No. 17-7002

In The
Supreme Court of the United States

DAVID WAYNE SIMS,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, Third Circuit

BRIEF OF THE CRIMINAL JUSTICE REFORM CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Lewis & Clark Law School's Criminal Justice Reform Clinic (CJRC) is a legal clinic dedicated to students receiving hands-on legal experience while engaging in a critical examination of and participation in important issues in Oregon's criminal justice system. Under the supervision of Lewis & Clark Law School faculty, CJRC students work on a variety of cases and issues. In addition to direct client casework, CJRC also works in collaboration with attorneys in Oregon on various research projects and legal briefs, designed to understand and improve Oregon's criminal justice system.

The case before the Court addresses non-unanimous juries in criminal trials. Non-unanimous juries in criminal trials exist in only two states, CJRC's home state of Oregon and Petitioner David Wayne Sims's state of Louisiana. CJRC's attorneys and students interact with and represent individuals with non-unanimous convictions through their casework and other client-centered projects regularly. In addition, CJRC's Director and law students have done significant research on the history of non-unanimous juries in Oregon. This research shows that Oregon's

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[1] Pursuant to Sup. Ct. R. 37.2(a), counsel of record received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner and Respondent have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No party has authored this brief in whole or in part, and no entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

non-unanimous provision, like Louisiana's, was borne out of prejudice. Specifically, Oregon's non-unanimous provision:

> [W]as passed during a period of racial tension . . . when the dominant media of that period ran multiple stories, over the span of years, contrasting "white" jurors from those with "mixed blood," warning against immigration participation in jury service, and claiming that certain "people of the world are unfit for democratic institutions."

State v. Williams, No. 15CR58698, at *16 (Or. Cir. Ct. Dec. 15, 2016), http://www.courts.oregon.gov/Multnomah/docs/Judges/James/JudgeJames_OpinionAndOrderStateOfOregonVsOlanJermaineWilliams.pdf (quoting The Morning Oregonian, May 7, 1932).

Amicus submits this brief in support of Mr. Sims's petition to present relevant information to the Court from Oregon. *Amicus* hopes to assist the Court in understanding the history of Oregon's non-unanimous provision and its effect on Oregon's defendants, jurors and citizens. *Amicus* further supports Mr. Sims's arguments that the incorporation doctrine as articulated by this Court's precedent culminating with *McDonald v. City of Chicago*, 561 U.S. 742 (2010), demonstrates that the Fourteenth Amendment should require unanimous jury verdicts in criminal cases.

SUMMARY OF ARGUMENT

Oregon's non-unanimous jury provision has a shameful lineage that remains prevalent today. The passage of the provision was driven by overwhelming xenophobic fears sparked by *State v. Silverman*, 148 Or. 296 (1934), and followed decades of discriminatory legislation. Receiving a lighter sentence because of a hung jury, Silverman's trial generated forceful anti-immigrant rhetoric that created the perfect storm for the passage of the non-unanimous jury provision. The implementation of the provision has resulted in a large number of felony convictions being decided by non-unanimous juries. Consequently, Oregon juries are subjected to the inevitability of discounting minority opinions and views throughout the deliberation process.

For decades, this Court has strived to eradicate racial bias from our criminal justice system. Juries in criminal cases have been treated as special harms deserving of special attention and intervention. Jury unanimity is the sole provision of the Sixth Amendment that has not been incorporated into the Fourteenth Amendment. This shortfall has perpetuated racial inequality within Oregon's criminal justice system, which precludes protection from the very form of intolerance that incorporation was intended to prevent.

In the decades following *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), numerous studies, showing the intricate

relationship between unanimity and the jury's safeguarding function, have disproved the Court's original perception of the jury deliberation process. Essential to the administration of justice, a unanimous jury decision inspires confidence in the jury trial. Not only is the original discriminatory intent of Oregon's non-unanimous jury provision still relevant today, the public's confidence in the criminal justice system, as a result, has substantially receded.

Amicus urges the Court to grant Mr. Sims's writ for certiorari.

ARGUMENT

I. Enacted in an Environment Wrought with Discrimination, Oregon's Non-Unanimous Provision Continues to Create Bias in Oregon's Criminal Justice System.

Enacted in 1934, Oregon Ballot No. 302-03 (302-03) was effectuated in an environment wrought with systemic prejudice, such that "no reasonable fact finder could conclude that race wasn't a motivating factor in the passage of [302-03]." *Williams*, No. 15CR58698, at *16. Oregon became the second state, after Louisiana, to allow non-unanimous juries in criminal cases. Today, Oregon and Louisiana are the only two states that continue to deviate from the original intent of the Sixth Amendment, inducing legal ambiguity. The inherent bias in Oregon's criminal justice system, a derivative of prejudicial legislation that has permanently affected

the ethnic composition of the state, continues to silence minority juror voices.

A. Oregon's Non-unanimous Criminal Jury Provision Was Borne Out of Prejudice.

Oregon's non-unanimous jury law stems primarily from fear of ethnic, religious, and racial minorities as well as the purported notion that minorities are "unfit for democratic institutions." *Debauchery of Boston Juries*, The Morning Oregonian, Nov. 3, 1933. The anomalous measure was passed directly following *Silverman*, where the public, simmering with anti-immigrant xenophobia, became outraged when 11 of the 12 jurors voted to convict Jacob Silverman, a Jewish man, on a charge of second degree murder, but, due to one holdout juror, a compromise of manslaughter was reached instead. *See* 148 Or. at 297; Clayton Tullos, *Non-Unanimous Jury Trials in Oregon*, Oregon Criminal Defense Lawyers Association (Sept. 29, 2014), https://libraryofdefense.ocdla.org/Blog:Main/Non-Unanimous_Jury_Trials_in_Oregon. While the 1934 Voter Pamphlet propagandized an "unreasonable juror" theory, the pamphlet unambiguously drew from the *Silverman* trial by toting the frequency of juror disagreements due to one or two holdout jurors who refused to agree with the majority. P.J. Stadelman, Secretary of State, Official Republican Voter's Pamphlet 7 (May 18, 1934). Oregonians were infuriated that a Jewish man accused of killing a Protestant was spared a murder conviction and death sentence because a single juror held out for manslaughter. After *Silverman*, due to the

passage of 302-03, "the majority of verdicts rendered by juries on felony cases are non-unanimous," effectively disregarding minority juror voices. *Williams*, No. 15CR58698, at *19 (discussing results of 2009 study, Office of Pub. Defense Servs., *On the Frequency of Non-Unanimous Felony Verdicts in Oregon* (May 21, 2009)). Consequently, in only Oregon and Louisiana, a multitude of criminal defendants are convicted in felony cases that carry potentially long sentences by less-than-unanimous jury verdicts, while, in the 48 other states and in federal court, those same defendants would have been afforded a more thorough deliberation process, leading to possible acquittals or hung juries instead.

In *Johnson*, Justice Douglas equated the decision to allow non-unanimous verdicts in criminal cases to giving the states the power to experiment with the civil rights of its most vulnerable citizens. 406 U.S. 356, 387 (1972) (5-4 decision) (Douglas, J., dissenting). Although, in support of 302-03, the 1934 Voter Pamphlet touted reasons of judicial efficiency and cost reduction, 302-03 cannot be separated from the rise of systemic discriminatory hatred surrounding this time-period:

> [I]t is clear that a multitude of factors spurred the passage of [302-03]. Certainly, concerns of cost and efficiency were a significant, if not dominant, motivation behind the referral. But this Court cannot cherry pick history. Neither the parties, nor the public, are served by attempts to marginalize the realities of a past

> that today we find uncomfortable or unpleasant. We do not live, as some might claim, in a "post-fact" era. Facts exist, and history is as it was, not as we wish it to be. And the inescapable conclusion is that the historical evidence supports a racial undercurrent to [302-03] . . . the measure was intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on Oregon juries.

Williams, No. 15CR58698, at *16.

Understanding how the non-unanimous jury rule contributes to perpetuating structural racism in Oregon today requires an appreciation of the State's tarnished history of racial prejudices. The entanglement between structural prejudice and the Oregon legislature is deeply rooted in Oregon's legislative history and covers all aspects of society. The discriminatory backdrop for 302-03 was such that "[f]rom the time of the founding of the Oregon territory, Oregon was not open to black residents." *Id.* Although slavery was banned in Oregon in 1844, African Americans were forbidden from residing within the territory for fear of sanctioned physical abuse and forced removal. *Id.* Continuing to shield the "white hold on power" from minorities, Oregon passed "A Bill to Prevent Negroes or Mulattoes from Coming to, Or Residing in Oregon" in 1849, which did away with the sanctioned beatings and dislodgements but continued to forbid minority immigration. "A Bill to Prevent Negroes or Mulattoes from Coming to, Or Residing in Oregon," Oregon Provisional and Territorial Government Records #6075, Oregon

State Archives, Salem. Less than a decade later, Oregon cemented its contempt for minorities by becoming the only state admitted to the Union with an exclusionary law written into the state's constitution. Article I, § 35 prevented African Americans from settling or owning property within the state. OR. CONST. art. I, § 35. Despite five efforts to repeal the ban between 1900 and 1916, Article I, § 35 was not done away with until 1927. *Williams*, No. 15CR58698, at *11. Throughout the 1860s, hostility towards minorities in the Oregon Legislature became even more apparent as revisions of the Code of Civil Procedure were presented to the House of Representatives that would further limit the roles and rights of minorities within the Oregon judicial system. *Id.*

By the late 1920s and early 1930s, Oregon was caught up in a deep recession as well as "the growing menace of organized crime and the bigotry and fear of minority groups." Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Jury Verdicts in Louisiana* 12 (2015). Factors such as "[w]artime stress, emphasis on patriotism, distrust of German-Americans, eugenics campaigns . . . and anti-Catholic bigotry created fertile ground in Oregon for the rise of the American Protective Association, Federation of Patriotic Societies, and the Ku Klux Klan." Stephen Dow Beckham, *Oregon History: Mixed Blessings* (2017). In a time of uncertainty, these organizations fed on the fear and distrust of Oregonians. At one point, Oregon became a harbor for over 200,000 Ku Klux Klan ("KKK") members. Elizabeth McLagan, *A Peculiar Paradise: A History of*

Blacks in Oregon, 1788-1940, 138-39 (1980). Welcomed by an overwhelmingly white, native-born and Protestant society, the KKK bolstered the construction of a society where "[r]acism, religious bigotry, and anti-immigrant sentiments were deeply entrenched in the laws, culture, and social life." Toy Eckhard, *Ku Klux Klan*, The Or. Encyclopedia, http://oregonencyclopedia.org/articles/ku_klux_klan/#.Vx_mZGOePJo. Discriminatory practices in Oregon were so refined "[d]uring the 1920s, the primary targets of the KKK in Oregon were Catholics and Jews, not blacks. The decades of exclusionary practices had been so successful in keeping the black population small and isolated that blacks were a secondary target." Darrell Millner, *Blacks in Oregon*, The Or. Encyclopedia (2017), https://oregonencyclopedia.org/articles/blacks_in_oregon/. It was not until World War II, when job opportunities became available in Oregon for the duration of the war, that the African-American population in Oregon saw any growth. *Diversity and Inclusion in the OregonLegal Profession*, Oregon and the Oregon State Bar (2017), https://storywall.osbar.org/1900-1959/. Consequently, the 1930s saw the birth of a new organization dedicated to the segregation and exclusion of Jews in American society. This group was called, variously, the Silver Shirts, Silver Legion, and the Silver Shirt Legion of America, and their main target was the Jewish community. *Silver Shirt Legion of America, Washington State Division records, 1931-1997*, University of Washington Libraries catalog record, http://archiveswest.orbiscascade.org/ark:/80444/xv38671/pdf. To evade discrimination, Jewish individuals were forced to "minimize the ethnic

component of Jewish identity" and "participate enthusiastically in Americanization efforts." Ellen Eisenberg, *Beyond San Francisco: The Failure of Anti-Zionism in Portland, Oregon*, 86 American Jewish History 309, 313 (1998).

Between the 1920s and 1940s, the KKK not only found general widespread acceptance in Oregon, but xenophobic attitudes were common among public office-holders as well. From 1917-1933, George Baker, the mayor of Portland, did little to refute accusations of his connection to the KKK. Baker not only "participated in a 'patriotic' dinner honoring the KKK Grand Dragon . . . he [also] solicited its support in his unsuccessful bid for the U.S. Senate seat in 1923." Jewel Lansing, *Portland: People, Politics and Power, 1851-2001*, 310-11 (2015). The KKK sponsored and oversaw the passage of various anti-Semitic, anti-Catholic, anti-Japanese, anti-Chinese, and anti-Oregon Indian legislation. Beckham, *Oregon History: Mixed Blessings*; Eisenberg, *Beyond San Francisco: The Failure of Anti-Zionism in Portland, Oregon*, at 313.

Heavily informed by Oregon's history including its "deep sense of racial paranoia," three culminating events led to the passage of Oregon's non-unanimous jury provision. *Williams*, No. 15CR58698, at *12. The first event, known as the Massie Affair, originated in Honolulu. In 1931, Thalia Fortescue Massie, a white, American woman "of refinement and culture," accused two Hawaiian men, two Japanese men and one Chinese-Hawaiian man of kidnapping and rape. David Stannard, *The Massie Case: Injustice and Courage*, The Honolulu

Advertiser, Oct. 14, 2011. Local newspapers repeatedly referred to the five accused men as "thugs," "degenerates," and "fiends," but, after "the longest jury deliberation ever in Hawai'i," the jury deadlocked. *Id*. Massie's family retaliated by kidnapping and assaulting two of the five accused men, one of whom was killed. *Id*. While the local jury did not convict any of the five accused men, the American defendants were found guilty of manslaughter. *Id*. Receiving national attention, reporters continuously contrasted the "sense of duty shown by the white persons on the jury in bringing a verdict of guilty against their fellow white men" with the "lack of responsibility shown by native and mixed-blood people in freeing the assaulters of Mrs. Massie." "*Honor Case*" *Jury Upheld*, The Morning Oregonian, May 7, 1932. The "race-focused coverage" continued in 1933, when a Boston jury tampering scheme was revealed. *Williams*, No. 15CR58698, at *14. The Morning Oregonian jumped at the opportunity to blame the ordeal on the fact that "Boston is now crowded with immigrants . . . unfit for democratic institutions." *Debauchery of Boston Juries*, The Morning Oregonian, Nov. 3, 1933.

The systemic prejudicial pressure became insurmountable in 1934, the time of Silverman's trial for the murder of James Walker. The State charged Silverman with first-degree murder for the fatal shooting of Jimmy Walker, who was suspected of shooting Silverman's friend. Tullos, *Non-Unanimous Jury Trials in Oregon*. The bodies of both Jimmy Walker and Edith McClain were discovered on a Saturday morning in

April of 1933. *Silverman*, 148 Or. at 297. The police arrested Silverman that same afternoon. *Id.* at 299. At trial, witnesses testified to seeing a man resembling Silverman get into a car with a small woman and three men. *Id.* at 301. The State theorized that one of these three men shot Walker and McClain and that Silverman aided and abetted in that crime by driving the vehicle. *Id.* at 303-04. While Silverman was charged with first degree murder, 11 of the 12 jurors voted to convict on a charge of second degree murder and one holdout juror wanted to acquit. *Id.* at 297; Tullos, *Non-Unanimous Jury Trials in Oregon*. After an hour of deliberation, the jurors compromised on a verdict of manslaughter. *Id.* The public was outraged that Silverman escaped conviction for murder due to one holdout juror. *Id.* While a second-degree murder charge carried with it a statutory sentence of life in prison, the manslaughter conviction carried a mandatory sentence of 1 to 15 years and a maximum fine of $5000. *Id.*

Less than a month after Silverman's sentencing for manslaughter, where he received three years in prison and a $1000 fine, far less time than the maximum sentence due, the Oregon Legislature proposed a constitutional amendment, Oregon Ballot No. 302-03, allowing non-unanimous verdicts to be voted upon in the 1934 Special Election. *Id.* The holdout juror unwittingly became the poster child for 302-03. *Id.*

The Morning Oregonian remonstrated:

> Jake Silverman of Portland, held responsible for the killing of James Walker in Dutch

Canyon last April, has been found guilty only of manslaughter. Such incidents always result in the accumulation of a new batch of letters on the editorial desk, complaining about the miscarriage of criminal justice under the jury system.

Objections have been especially pointed in the Silverman case, since it has been alleged and apparently with authority, that a few hours after the case went to the jury, the vote stood eleven for conviction on second degree charges and one opposed. The one opposition vote is said to have remained unchanged during the remaining eighteen hours that the jury was out, finally forcing the compromise verdict of manslaughter.

Obviously, Silverman was not guilty of manslaughter. Either he murdered Walker or he was not involved. But the eleven who stood for second degree either had to give way, or the state had to pay the expenses of a second trial following disagreement.

This newspaper's opinion is that the increased urbanization of American life, the natural boredom of human beings with rights once won at great cost, and the vast immigration into America from southern and eastern Europe, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory. . . .

Ultimately, conviction will have to be made possible with less than a unanimous vote of the twelve jurors. But that change will not be

> made until miscarriages of justice have become so flagrant that the people cannot deny them. The public is so attached to the present safeguards thrown around defendants that it will not make the change willingly, and, as far as Oregon is concerned, the reorganization will require an amendment to the state constitution.

One Juror Against Eleven, The Morning Oregonian, Nov. 25, 1933.

It cannot be avoided that "[302-03] was passed in a state with a long history of racial discrimination." *Williams*, No. 15CR58698, at *16. The Oregon Supreme Court has gone so far as to say that the state's non-unanimous jury law effectually endeavors "to make it easier to obtain convictions." *State ex rel. Smith v. Sawyer*, 263 Or. 136, 138 (1972).[2] Despite purported ease or efficiency, non-unanimous jury verdicts not only work to perpetuate racial discrimination, they also create an unacceptable risk of convicting the innocent by weakening the right to a jury trial and invalidating jurors with minority opinions. Given the liberties at stake, it is critical to heed that "what is easy is not always right, and what is efficient is not always what the law demands." *Williams*, No. 15CR58698, at *31.

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[2] The very fact that Oregon and Louisiana require unanimous juries in first-degree murder/capital cases, OR. CONST. art. I, § 11; LA. C.CR.P. art. 782(A), indicates that both states chose greater certainty in their most serious cases.

B. Oregon's Non-Unanimous Jury Provision Remains Prejudicial Today.

Today, Oregon's non-unanimous jury provision functionally silences minority opinions in criminal jury cases and inevitably marginalizes the already vulnerable voice of demographic minorities in Oregon. Oregon's population is 85.1% white, 10.8% non-white, and 4.1% mixed race. *See* U.S. Census Bureau*, 2011-2015 American Community Survey 5-Year Estimates*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF. Statistically, a jury composition proportional to Oregon's population would yield roughly two non-white jurors per 12-person jury.[3] "If one wanted to craft a system to silence the average number of non-white jurors on an Oregon jury, one could not create a more efficient system than 10-2." *Williams*, No. 15CR58698, at *18. The sobering reality is that Oregon jury pools over-represent whites and underrepresent minorities. Or. Judicial Dep't, Office of the State Court Administrator, *The Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System* 73-74 (May 1994), http://www.courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/access/rac_eth_TFR.pdf. Oregon's prejudicial history has permanently impacted the ethnic composition of the state, which has, in turn, fostered inequity throughout Oregon's criminal justice system.

Beyond the inherent bias that exists in Oregon's criminal justice system, the jury's objective is detrimentally

[3] Two of 12 jurors are 16.6%.

affected by the non-unanimous jury provision. Because of the diminutive 10-2 requirement, non-unanimous jury deliberations are likely to be "verdict-driven." Angela A. Allen-Bell, *How the Narrative About Louisiana's Nonunanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 Mercer L. Rev. 585, 607 (2016). In other words, they are driven more by a desire to reach a verdict rather than attention to and careful consideration of case facts and evidence. *Id.* Alternatively, unanimous juries are much more likely to be "evidence-driven," meaning their need for a consensus inherently generates debate, reintroduces facts, and emphasizes evidence. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 388 (2007). In Oregon, if 10 members of a jury agree on a verdict, no further deliberation is necessary. Thus, potential exists for one or two jurors' input to be eliminated from the deliberation process once the 10-juror threshold is met. This detracts from the democratic intent of the jury process, since there "is no guarantee of a full and fair deliberation," which necessarily and naturally manifests with a unanimous jury. *Id.* When coupled with an underrepresented minority population, non-white voices are more likely to be silenced.

The Oregon Supreme Court Chief Justice Edwin Peterson established a task force in 1994 to study racial/ethnic issues in Oregon's judicial system. The task force found that minority Oregonians "are more likely to be arrested, charged, convicted and incarcerated,

and less likely to be released on bail or put on probation." Or. Judicial Dep't, *The Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, at 48. The task force continued to release reports through 2006 showing a significant racial disparity in Oregon's jury selection process. Or. Judicial Dep't, *Access Committee Progress Updates*, http://www.courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/access/pages/progress.aspx. Yet, no substantive progress was made in the 12-year period following the release of the 1994 Report. *Id*. Rather, the task force's reports continued to show minority jurors were summoned for or served on juries at a rate disproportionately lower than non-minority Oregonians. *Id.* at 47. The situation has not improved. Racism still pervades Oregon's criminal justice system at each step of the criminal process. A 2016 study, the Racial and Ethnic Disparities (RED) Report, conducted by the MacArthur Foundation affirms that Oregon disproportionately punishes minority, non-white populations; particularly its black population. Safety and Justice Challenge, Racial and Ethnic Disparities and the Relative Rate Index (RRI), at 7 (2016), http://media.oregonlive.com/portland_impact/other/RRI%20Report%20Final-1.pdf.

The RED Report compared the experiences of minorities to that of whites in Multnomah County's (Portland) criminal justice system and found that black people in Oregon are 4.2 times more likely than white Oregonians to be referred to the District Attorney, 4.1 times more likely to have their case accepted for prosecution, 4.1 times more likely to have their case

continued, and more likely to be convicted. *Id.* at 7, 11, 18-19. Additionally, black people in Oregon are 7 times more likely than white people to be sentenced to prison, 4.3 times more likely to be sentenced to jail, 3.7 times more likely to be sentenced to probation, and 4 times more likely to have a monetary judgement. *Id.* at 26. These recent statistics affirm that systemic racism continues to penetrate the criminal justice system throughout the entire criminal process. Subject to non-unanimous jury verdicts, felony cases in Oregon effectively preserve institutional racism through conviction.

Ultimately, with little diversity in its jury pool, Oregon's non-unanimous jury law puts its minority defendants and jurors at a high risk of discrimination.

II. The Sixth Amendment Guarantee of Unanimity Must Be Incorporated Against the States to Prevent Discrimination in our Criminal Justice System.

Not only does the history of the Sixth Amendment demand total incorporation, the non-unanimous jury rules in Oregon and Louisiana – having the purpose and effect of silencing minority voices on the jury – are exactly the kind of state action that Congress enacted the Fourteenth Amendment to prevent. "'[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.'" *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Indeed, the Fourteenth

Amendment was designed, in part, to remedy "racial discrimination in the jury system," which was rampant in the South. *Id.* "It must become the heritage of our Nation," this Court has explained, "to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction" by the Fourteenth Amendment. *Id.* Accordingly, incorporating the Sixth Amendment's unanimous jury requirement, a recognized federal fundamental right, is required.

Incorporation plays a large role in preventing states from fostering discrimination in their justice system. In *Powell v. Alabama*, the Court incorporated the Sixth Amendment right to counsel in a criminal case after the state upheld the convictions and death sentences of 7 black men, illiterate and from out of state, for whom the state neglected to appoint counsel until the morning of their respective trials. 287 U.S. 45, 50-56 (1932). Again, in *Brown v. Mississippi*, the Court protected the fundamental right to be free from self-incrimination through the Due Process Clause of the Fourteenth Amendment when it reversed the convictions of 3 black men who were hung, whipped, and tortured until they confessed to murder. 297 U.S. 278, 279-82 (1936). It reasoned that "[t]he due process clause requires that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id*. at 286 (internal quotation marks omitted).

Nonetheless, the promise of equality embodied in the Fourteenth Amendment coexists with a history of turning a blind eye to racial injustice. *See Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Justice Harlan, dissenting) (upholding "separate but equal," where all passengers were required by law to sit in a train compartment "set apart for the exclusive use of his race" and the train operator did not exercise any discretion in separating passengers by race) (overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); *Corrigan v. Buckley*, 271 U.S. 323 (1926) (dismissing an appeal, in part, because the Fourteenth Amendment does not prohibit individuals from entering into restrictive covenants that discriminate on the basis of race) (distinguished by *Shelley v. Kraemer*, 334 U.S. 1 (1948)); *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing detention of U.S. citizens of Japanese descent).

While demonstrating the difficulty of recognizing laws that perpetuate racial inequality in one's own time, these cases are also a call to current action. The history of the criminal justice system demonstrates a pervasive racial inequality that states have encouraged and upheld. More specifically, "this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Pena-Rodriguez*, 137 S.Ct. at 867-68 (citing*, inter alia*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting litigant's use of race-based peremptory challenges to exclude prospective jurors of a minority race); *Ham v. South Carolina*, 409 U.S. 524 (1973) (requiring that defendant be permitted to ask

questions about racial bias during voir dire); *Strauder v. West Virginia*, 100 U.S. 303, 305-09 (1880) (prohibiting state law that excluded jurors on the basis of race)). Racial bias in our jury system presents "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 868. Importantly, efforts to address such racial bias "is not an effort to perfect the jury but to ensure that our legal system remains capable of coming even closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id.*

The incorporation of the Bill of Rights guarantees is the battleground on which fundamental rights are either protected or ignored. History, tradition, the federal criminal justice system, and the practice of every other state besides Oregon and Louisiana dictate that a jury must reach a unanimous decision in criminal trials

III. Non-unanimity in Criminal Jury Trials Undermines Confidence in the Criminal Justice System.

The jury's role is to provide a check on the judicial system by laying "in the interposition between the accused and his accuser." *Williams v. Florida*, 399 U.S. 78, 101 (1970). By engaging citizens in the process, the presence of a jury ensures both confidence and fairness in the judicial system. In Oregon and Louisiana, this role has been diminished by allowing non-unanimous juries in criminal felony cases. The 45-year-old *Apodaca*

and *Johnson* rulings, that left a single provision of the Sixth Amendment unincorporated, 406 U.S. at 406; 406 U.S. at 364, has allowed Oregon and Louisiana to regularly convict defendants through non-unanimous juries that discount the deliberation of the jury in the process. *Williams*, No. 15CR58698, at *19. In the years since *Apodaca* and *Johnson*, the Court's assumptions about how juries function have been disproved by numerous studies. Moreover, the existence of non-unanimous juries in Oregon and Louisiana damages the public's confidence in and respect for the criminal justice system in these two states.

The Court in *Taylor v. Louisiana* confirmed that the fair cross section requirement is fundamental to a criminal defendant's Sixth Amendment right to a jury because it "guard[s] against the exercise of arbitrary power." 419 U.S. 522, 530 (1975). When *Apodaca* and *Johnson* were decided in the early 1970s, the Court did not believe that unanimity affected a jury's ability to perform its "safeguarding function" as long as the jury was still composed of a cross section of the community and given a full opportunity to deliberate. *Apodaca*, 406 U.S. at 410-11; *Johnson*, 406 U.S. at 361. At the time, little research was available on juror diversity and interaction. *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psych. Pub. Pol. & L. 622, 623 (2001) (noting that only isolated studies were conducted before World War II and the first systematic research study did not begin until 1953). Today we understand that to fully realize the right to a jury trial, a jury must

reach a unanimous decision. Research conducted since the early 1970s has demonstrated how non-unanimous juries inevitably deprive a criminal defendant of 1) the right to a jury that represents a cross section of the community; and 2) a jury that is given the opportunity to fully deliberate. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272-74 (2000).

At the time of *Apodaca* and *Johnson*, the Court could not have weighed the then-unknown effects of implicit bias on the jury in arriving at its decision to allow non-unanimous verdicts. More recent studies on implicit bias explain how each juror enters the deliberation process with rooted generalizations based in their own unique experiences. *Williams*, No. 15CR58698, at *22. This accepted understanding of bias increases the need for active, evidence-driven deliberation. Evidence-driven juries begin by discussing evidence and evaluating the jurors' potential theories and understanding of the evidence. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, at 388. In contrast, non-unanimous juries often adopt a verdict-driven deliberation style because jurors are "highly cognizant of their need only to deliberate to non-unanimity." *Williams*, No. 15CR58698, at *27. Studies indicate that, instead of working toward an evidence-driven unanimous decision, jurors seeking non-unanimous decisions do not have to persuade those in the minority. *Id*. (internal citations omitted). Furthermore, jurors lack an incentive to even consider minority positions. *Id.* Justice Stewart, dissenting in

Johnson, explained, "[f]or only a unanimous jury so selected can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear." *Johnson*, 406 U.S. at 398 (5-4 decision) (Stewart, J., dissenting). Verdict-driven juries in Oregon and Louisiana are less likely to deliberate through disagreement when the jurors recognize only 10 of the 12 members need to agree, and often begin with a vote instead of a discussion of the case. *See* Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 Yale L.J. 593, 602 (1987); Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, at 388. The importance of deliberating through disagreement to arrive at a unanimous decision ensures the jury can overcome its own inevitable implicit bias. *See Williams*, No. 15CR58698, at *24-25.

This research, unavailable to the Court in 1972, highlights the importance of unanimous verdicts, giving weight to the viewpoint of minority members to combat implicit biases in the criminal justice system. Non-unanimous verdicts, on the other hand, give juries the choice to ignore the memories of two of their peers and limits the jury members' ability to confront their own implicit biases through group discussion. Ultimately, this impacts the jury's ability to function as a jury – that is, to ensure that the state is not arbitrarily punishing citizens without sufficient evidence. As the Supreme Court explained in 1896, a criminal defendant starts "with the presumption of innocence in his favor. That stays with him until it is driven out of the

case . . . when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed." *Allen v. United States*, 164 U.S. 492, 500 (1896). In Oregon and Louisiana, however, the state need only convince eighty-three percent of the jurors to "drive out" this presumption of innocence. Marjorie R. Esman, *Nonunanimous Jury Verdicts Steeped in Racist Past*, The Advocate Jan. 28, 2016, http://www.theadvocate.com/baton_rouge/opinion/our_views%20/article_e9fefca4--c278-57f6-a0fa-24eb1c93d2fd.html.

Having non-unanimous juries in Oregon and Louisiana but requiring unanimous juries in federal court or in any of the other 48 states in the United States, does an injustice to everyone involved in the criminal justice system and diminishes the public's faith in the system. Research indicates that non-unanimous verdicts are rendered in over 40 percent of all felony jury verdicts in Oregon. Office of Pub. Defense Servs., *On the Frequency of Non-Unanimous Felony Verdicts in Oregon* 4-5 (May 21, 2009). These defendants, along with their families and communities, understand that they could have been acquitted[4] if they were prosecuted in a federal court or in any of the other 48 states in the United States. As Justice Stewart specifically stated in *Johnson*:

> [C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury

[4] These cases would be considered hung juries and the state would have the opportunity to retry the defendants.

> split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.

Johnson, 406 U.S. at 398 (5-4 decision) (Stewart, J., dissenting).

The non-unanimous jury provisions in Oregon and Louisiana significantly add to corroding the public's confidence in these states' criminal justice systems and it is about time for this Court to strike them down.

CONCLUSION

For the reasons stated above, Mr. Sims's petition for *writ of certiorari* should be granted.

Respectfully submitted,

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