No. 12-162

In The
Supreme Court of the United States

COREY MILLER,
Petitioner,

v.

LOUISIANA,
Respondent.

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

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF THE PETITION

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
NEIL WEARE
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees.

Among other things, CAC works to defend constitutional protections for the accused in our criminal justice system. CAC has filed *amicus curiae* briefs in support of these interests in cases such as *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), *Blueford v. Arkansas*, 132 S. Ct. 2044 (2012), and *Chaidez v. United States*, No. 11-820 (pending). In addition, CAC has a strong interest in ensuring that fundamental rights, including those articulated in the Bill of Rights, are incorporated against the States. CAC filed a brief on behalf of prominent constitutional scholars from across the ideological spectrum in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), discussing the text

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk; notice was provided to the parties more than ten days prior to this filing. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

and history of the Fourteenth Amendment and incorporation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The centrality of the jury to the Founders cannot be overstated. "[A] paradigmatic image underlying the original Bill of Rights," the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96-97 (1998). Sir William Blackstone called the jury a "sacred bulwark" of liberty. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343-44 (1769).

Jury unanimity was essential to this conception of the jury as a bulwark of liberty. For example, in 1786, several years prior to ratification of the Constitution and the Sixth Amendment, John Adams reflected that "it is the *unanimity* of the jury that preserves the rights of mankind." 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (1797) (emphasis added). From Blackstone to James Madison, unanimity was as much a part of the jury right as the right to a jury of one's neighbors and peers. As this Court has recognized, "the Sixth Amendment right to trial by jury requires a unanimous jury verdict." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010).

The Fourteenth Amendment "fundamentally altered our country's federal system," *id.* at 3028, by applying the guarantees of the Bill of Rights to the States. The framers of the Amendment specifically mentioned the Sixth Amendment's right to a jury trial as one of the fundamental rights newly protected against state infringement. *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Jacob Howard). Indeed, the right to a meaningful jury trial gained new importance after the Civil War as a critical constitutional tool for protecting the rule of law and combating racial discrimination. Troublingly, the roots of Louisiana's current non-unanimous jury provision were put in place during the State's 1898 Constitutional Convention, the avowed "mission" of which was "to establish the supremacy of the white race in [Louisiana]" by rolling back the advances made by the Civil War Amendments. *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana*, 8-9 (1898).

Against this historical backdrop, Court precedent has recognized that the critical rights and liberties of the Bill of Rights are just as important to protect against state infringement as federal encroachment. In "incorporating" the protections of the Bill of Rights against the States, this Court definitively held that these rights "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy v. Hogan*, 378 U.S. 1, 10 (1964). As the Court explained, it would be "incongruous" to apply different

standards "depending on whether the claim was asserted in a state or federal court." *Id*. at 11.

Despite this clear constitutional text, history, and precedent, this Court, in a deeply fractured ruling in *Apodaca v. Oregon*, 406 U.S. 404 (1972), concluded that the Sixth Amendment does not require jury unanimity in state criminal trials. Importantly, however, the Court recently acknowledged that *Apodaca* is an outlier case that falls well beyond the Court's accepted understanding of how individual guarantees of the Bill of Rights apply to the States through the Fourteenth Amendment, and was "the result of an unusual division among the Justices." *McDonald*, 130 S. Ct. at 3035 n.14.

As the Court explained in *McDonald*, in *Apodaca* "eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States." *Id.* Yet with the Justices in *Apodaca* evenly divided 4-4 as to whether the Sixth Amendment requires unanimous jury verdicts at all, the deciding vote went to Justice Lewis Powell, who "concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases." *Id.* Justice Powell's solitary view rested on his anomalous conclusion that although the Sixth Amendment established a requirement of jury unanimity in federal criminal trials, not "all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated" by the Fourteenth Amendment. *Johnson v. Louisiana*, 406 U.S. 366, 370 (1972) (Powell, J., concurring in

the judgment). Even at the time, Justice Powell readily acknowledged that his view on incorporation conflicted with the Court's majority view in *Duncan v. Louisiana*, which had just four years earlier fully incorporated the Sixth Amendment through the Fourteenth Amendment's Due Process Clause. *Id.* at 375.

The incorporation analysis of *Duncan* has stood the test of time. Justice Powell's anomalous and contrary incorporation theory has not. The Court has abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," *Malloy*, 378 U.S. at 10-11, explicitly rejecting such an argument in *McDonald*. Nonetheless, Petitioner and other individuals who are prosecuted in states that allow non-unanimous jury verdicts continue to have their fundamental right to a jury trial—the "sacred bulwark" of liberty—violated based on a two-track version of Sixth Amendment rights.

Amicus urges the Court to grant review in this case to right this wrong and harmonize the Court's incorporation doctrine as it relates to the Sixth Amendment right to trial by jury.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO RECOGNIZE THAT THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE JURY UNANIMITY IN STATE AS WELL AS FEDERAL CRIMINAL TRIALS.

A. The Sixth Amendment Requires Jury Unanimity in Criminal Cases.

Featured expressly in three of the first ten Amendments to the Constitution, the jury is "a paradigmatic image underlying the original Bill of Rights." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96-97 (1998); *see, e.g.*, U.S. CONST. amends. V, VI, VII. Sacrosanct to the Founders, the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." AMAR, THE BILL OF RIGHTS, at 97.

The Founding generation's focus on the jury as a central feature of a system of ordered liberty was strongly rooted in English common law. As Sir William Blackstone emphasized, "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (1769) ("BLACKSTONE'S COMMENTARIES"). Blackstone's understanding was that trial by jury "is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the *unanimous*

consent of twelve of his neighbours and equals." *Id.* (emphasis added). Expanding on this, Blackstone later explained the importance that a trial by jury include "the *unanimous suffrage* of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." 4 BLACKSTONE'S COMMENTARIES 343 (emphasis added).

The Founders shared this idea that jury unanimity was implicit in the fundamental right to trial by jury in criminal cases. In 1786, several years prior to ratification of the Constitution and the Sixth Amendment, John Adams reflected that "it is the *unanimity* of the jury that preserves the rights of mankind." 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (1797) (emphasis added). Later, as the Sixth Amendment was being debated and ratified by the States, Justice James Wilson expressed in his 1790-91 *Lectures on Law* that "To the conviction of a crime, the undoubting and the *unanimous* sentiment of the twelve jurors is of indispensable necessity." 2 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 350 (1804) (emphasis added). In 1803, St. George Tucker, author of the 1803 edition of *Blackstone's Commentaries*, explained his view that "the trial by jury" described in Blackstone's text was adopted in the United States, and secured by the Sixth Amendment, 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 348-49 n.2 (1803), later commenting that "without [the jurors'] *unanimous verdict*, or consent, no person can be condemned of any crime." 1 *id.* at App. 34 (emphasis added).

State practice at the time the Sixth Amendment was adopted also supports the view that unanimity had become an essential element of trial by jury for criminal trials in the United States. Even the *Apodaca* plurality conceded that "unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems," 406 U.S. at 408 n.3, before disregarding this history to conclude that the Sixth Amendment does not require unanimity.[2]

In the 19th century, Justice Joseph Story embraced the unanimity requirement in his 1833 Commentaries on the Constitution. First, he explained that America's forebearers "brought this great privilege [of trial by jury] with them, as their birthright and inheritance, as part of that admirable common law." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1779, at 559 (5th ed. 1891). He then went on to explain that "A trial by jury is generally understood to mean . . ., a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites,

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[2] Both Justice Powell, in his concurrence, and the four *Apodaca* dissenters expressly disagreed with the plurality's view that the Sixth Amendment does not require unanimous jury verdicts. *See* Pet. at 9-14 (discussing the *Apodaca* opinions and judgment).

may be considered unconstitutional." *Id.* at n.2 (emphasis in original).

This Court has repeatedly confirmed the historical truth that the Sixth Amendment jury right includes the right to a unanimous verdict. *See* Pet. at 13-17 (discussing the Court's current Sixth Amendment jurisprudence). The Sixth Amendment requires that the "truth of every accusation" against a criminal defendant must be "confirmed by the unanimous suffrage of twelve of his equals and neighbours." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting BLACKSTONE'S COMMENTARIES 343).

B. The Text and History of the Fourteenth Amendment Support Application of the Sixth Amendment's Jury Unanimity Requirement to the States.

Justice Powell's view in *Apodaca*, that the Fourteenth Amendment permits a "watered-down version of" the Sixth Amendment right to trial by jury, is contrary to this Court's precedent, *see Apodaca*, 406 U.S. at 384 (Douglas, J., dissenting), and *infra* Section C, and inconsistent with the text and history of the Fourteenth Amendment.

In his critical speech introducing and describing the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction, Senator Jacob Howard, explained that the rights the Amendment sought to protect included "the personal rights guaranteed and

secured by the first eight amendments of the Constitution," expressly including among these "the right of an accused person . . . to be tried by an impartial jury." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). Acknowledging that the Bill of Rights, without more, was merely a limitation on the federal government, Senator Howard explained that "[t]he great object of the first section of [the Fourteenth] amendment, is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766.

The view that jury unanimity was an essential component of the right to trial by jury did not change between the ratification of the Sixth Amendment and the ratification of the Fourteenth Amendment. In 1868, Thomas Cooley stated in an influential treatise that the "common-law incidents to a jury trial" that were "preserved by the constitution," included the requirement that "[t]he jury must unanimously concur in the verdict." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 319-20 (1868). Other prominent legal commentators of the time accepted this view as well. *See* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 532 (1866) ("[I]n a case in which the constitution guarantees a jury trial," a statute allowing "a verdict upon anything short of the unanimous consent of the twelve jurors" is "void."); JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW 78 (1864) ("[T]he jury [must] be

unanimous in rendering their verdict. . . . The principle once adopted has continued as an essential part of the jury trial."); JOEL TIFFANY, A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW 366-67 (1867) ("[I]t is required that the jury shall be unanimous.").

Just as the jury and its implicit unanimity requirement was central to the 18th-century Founders, so, too, was it essential to the Reconstruction Framers. One of the significant struggles following the Civil War was making the right to trial by jury meaningful for the newly freed slaves. In many southern States, so-called "Black Codes" limited jury service to whites, undermining the principle that the jury should be drawn from a cross-section of the entire community. *See*, *e.g.*, FLA. CONST. of 1865, Art. XVI, § 3 (1865). The Fourteenth Amendment and other civil rights legislation specifically targeted state laws limiting jury service to whites. As Senator John Sherman explained in 1872, "where a great number of black men are by law citizens, if a law of the State prevents those men from sitting on a jury because they are black men, such a law does deprive such citizens of a privilege, an immunity which they have a right to enjoy." Cong. Globe, 42d Cong., 2d Sess. 845 (1872) (statement of Sen. Sherman). Exercising its powers under Section 5 of the Fourteenth Amendment, Congress acted to open the jury box to African Americans by enacting the Civil Rights Act of 1875, which provided that no otherwise qualified juror could be excluded "on account of race, color or previous condition of servitude." Civil Rights Act of 1875, ch. 114, §4, 18

Stat. 335, 336-37. As the Court held in *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879), under the Fourteenth Amendment, "every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color." The prohibition of racial discrimination in connection with jury service was intended to not only help black defendants, but to make it more likely that justice would be served against white defendants who committed acts of violence against black victims. *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 114 YALE L.J. 895, 926-30 (2004).

Indeed, the roots of Louisiana's current non-unanimous jury verdict provision[3] provide the perfect example of why the Framers of the Fourteenth Amendment considered it so important to ensure that states could not infringe the fundamental liberties of the Bill of Rights, including the jury right—and why the jury right must be just as vigorously protected in the States as in federal court. The provision of the Louisiana state Constitution permitting non-unanimous jury verdicts originated at the State's 1898 Constitutional Convention, the avowed "mission" of which was "to establish the supremacy of the white race in [Louisiana]" by rolling back the advances made by the Civil War Amendments. *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana*, 8-9 (1898). The 1898 Constitutional Convention was opened by

[3] LA. CONST. Art. I, § 17(a); LA. CODE CRIM. PROC. Art. 782.

an acknowledgment that it was "little more than a family meeting of the Democratic party of the State of Louisiana," *id.* at 8-9, and closed by a recognition that the Convention's goal was "to perpetuate the supremacy of the Anglo-Saxon race in Louisiana." *Id.* at 381. *See generally* W. BILLINGS AND E. HAAS, IN SEARCH OF FUNDAMENTAL LAW: LOUISIANA'S CONSTITUTIONS, 1812-1874, The Center for Louisiana Studies (1993), 98-99. The non-unanimous jury verdict provision resulted from this Convention, which sought to deprive African Americans of their fundamental rights and liberties. *E.g.*, *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana,* 381 (1898). ("I don't believe that [federal courts or Congress] will take the responsibility of striking down the system which we have reared in order to . . . perpetuate the supremacy of the Anglo-Saxon race in Louisiana.") The relationship between racial discrimination and non-unanimous jury verdicts implicates the guarantees of equality and liberty at the core of the Fourteenth Amendment. *See generally* Pet. at 26-34 (discussing empirical research linking suppression of minority viewpoints with non-unanimous jury verdicts, as well as the insidious racial component of the use of such verdicts).

C. The Court's Analysis in *McDonald* Makes Clear That *Apodaca*'s Acceptance of State Non-Unanimous Jury Verdicts Cannot Stand.

The outcome in *Apodaca* is not only contrary to constitutional text and history, it is also sharply

out of line with the Court's analysis of the relationship between the protections in the Bill of Rights and the States. *See* Pet. at 17-20 (discussing incorporation jurisprudence). Court precedent has recognized that the critical rights and liberties of the Bill of Rights must be protected against state infringement just as robustly as they are protected against federal encroachment. In incorporating the protections of the Bill of Rights against the States, this Court decisively held that these rights "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy v. Hogan*, 378 U.S. 1, 10 (1964). As the Court explained, it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Id*. at 11.

The Court recently reaffirmed this incorporation analysis in *McDonald v. City of Chicago*, In doing so, the Court specifically identified *Apodaca* as the "one exception to this general rule," which "was the result of an unusual division among the Justices, *not* an endorsement of the two-track approach to incorporation." *McDonald*, 130 S. Ct. at 3035 n.14. Indeed, this Court explicitly rejected the City of Chicago's suggestion that the Court utilize the abandoned "two-track approach" to incorporation. *Id.* at 3046. Importantly, the majority also rejected the dissenting Justices' argument that "[t]he rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need

not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights." *Id.* at 3048 (quoting Stevens, J., dissenting, 130 S. Ct. at 3093). *See also id.* at 3054 n.5 (Scalia, J., concurring) (explaining that "the demise of watered-down incorporation means that we no longer sub-divide Bill of Rights guarantees into their theoretical components, only some of which apply to the States"). The Court stated plainly that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle." *Id.* at 3048.

Without action by this Court, however, the lower courts will continue to apply *Apodaca* in line with this rejected "watered-down," "two-track" approach to incorporation of the jury trial right, thus allowing Louisiana and other States to convict defendants without the unanimous consent of the jury. The Court should grant review to protect the "sacred bulwark" of the jury and once again reject the two-track approach to incorporation of the Bill of Rights.

* * *

Five Justices in *Apodaca* (including Justice Powell) concluded that the Sixth Amendment requires jury unanimity. Eight Justices agreed or assumed that the Amendment applies identically against the federal government and the States. Yet unanimous jury verdicts are not required in state criminal courts. Having explicitly rejected a

similar two-track approach to incorporation, the Court's *McDonald* ruling makes clear that this anomalous situation cannot stand. The right to trial by jury, and the requirement of unanimity implicit in that right, are as applicable to the States as they are to the federal government.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
NEIL WEARE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
**Counsel of Record*

Counsel for Amicus Curiae

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