdout juror to subvert the will of a principled majority. *See* Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The*

of the Sixth Amendment jury trial guarantee turns on the Framers' original understanding of the jury trial, non-unanimous verdicts cannot be tolerated and *Apodaca* cannot stand.

CONCLUSION

Non-unanimous criminal verdicts in Oregon and Louisiana continue to undermine a critical portion of the Sixth Amendment's jury trial guarantee. This Court should grant the Petition and reverse *Apodaca*.

Respectfully submitted,

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behavior of the non-unanimous civil jury, 100 Nw. U. L. Rev. 201, 204 (2006) (citing critics of unanimity who claim that quorum juries protect the jury from the "obstinacy of the erratic or otherwise unreasonable holdout juror") This concern is unfounded. *See* Shari Seidman Diamond, et al., *supra*, at 205 (finding no evidence that outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views). Holdout jurors view the judge's instructions in much the same way as the majority jurors, and their recall of the testimony and of the elements of the offenses does not differ from that of the majority. Hastie et al., *supra*, at 149; *See also* Shari Seidman Diamond, et al., *supra*, at 220 (finding that holdouts and majority jurors largely agreed about the content of the evidence).

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