No. 07-1523

In the Supreme Court of the United States

DERRICK TODD LEE, ET AL.,
PETITIONERS

v.

LOUISIANA, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF LOUISIANA,
FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does the Fourteenth Amendment, by incorporation of the Sixth Amendment, prohibit states from respecting jury verdicts by majorities of at least ten to two in non-capital criminal cases?

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This case is a consolidation of two petitions from Louisiana and one from Oregon. Both states respect jury verdicts of at least ten to two in non-capital criminal cases. Petitioners Lee and Bertrand appeal from the state of Louisiana, while petitioner Bowen hails from Oregon.

On January 14, 2002, petitioner Derrick Todd Lee ("Lee") killed Geralyn DeSoto by slitting her throat. (R. at 4-5.) After a Louisiana jury voted eleven to one to convict Lee of first-degree murder, the trial court sentenced Lee to mandatory life imprisonment at hard labor without the possibility of parole. (R. at 4-5.) Lee's conviction complied with the Louisiana Code of Criminal Procedure, which provides in relevant 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." LSA-C.Cr.P. art. 782(A).[1] Lee appealed his conviction, arguing that the Sixth and Fourteenth Amendments to the U.S. Constitution require unanimous jury verdicts in state trials. (R. at 5.) Finding no merit to his constitutional challenge, the Louisiana Court of Appeal affirmed Lee's conviction on May 16, 2007. (R. at 6, 52.) The Louisiana Supreme Court denied certiorari on March 7, 2008. (R. at 2.)

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[1] Similarly, Louisiana's constitution provides, "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." La. Const. art. I, § 17(A).

Petitioners Shannon McBride Bertrand ("Bertrand") and Wilford Frederick Chretien, Jr. ("Chretien") were each indicted for felonies requiring punishment by confinement at hard labor. (R. at 55.) Both filed pretrial motions to declare Louisiana Code of Criminal Procedure Article 782(A) unconstitutional, which the trial judge granted. (R. at 55.) Requesting consolidation, the State of Louisiana appealed directly to the state supreme court. (R. at 55.) The Louisiana Supreme Court reversed and remanded, ruling that Article 782 comported with the Fifth, Sixth, and Fourteenth Amendments. (R. at 62-63.) Neither Bertrand nor Chretien have been tried.

An Oregon jury convicted petitioner Scott David Bowen ("Bowen") of multiple felony sex offenses. (R. at 67.) During trial, Bowen requested a jury instruction requiring that "each and every juror" agree on the verdict. (R. at 68.) The trial judge rejected the instruction, citing Oregon Constitution Article I, § 11, which provides in relevant part that "ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict." (R. at 68.) Convicted by a ten-to-two majority, (R. at 73,) Bowen moved unsuccessfully for a mistrial and subsequently appealed. (R. at 67.) The Oregon Court of Appeals affirmed Bowen's conviction. (R. at 69.)

SUMMARY OF ARGUMENT

This Court should affirm the decisions by the Oregon Court of Appeals and the Louisiana Supreme Court, which rely on the Court's approval of majority verdicts. Indeed, the Court has already held that states may respect majority verdicts in non-capital criminal cases. *See Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). No special justification exists for disturbing this precedent because majority verdicts comport with both the Sixth and Fourteenth Amendments to the Constitution.

The Sixth Amendment does not require trial by unanimous jury for three reasons. First, the history of common law trial by jury indicates that unanimity is a historical accident with no significant relevance to modern trial by jury. Second, the Framers' of the amendment did not intend it to indiscriminately incorporate common law jury features such as unanimity. Finally, unanimity is not essential to the jury's purpose: interposition by the community between the government and the accused.

The Sixth Amendment does not apply directly to the states. Rather, the Court has held that right of trial by jury is enforceable against state governments through the Due Process Clause of the Fourteenth Amendment. However, the Fourteenth Amendment's application of the Sixth to the states does not add unanimity to the right to trial by jury. The Due Process Clause does not limit that states to a unanimous decision rule because such a rule is not "fundamental to the American scheme of justice." Specifically, majority verdicts may effectively hold the

government to its burden of proof beyond a reasonable doubt, required by the Due Process Clause. In addition, empirical research suggests that majority verdicts do not compromise the independence of the jury by unfairly favoring the prosecution. Finally, although the Court has required unanimity for capital cases, this requirement does not translate to lesser crimes because capital cases are qualitatively different. Consequently, the Due Process Clause does not require jury unanimity.

Finally, principles of federalism caution against blanket application of the unanimity rule to all states. Prohibiting majority verdicts in the states compromises their ability to develop new efficient and effective criminal procedure. There is considerable debate about the costs and benefits of majority verdicts. And compelling policy arguments exist for respecting jury verdicts by substantial majorities rather than insisting on unanimity: they promote efficient jury deliberation and reduce the frequency of mistrials. Since majority verdicts are constitutionally permissible, this Court should ensure that the states have the flexibility to experiment within the boundaries of due process.

ARGUMENT

I. THERE IS NO JUSTIFICATION FOR OVERRULING THE COURT'S PRIOR DECISIONS ALLOWING MAJORITY VERDICTS

A. This Court Has Already Considered Majority Verdicts and Found Them Constitutional in *Apodaca* and *Johnson*

Petitioners' argument fails because the Court has already ruled that non-unanimous jury verdicts in state court comport with the Sixth and Fourteenth Amendments to the Constitution. *See Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972); *see also Rita v. United States*, 551 U.S. 338, 385 (2007) (Souter, J., dissenting); *Schad v. Arizona*, 501 U.S. 624, 634 n.5 (1991); *Brown v. Louisiana*, 447 U.S. 323, 330-31 (1980); *Burch v. Louisiana*, 441 U.S. 130, 136 (1979).

In the companion cases *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), the Court considered and upheld majority verdicts in the very same states from which Lee et al. now petition. In *Apodaca*, petitioners Robert Apodaca and James Madden were each individually convicted by separate Oregon juries of eleven to one of assault with a deadly weapon and grand larceny, respectively. 406 U.S. at 405-06. The third petitioner, Henry Cooper, Jr., was found guilty by ten of twelve Oregon jurors for burglary. *Id.* Affirming the three convictions, the Court likened unanimity to the twelve-man requirement—a remnant of medieval common law "not of constitutional stature." *Id.* at 407-08.

In concluding that the Sixth Amendment did not require unanimity, the *Apodaca* Court examined trial by jury in two steps. First, the Court reviewed the

history of the right at common law and the framing of the Sixth Amendment. Second, the Court examined the contemporary function of unanimity. *Id.* at 407. Conducting its historical analysis, the Court first observed that while the unanimity rule had been standard feature of common law juries since the Middle Ages, its origins and purpose were "shrouded in mystery." *Id.* at 407 n.2. Next the Court reviewed the framing of the Sixth Amendment, inquiring whether the Framers' use of the word "jury" implied unanimity. The Court noted that Congress had specifically removed references to unanimity from its initial draft of the amendment. *Id.* at 409-10. The Court found this deletion suggestive of the Framers' intent to exclude unanimity from the Sixth Amendment. *Id.*

Finding no historical mandate to fix a unanimity requirement in the Fourteenth or the Sixth Amendments, the Court turned to the jury's function in contemporary society. *Id.* at 410. The Court identified the jury's role as a safeguard against government abuse, "interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen. *Id.* (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)). Since a jury may accomplish such interposition by votes of ten to two or eleven to one, the Court declined to hold unanimity an essential element of trial by jury. *Id.* at 411. The Court next dismissed the claim that unanimity was essential to applying the reasonable doubt standard, reasoning that the standard did not develop until well after the Bill of Rights was passed. *Id.* at 412. Finally, the Court rejected the argument that the Fourteenth Amendment necessitated unanimity based on its demand that jury panels represent a fair cross

section of the community. *Id.* at 413. "All that the Constitution forbids . . . is systematic exclusion of identifiable segments of the community from jury panels and from juries ultimately drawn from those panels . . . ." *Id.*

Apodaca's companion case, *Johnson v. Louisiana* also upheld a non-unanimous verdict. 406 U.S. at 359. A Louisiana jury had convicted Frank Johnson of armed robbery by a vote of nine to twelve. *Id.* at 358. The Court first rejected Johnson's due process claim as equivocation between jury dissent and reasonable doubt. *Id.* at 363. The presence of three dissenters did not impugn the reasoned judgment of the remaining nine jurors or their ability to follow the judge's instruction as to the appropriate standard of proof. *Id.* at 361. The Court also cited the operation of the federal unanimity rule as evidence that unanimity is unnecessary for guilt beyond a reasonable doubt. *Id.* at 363. In federal courts, failure by the jury to reach consensus results in mistrial. By contrast, "[i]f the doubt of a minority of jurors indicates the existence of a reasonable doubt, it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial." *Id.*

Petitioners from the states of Oregon and Louisiana have already submitted the question of jury unanimity in state trials. The Court has already ruled that neither the Sixth nor Fourteenth Amendments prohibit Oregon and Louisiana from respecting majority verdicts in non-capital criminal cases.

B. Stare Decisis Cautions Against Overruling *Apodaca* and *Johnson*

This Court should reject Petitioners' request to overrule *Apodaca* and *Johnson* in order to preserve the integrity of the judicial system and continuity in the law.

Stare decisis is an important public policy, representing "continuity in law," with roots "in the psychologic need to satisfy reasonable expectations." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). In addition, stare decisis "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Consequently, "in most matters it is more important that the applicable rule of law be settled than it be settled right." *Id.* at 827 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). Thus, even in constitutional cases, this Court has often declined to overrule past precedent absent some "special justification." *United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 856 (1996).

As shown below, the non-unanimous verdicts rendered against Petitioners are authorized by the Constitution. Consequently, Petitioners cannot justify overruling the Court's precedent allowing non-unanimous verdicts.

II. THE SIXTH AMENDMENT DOES NOT REQUIRE UNANIMOUS JURY VERDICTS

A. There Is No Historical Basis for Assuming That Unanimity Inheres in the Sixth Amendment Right to Trial by Jury

Petitioners' attempt to interpret the Sixth Amendment as specifying unanimous jury verdicts is at odds with constitutional history, which indicates a

conscious effort by the Framers to avoid incorporating specific jury characteristics of their era. *See Williams v. Florida*, 399 U.S. 78, 99 (1970). Indeed, "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* at 99.

The right to trial by jury, at least in federal court, is enshrined in the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. At the time the amendment was drafted, juries had been fixtures of common law criminal procedure for centuries. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968). 18th Century common law juries shared a number of virtually universal characteristics, two of which are important to this discussion. First, juries were composed almost invariably of twelve men. *Williams v. Florida*, 399 U.S. 78, 87 (1970). Second, common law juries rendered their verdicts unanimously. *Apodaca*, 406 U.S. at 407-08. Accurately interpreting the Constitution, the Court has held that the Sixth Amendment requires neither. *Id.*

In *Williams*, the Court held that the Sixth Amendment did not fix the number of jurors at twelve—even though juries at common law consisted invariably of twelve men. 399 U.S. at 86. In that case, a Florida court had denied petitioner Johnny Williams's pretrial motion to impanel a jury of twelve rather than the six-person jury specified by Florida law in non-capital cases. *Id.* at 79-80. The Court began by surveying the history of the twelve-man requirement. *See id.* at 86-90. The

Court's historical inquiry turned up a myriad of hypotheses for why common law juries had developed in the Middle Ages. *Id.* Most concerned "mystical or superstitious insights." *Id.* at 88.

> In short, while sometime in the 14th Century the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been historical accident, unrelated to the great purposes which gave rise to the jury in the first place.

Id. at 88-89.

After its fruitless search for a historical rationale, the Court examined past decisions interpreting the Sixth Amendment as requiring juries of twelve. The leading case at the time, *Thompson v. Utah*, 170 U.S. 343 (1898), read the twelve-man requirement in the Sixth Amendment "simply by referring to the Magna Carta, and by quoting passages from treatises which noted . . . that at common law the jury did indeed consist of [twelve]." *Williams*, 399 U.S. at 91. Subsequent cases followed the same logic. *Id.* at 91-92. None of the past decisions, the Court explained, had bothered to substantiate the underlying premise "that every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'" *Id.* at 91.

To test the premise that the Sixth Amendment incorporated every aspect of common law trial by jury, the *Williams* Court conducted a textual analysis of the Sixth Amendment. *See id.* at 93-99. Since the amendment makes to reference to unanimity, the Court inquired whether Congress had intended it to incorporate every common law feature. *Id.* at 92. To illuminate congressional intent, the Court

sketched the Sixth Amendment's path from introduction to final formulation. *See id.* at 93-99. The amendment's initial draft included language specifying common law characteristics of trial by jury:

> The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.

Id. at 94 (quoting 1 *Annals of Cong.* 435 (1789)). But Congress removed the unanimity requirement and the "accustomed requisites" language before passing the amendment. *Id.* at 96. In fact, Congress rejected a motion specifically introduced to restore unanimity and other common-law jury characteristics. *Id.* at 94 n.37. Given this exclusion, the Court found no reason to assume that the Framers' intended to replicate in the Sixth Amendment every element of the common-law jury. *Id.* at 99.

Like the twelve man requirement dispensed with by *Williams*, unanimity has no sound historical basis. Unanimity also arose during the Middle Ages. *Apodaca*, 406 U.S. at 407-08. However, the precise origins of the rule are "shrouded in mystery." *Id.* at 407 n.2; *see also* Jeffrey Abramson, *We, the Jury* 182 (2000). Indeed, just as the Court in *Williams* confronted a myriad of historical hypotheses explaining the twelve-man rule, "[t]he origins of the unanimity rule are shrouded in obscurity." *Apodaca*, 406 U.S. at 407 n.2. Some historians have suggested that it "developed to compensate for the lack of other rules insuring that a defendant received a fair trial." *See id.* Others point to the fact that medieval juries knew the facts of the case personally and could be punished for perjury for declaring the facts

erroneously. *Id.* In sum, common-law history provides no compelling reason to hold unanimity inviolate.

Similarly, constitutional history yields no basis for reading unanimity into the Sixth Amendment. The Framers did not intend the Sixth Amendment to fix in the Constitution the common-law requirement of unanimity for criminal conviction. The relevant constitutional history indicates consideration and subsequent exclusion of unanimity from the Sixth Amendment's right to trial by jury in criminal cases. *Apodaca*, 406 U.S. at 409-10; *Williams*, 399 U.S. at 94-96. Neither did the Framers leave unanimity out of the Sixth Amendment because majority verdicts were unheard of. In the 17th Century, several of the American colonies—the Carolinas, Connecticut, and Pennsylvania—had experimented with majority verdicts. *Apodaca*, 406 U.S. at 408 n.3; *see also* Francis H. Heller, *The Sixth Amendment* 16-18 (1951). This Court should reject Petitioners' attempt to read into the Sixth Amendment what the Framers specifically excised.

B. There is No Functional Basis for Reading Unanimity into The Sixth Amendment

When lacking a historical or textual basis for a proposed constitutional requirement, the Court has turned to a functional analysis. "The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Williams*, 399 U.S. at 99. This approach was also followed in *Apodaca*: "Our inquiry must focus upon the function served by the jury in contemporary society." 406 U.S. at 410. The purpose of the Sixth Amendment's right to trial by jury does not depend on unanimity.

The primary, constitutional purpose of the jury is to interpose the common sense of the community between the prosecution and the accused, guarding against government corruption or bias. *See Duncan*, 391 U.S. at 156; *Williams*, 406 U.S. at 100. In *Williams*, the Court identified a "long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." 399 U.S. at 87. Indeed, the jury's role as a bulwark against government abuse was a unifying theme among the Framers:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

The Federalist No. 83 (Alexander Hamilton). This defensive role is the very reason why the Court has applied the right to trial by jury to the states via the Due Process Clause. *Duncan*, 391 U.S. at 156.

Majority juries are an effective bulwark against government abuse because they represent the commonsense judgment of the community. "In terms of this function," wrote the Court in *Apodaca*, "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." 406 U.S. at 411. This conclusion is sound. A verdict will represent the views of the community as long as it consists of laypersons who are allowed adequate time to deliberate. *Id.* at 410; *Williams*, 399 U.S. at 100. It does not follow that if Louisiana and Oregon respect majority verdicts, each majority will somehow become beholden to the whims of the prosecution. Consequently, majority

juries satisfy the functional requirements of trial by jury because they interpose the common sense of the community between the government and the accused.

C. While Requiring Unanimous Convictions by Juries of Six, *Burch v. Louisiana* Cannot Logically Extend to Require Unanimity in Juries of Twelve

Petitioners reliance on *Burch v. Louisiana*, 441 U.S. 130 (1979), is mistaken because *Burch* was logically limited to six-person juries. In *Burch*, the Court considered the constitutionality of non-unanimous convictions by six person juries for non-petty crimes. 441 U.S. at 130. A six-person Louisiana jury had convicted petitioner Daniel Burch of exhibiting obscene motion pictures by a margin of five to one. *Id.* at 132. The Court reversed Burch's conviction, declaring that when a state reduces jury size to the constitutional minimum of six—established by *Ballew v. Georgia*, 435 U.S. 223 (1978)—all six jurors must concur in conviction.

The Court's decision in *Burch* was a logical extension of the constitutional requirement that juries trying non-petty crimes must consist of at least six people. *See Brown v. Louisiana*, 447 U.S. 323, 333 (1980) (discussing *Burch* and applying it retroactively); *Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that the Constitution requires trial by at least six jurors in non-petty criminal cases). Put simply, the Constitution required conviction by at least six peers. *Id.* at 334. The problem with a five to one verdict is not the presence of a dissenting vote but the absence of a sixth concurring vote. *See id.* at 333. Since Oregon and Louisiana both require convictions of at least ten out of twelve, *Burch* does not apply.

III. UNANIMITY CANNOT BIND THE STATES VIA THE FOURTEENTH AMENDMENT BECAUSE UNANIMITY IS NOT FUNDAMENTAL TO THE AMERICAN SCHEME OF JUSTICE

Unanimity does not inhere in the Sixth Amendment right to trial by jury. Neither is trial by jury somehow "enriched" with unanimity when applied to the states via the Fourteenth Amendment. The Fourteenth Amendment applies the Sixth Amendment to the states via its Due Process Clause, which mandates that states respect rights that are fundamental the American scheme of justice. The Due Process Clause does not necessitate unanimous jury verdicts because they are not fundamental to the American scheme of justice.

A. The Sixth Amendment Constrains States Via the Fourteenth Amendment's Due Process Clause

When adopted, the Bill of Rights guaranteed its individual liberties against the federal government only. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), was the Court's first occasion to consider whether the Bill of Rights to applied to the states. The plaintiff in error had attempted to enforce the takings clause of the Fifth Amendment against the state of Maryland. *Barron*, 32 U.S. (7 Pet.) at 246. Referring to the Bill of Rights, Chief Justice Marshall wrote, "These amendments demanded security against the apprehended encroachments of the general government not against those of the local governments." *Id.* at 250. Consequently, Marshall concluded, "[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states." *Id.* at 247.

The Court has consistently adhered to *Barron*'s conclusion that the Bill of Rights constrained only the federal government. Indeed, in 1947 the Court referred

to "the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states." *Adamson v. California* 332 U.S. 46, 51 (1945), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). And in 1968, Justice Harlan wrote,

> I believe I am correct in saying that every member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate directly against the States.

Duncan v. Louisiana, 391 U.S. 145, 173 (1968) (Harlan, J., dissenting). Because the Sixth Amendment does not apply directly to the states, the Court has invoked the Due Process Clause to establish the right to trial by jury in state courts.

B. The Due Process Clause Requires States to Respect Rights that Are Fundamental to the American Scheme of Justice, Including Trial by Jury

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. IX, § 1. However, there has been considerable debate since the amendment's ratification over the meaning of due process and precisely what individual rights the clause renders enforceable against states. Rights come within the Fourteenth Amendment's guarantee if they are "fundamental to the American scheme of justice." *Duncan*, 391 U.S. at 149. Whether the Sixth Amendment, through the Fourteenth, requires a particular feature of the states depends on the particular procedure is "necessary to an *Anglo-American* regime of ordered liberty." *Id.* at 150 n.14 (emphasis added). Put yet another way, it must be "fundamental in

the context of the criminal processes maintained by the American States." *Id.* The *Duncan* Court held that the Sixth Amendment right to trial by jury extends through the Due Process Clause to defendants in state criminal proceedings because it is essential in light of the fact every state has always structured criminal procedure around trial by jury. *See id.* at 149; *see also Bloom v. Illinois*, 391 U.S. 194, 199-200 (1968).

This Court should continue discern whether a right falls within the Due Process Clause using standard established in *Duncan*. Decisions prior to *Duncan* used more amorphous tests such as "whether a right is fundamental to the principles of liberty and justice," *Powell v. Alabama*, 287 U.S. 45, 67 (1932), or "essential to a fair trial." *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). The *Duncan* standard is preferable because it anchors due process to the actual procedures that have developed in the United States. *See Duncan*, 391 U.S. at 150 n.14. Alternative tests inquiring whether a right is essential to liberty, justice, or fairness, which are not anchored in the actual American system of justice, may overlook rights that may not seem necessary to every imaginable system but which become necessary for due process in the context of the particular criminal justice system in the United States. *See id.* By illustration, the Court in *Duncan* criticized *Palko v. Connecticut*, 302 U.S. 319 (1937), which excepted trial by jury from due process because it was possible to imagine a "fair and enlightened system of justice" that did not use juries. *See Duncan*, 391 U.S. at 150 n.14. By looking for fundamental due process rights within "the American scheme of justice," this Court

can assess most accurately which rights the Due Process Clause was designed to protect.

Incidentally, the *Duncan* test is also the most inclusive. It is more likely to fold a given right into the protective embrace of the Fourteenth Amendment than the more amorphous tests discussed above. In other words, if a proposed right is not essential to the American scheme of justice, then it certainly not essential to broader concepts of "liberty and justice" or "fair trial". Even so, despite its breadth, the Due Process Clause as interpreted by *Duncan* does not encompass a right to unanimous verdicts in non-capital state criminal trials.

C. Unanimous Verdicts Are Not Fundamental to the American Scheme of Justice

Verdict unanimity does not inhere in the Fourteenth Amendment because majority verdicts of ten to two or eleven to one accomplish the purposes of trial by jury in the context of the American scheme of justice. First, as discussed above, majority verdicts fulfill the constitutional purpose of guarding against government abuse. Second, this conclusion is born out by empirical studies of jury decision patterns. Finally, majority juries can effectively perform their role as factfinders, holding the prosecution to proof beyond a reasonable doubt.

1. Majority Juries Are Competent to Apply the Reasonable Doubt Standard

In addition to fulfilling the jury's constitutional role as a bulwark against government abuse, majority juries can competently hold the government to prove its case beyond a reasonable doubt.

The Constitution requires that states prove their criminal cases beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 363-64 (1970). This requirement does not stem from the Sixth Amendment, as the reasonable doubt standard "did not crystallize in this country until after the Constitution was adopted." *Apodaca*, 406 U.S. at 411. Instead, it is the Fourteenth Amendment's Due Process Clause that requires state prosecutors to prove guilt beyond reasonable doubt. *See id.* Majority verdicts by margins of ten to two or eleven to one do not undermine the reasonable doubt requirement. *Id.* at 412.

First, the presence of one or two dissenting votes does not mean that the remaining ten or twelve failed to follow their instructions concerning the prosecution's burden of proof. *See Johnson*, 406 U.S. at 361. Proponents of blanket unanimity rules cite the presence of dissent as prima facie evidence that the majority is shirking its duty by ignoring reasonable doubt. However, this logic may be reversed. Indeed, if any person is as likely to be as reasonable as the next, the stronger inference is the opposite: that the dissenting juror or jurors are entertaining *unreasonable* doubts. *Id.*

Second, the Court's application of the federal unanimity rule belies the idea that unanimity is somehow linked to proof beyond a reasonable doubt. *See id.* at 363. Under the federal unanimity rules, irresolvable dissent results in mistrial rather than acquittal. *Id.* The jurors are dismissed and the prosecutor may decide whether or not to retry the case. *Id.* If the presence of one or two dissenters indicated a lack of proof beyond reasonable doubt, then "it would appear that a

defendant should receive a directed verdict of acquittal rather than a retrial." *Id.* But this is not the case.

In addition, the fact that the Court has condoned verdicts based on conflicting factual bases undermines the contention that the reasonable doubt standard requires unanimity. In *Schad v. Arizona*, Justice Souter wrote, "We have never suggested that . . . jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." *Schad v. Arizona*, 501 U.S. 624, 631 (1991) (plurality opinion). Indeed, "it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Id.* at 649 (Scalia, J., concurring). Take a murder trial where the defendant is accused of strangling the victim and then burning his house down. Six jurors may believe the defendant strangled the victim, but reasonably doubt that he set the fire; six may believe the converse. Nontheless, the verdict would be constitutionally valid. *See id.* at 650. According to the Court's approach, the presence of doubt among some jurors does not impugn the reasonable judgment of the others.

In *Apodaca* and *Johnson*, the Court directly addressed and rejected the argument that majority verdicts somehow undermined the reasonable doubt standard required by the Due Process Clause. In addition, the Court's decisions interpreting unanimity in jurisdictions that require it show that dissent among jurors is does not impugn their ability to hold the prosecution to its constitutional burden. Consequently, unanimity is not essential the American scheme of justice

and not overlaid upon the Sixth Amendment as applied to states via the Fourteenth.

2. Empirical Research Suggests that Majority Verdicts Do Not Unfairly Favor the Prosecution

Comprehensive studies of the American jury system suggest that the differences between majority verdicts and unanimous verdicts are constitutionally insignificant. Louisiana and Oregon's lower rates of mistrial caused by hung juries do not undermine the American scheme of justice.

The reduced frequency of hung juries in Oregon and Louisiana is not significant enough to raise due process concerns. Proponents of blanket unanimity cite a lower rate of hung juries in majority verdict states as indicative of an unacceptable preference by majority juries for the prosecution. *See, e.g.*, *Johnson v. Louisiana*, 406 U.S. 380, 391 (Douglas, J., dissenting). However, the increase in conviction rates vis-à-vis hung juries in majority states must be viewed in perspective. Majority juries in Oregon and Louisiana do hang less than juries in other states, but hang *more* than unanimous juries trying federal cases.

In their seminal work, *The American Jury*, Kalven and Zeisel estimated that the percentage of trials resulting in a hung jury was 5.6% in states requiring unanimity. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 461 tbl.126 (1966). Writing in 2002, Hannaford-Agor et al. found that from 1996 through 1998, juries in state courts requiring unanimity hung 6.2% of the time. Paula L. Hannaford-Agor

et al., *Are Hung Juries a Problem?* 25 (2002).[2] These studies suggest that the rate of deadlock in states requiring unanimity has remained relatively constant since 1966. By contrast, in states allowing majority verdicts, only 3.1% of cases result in hung juries. Kalven & Zeisel, *supra*, at 461 tbl.126. On the other hand, federal juries, though unanimous, deadlock even less than majority juries: from 1980 to 1997, between 2.1% and 3% of federal criminal trials resulted in hung juries. Paula L. Hannaford-Agor et al., *supra* at 22.

Empirical studies cannot determine whether there exists some baseline frequency of deadlock so low as to offend the Constitution. But the data suggests that even if such a threshold exists, the majority verdict rules in Louisiana and Oregon do not approach it. Indeed, if a hung-jury rate of around 3% were constitutionally unacceptable, then serious questions would be raised regarding due process in federal courts.

3. The Requirement of Unanimity in Capital Cases Does Not Militate Unanimous Convictions for Other Crimes

The Court's decisions declaring that the Due Process Clause requires unanimity for conviction of capital crimes do not apply to non-capital cases. The particular gravity of the death penalty sets it apart from all other crimes. *See Spaziano v. Florida*, 468 U.S. 447, 467-70 (1984) (Stevens. J., concurring in part,

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[2] Hannaford-Agor et al. were unfortunately unable to measure modern deadlock rates in Louisiana and Oregon. *Id.* at 3.

dissenting in part). The distinctive qualities of the death penalty were described by Justice Stewart in *Furman v. Georgia*:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

408 U.S. 238, 306 (1972) (Stewart, J., concurring). Indeed, since *Furman*, the Court has consistently held since the death penalty is "qualitatively different from any other punishment, [it] must be accompanied by unique safeguards." *Spaziano*, 447 U.S. at 468. Because capital cases are qualitatively different from other crimes, their procedures cannot automatically be applied to lesser crimes.

D. The Court's Recent Interpretations of Due Process in *Jones*, *Apprendi*, and *Ring* Do Not Support Unanimity as a Constitutional Requirement

Petitioner Lee's reliance on *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), is illogical. First, *Jones* held that a federal carjacking statute's "sentencing considerations" were more appropriately elements that must be proved to the jury since they resulted in increased penalties. 526 U.S. at 229. The Court's holding had nothing to do with jury unanimity. Indeed, the Court used the word "unanimous" only once in its opinion—in a parenthetical within a footnote describing its prior holding in *Burch v. Louisiana*. *See id.* at 251 n.11.

Petitioners' reliance on *Apprendi* is similarly misplaced. In that case, the Court applied its conclusion in *Jones* to state courts, holding that any fact that could increase the defendant's liability must be submitted to the jury and proved

beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 476, 490 (2000). In describing the jury's historical importance, the *Apprendi* Court quoted Blackstone's characterization of trial by jury as "the unanimous suffrage of twelve." *Id.* at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). But this quotation was the only reference to unanimity in the opinion. In *Williams*, the Court refused to infer constitutional requirements from such descriptive passages. *See* 399 U.S. at 99.

Neither does *Ring v. Arizona* provide any basis for a constitutional unanimity requirement. In that case, the Court applied *Apprendi* and *Jones* to capital cases in state courts, holding that aggravating factors which expose a defendant to the death penalty must be decided by the jury. *See Ring*, 536 U.S. at 589. First, the Court's holding in *Ring* had nothing to do with jury unanimity. Second, as discussed above, decisions involving capital cases cannot easily apply to lesser cases because capital cases entail a unique set of safeguards. *See Spaziano*, 447 U.S. at 468.

IV. REQUIRING UNANIMOUS STATE VERDICTS FRUSTRATES THE OBJECTIVES OF FEDERALISM

A. This Court Should Not Prohibit States from Experimenting With Constitutionally Permissible Public Policy

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Harlan called trial by jury "an almost perfect example of a situation in which the

celebrated dictum of Mr. Justice Brandeis should be invoked. *Duncan*, 391 U.S. at 193 (1968) (Harlan, J., concurring). Jury policy is an evolving field exhibiting a wide range of views on the composition and decision process of the jury. *Id.* "The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 states." *Id.* at 171 (1968) (Fortas, J., concurring). Instead, this Court "should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury." *Id.*

B. Majority Verdicts May Be Sound Policy Because They Increase Efficiency and Reduce Mistrials

Commentators have identified two primary benefits to majority verdicts: quicker deliberations and fewer hung juries. *See, e.g.*, *Johnson*, 406 U.S. at 377 (Powell, J., concurring) (fewer hung juries); Vincent Bentivenga, *Is 11 Enough?*, 69 A.B.A. J. 1796 (1983) (both arguments). While not dispositive of the Constitutional question, the presence of a healthy policy debate over the merits of majority and the defects of unanimity illustrates the value of preserving the states' ability to experiment.

In states allowing majority verdicts, the instance of mistrial due to hung jury is decreased. Kalven & Zeisel, *supra*, at 461 tbl.126. In the words of Justice Powell, the majority rule may "minimize the potential for hung juries occasioned either by bribery or juror irrationality." *Johnson*, 406 U.S. at 377 (Powell, J., concurring). This reduction in deadlock contributes to the legitimacy of the criminal justice

system, increasing the number of final verdicts. In Louisiana and Oregon, the hard work and attention of ten or eleven jurors cannot be discredited by one or two holdouts. Furthermore, respecting majority verdicts may also mitigate costs associated with excessive deliberations necessitated by unreasonable holdout jurors. Under the unanimity rule, one holdout juror may prolong the deliberative process for days, imposing significant costs on the criminal justice system. *See* Bentivenga, *supra* (Illinois state judge advocating majority verdicts).

In addition to increasing efficiency and preventing mistrials, majority verdicts may actually increase the effectiveness of the jury by reducing the pressure on dissenting jurors to compromise. A rule that requires unanimity "often leads, not to full agreement among the 12 but to agreement by none and compromise by all." *Johnson*, 406 U.S. at 377 (Powell, J., concurring). In addition, commentators have suggested that the possibility that a jury will hang "leads to the deficient result that only juries who poorly represent the preferences of the population will render verdicts." Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 Geo. L.J. 775, 776 (1992). In another article, Schwartz & Schwartz also argue that the unanimity rule encourages insincere voting and "manipulation of the jury composition to eliminate potential members who are likely to prevent the jury from being unanimous." *And So Say Some of Us . . . What To Do When Jurors Disagree*, 9 S. Cal. Interdisc. L.J. 429, 434 (2000). These additional policy arguments illustrate the value of preserving federalism with respect to jury decision rules.

Courts and commentators have identified important policy benefits associated with majority verdicts. Since they are constitutionally permissible, this Court should not frustrate Louisiana and Oregon's experimentation majority verdicts.

CONCLUSION

Petitioners have failed to show that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, prohibits states from respecting verdicts of ten to two or eleven to one in non-capital criminal cases. Accordingly, Respondents ask this Court to affirm the Oregon Court of Appeals and Louisiana Supreme Court decisions denying Petitioners relief.

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Respectfully submitted,

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