No. 19-5807

IN THE

Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner,

v.

DARREL VANNOY, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

NAOMI A. IGRA
MATTHEW P. HENRY
BENJAMIN GILLIG
SIDLEY AUSTIN LLP
555 California Street
Suite 2000
San Francisco, CA 94104

ANDRÉ BÉLANGER *
YIGAL BANDER
JAMES P. MANASSEH
MANASSEH, GILL, KNIPE & BÉLANGER, P.L.C.
8075 Jefferson Highway
Baton Rouge, LA 70809
(225) 383-9703
andre@manassehandgill.com

COLLIN P. WEDEL
ANDREW B. TALAI
SUMMER A. WALL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013

Counsel for Petitioner

* Counsel of Record

July 15, 2020

QUESTION PRESENTED

Whether this Court's decision in *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), applies retroactively to cases on federal collateral review.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Thedrick Edwards, an inmate incarcerated at the Louisiana State Penitentiary. Respondent is Darrel Vannoy, Warden of the Louisiana State Penitentiary. There are no corporate parties involved in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

SCHOLARLY AUTHORITIES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

BRIEF FOR PETITIONER

Petitioner Thedrick Edwards respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the court of appeals (J.A. 298–99) is not published in the Federal Reporter but is available at 2019 WL 8643258. The order of the district court (J.A. 278–81) is not published in the Federal Supplement but is available at 2018 WL 4373644. The report and recommendation of the magistrate judge (J.A. 241–63) is not published in the Federal Supplement but is available at 2018 WL 4375145.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2019. The petition for a writ of certiorari was filed on August 15, 2019, and granted on May 4, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2253(c)(2) of Title 28 of the U.S. Code provides in relevant part: "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

Section 2254(d)(1) of Title 28 of the U.S. Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

INTRODUCTION

Petitioner Thedrick Edwards is a Black man who was convicted by a non-unanimous Louisiana jury and sentenced to life in prison over the lone Black juror's vote to acquit on all counts. He is entitled to challenge that conviction because this Court's decision in *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), applies retroactively on collateral review. *Ramos* confirmed that convictions by non-unanimous juries offend the Constitution. But the *Ramos* Court divided over how to treat the fractured decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (plurality opinion), which had for a time allowed Louisiana's and Oregon's non-unanimous jury regime to persist. That division cleared two paths to retroactivity under *Teague* v. *Lane*, 489 U.S. 288 (1989). Either *Ramos* reaffirmed a longstanding "old rule" that was undisturbed by the historical accident of *Apodaca*, or it an-

nounced a watershed "new rule" that restored a bedrock principle of constitutional law in Louisiana and Oregon and seriously improved the fairness and accuracy of criminal trials. Either way, *Ramos* applies retroactively on collateral review.

STATEMENT

A. The State excludes all but one Black person from the jury, and Mr. Edwards is convicted by a divided vote.

1. This case arises from a series of crimes that occurred near Louisiana State University in May 2006. *State* v. *Edwards*, No. 2008-KA-2011, 2009 WL 1655544, at *1 (La. Ct. App. June 12, 2009). On a Saturday night, around 11:30 p.m., Ryan Eaton drove to his girlfriend's apartment. *Id.* He parked, opened a beer, and sat with the car door open. *Id.* As Eaton exited the vehicle, he was abducted by two armed assailants—at least one of whom was wearing "a black bandana across his face." *Id.* The assailants drove Eaton to an ATM for cash, to his apartment to take some property, and then back to his girlfriend's apartment where they raped two women. *Id.* at *1–2. Neither woman could identify her attacker. *Id.* at *2. Two days later, Marc Verret went through a similar experience. *Id.* He was abducted by two armed assailants both wearing "bandanas over their faces." *Id.* They "forced entry into his vehicle" and then took him to an ATM to withdraw cash. *Id.*

The Baton Rouge Police Department focused on Mr. Edwards as a suspect. J.A. 81. He was 19 years old at the time and had no record of prior criminal offenses. *Id.* at 82. Within a day of the second abduction and robbery, officers obtained and executed a warrant to search Mr. Edwards's home. *Id.* at 81. During a midnight search, officers found nothing connected to the

crimes (*e.g.*, no stolen property, weapons, or clothing). *Id.* at 83. Although Mr. Edwards was not present for the search, he voluntarily surrendered to the authorities soon after. *Id.* at 81.

Mr. Edwards was interrogated multiple times over the next several days. *Id.* at 81–83. During an initial interview with Sergeant Tillman Cox, Mr. Edwards stated that he "did not have anything to do with the offenses." *Edwards*, 2009 WL 1655544, at *3. This interview was not recorded. The next day, Detective Greg Fairbanks and Lieutenant John Attuso took Mr. Edwards to a room, chained him to a wall for 45 minutes, and encouraged him to cooperate in the investigation. *Id.* at *5; see also J.A. 81–82. This portion of the interrogation was not recorded either. Subsequently, Mr. Edwards "signed [a] waiver of . . . [his] right to counsel" and "confessed to involvement in the armed robberies and the rapes." *Edwards*, 2009 WL 1655544, at *4. According to Mr. Edwards, "force was used" during "the portion of the interview [that] . . . was not recorded." *Id.* at *5. The confession thus was, in his words, a product of "force and being naïve and soft-hearted." *Id.*

2. Mr. Edwards was indicted on multiple counts, including armed robbery, aggravated rape, and aggravated kidnapping. J.A. 86. He pleaded not guilty and invoked his right to trial by jury. *Id.* at 77. Mr. Edwards also filed a motion to suppress his confession on the grounds that it was "made under the influence of fear, duress, intimidation, threats, inducements, and promises, and without the benefit of counsel." *Edwards*, 2009 WL 1655544, at *4. The trial court denied the motion. *Id.*

During jury selection, the State used 10 of its 11 strikes to eliminate all but one Black person from the jury. See J.A. 7–15. Specifically, the State used four

of its six peremptory strikes on Black venirepersons, struck five Black jurors for cause (*e.g.*, because several individuals had a family history of incarceration), and used its final strike peremptorily after a Black juror was seated on the petit jury (*i.e.*, a "back-strike"). In the end, of the 12 individuals empaneled, only one remaining juror was Black. *Id.*

Aside from Mr. Edwards's confession, the prosecution's case-in-chief was mostly circumstantial, with little or no direct evidence connecting Mr. Edwards to the crimes. *Id.* at 83–84. For example, despite searching his home and collecting samples of his DNA, the prosecution presented no physical or forensic evidence implicating Mr. Edwards. *Id.* at 83. Similarly, only one eyewitness (out of five) picked Mr. Edwards out of a photo line-up—and trial counsel was prohibited from presenting expert rebuttal on such "cross-racial" identifications. *Id.* at 83–85.

3. None of Mr. Edwards's convictions were obtained by a unanimous vote. After deliberating for roughly three hours (*State* v. *Edwards*, No. 07-06-0032, Mins. (La. 19th Jud. Dist. Ct. Dec. 7, 2007)), the jury returned a verdict convicting Mr. Edwards of armed robbery, aggravated rape, and aggravated kidnapping. J.A. 17–39. The verdict was as follows: 10-to-2 on four armed robbery counts; 11-to-1 on the remaining armed robbery count, two kidnapping counts, and the rape count; and not guilty of attempted robbery. *Id.* In each instance, the sole Black juror voted to acquit Mr. Edwards of the charges. *Id.*[1]

At the time, in 48 States and federal court, a single juror's vote to acquit would have been enough to pre-

[1] Contrary to the State's suggestion (BIO 7 n.5), the sole juror who voted to acquit Mr. Edwards on all counts was, in fact, a Black woman. J.A. 12.

vent conviction. But not in Louisiana. See La. Code Crim. Proc. Ann. art. 782(A) (2007) ("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."). Instead, Mr. Edwards was sentenced to 30 years' imprisonment without parole for each of the robbery charges, and a life sentence without parole for the kidnapping and rape charges. J.A. 75–76. All sentences were to be served consecutively. *Id.* at 76.

4. The Louisiana Court of Appeal affirmed the convictions and sentences. *Edwards*, 2009 WL 1655544, at *5. On appeal, Mr. Edwards argued that the trial court erred in denying his motion to suppress. *Id.* at *1. He maintained that the State violated *Miranda* v. *Arizona*, 384 U.S. 436 (1966), by "ignoring" his request for an attorney during interrogation. *Id.* at *5. The court concluded that "the record supports the trial court's denial of the . . . motion to suppress the confession." *Id.*

5. The Louisiana Supreme Court denied review. *State* v. *Edwards*, 51 So. 3d 27 (La. 2010) (mem.).[2] Because Mr. Edwards did not petition for a writ of certiorari, his convictions and sentences became final on March 17, 2011. See 28 U.S.C. § 2101(c); *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994).

B. The Louisiana state courts deny post-conviction relief.

1. Mr. Edwards's application for post-conviction relief in the Nineteenth Judicial District Court of Loui-

---

[2] Mr. Edwards sought error patent review in his writ application, arguing that the prosecution discriminated on the basis of race in jury selection. *See* J.A. 155; *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

siana argued that article 782(A) of Louisiana's Code of Criminal Procedure—which, at the time, allowed non-unanimous convictions—violated the Sixth and Fourteenth Amendments. J.A. 87. Notwithstanding the result in *Apodaca*, Mr. Edwards argued that the time had come for Louisiana to follow "th[e] nation's tradition of requiring . . . unanimous jur[ies]." *Id.* at 99. Mr. Edwards further maintained that "[t]he State intentionally excluded African Americans from the jury" through "its use of cause and peremptory challenges," and that trial counsel was "ineffective" for failing to raise his various constitutional claims on direct appeal. *Id.* at 88.

2. The Commissioner recommended denial. As relevant here, the State objected to Mr. Edwards's unanimity and *Batson* claims on the ground that they were not raised during trial. *Id.* at 118. The Commissioner rejected the State's procedural arguments, however, and decided both claims on the merits. *Id.* at 130–37. As for the Sixth Amendment, the Commissioner asserted that "the jurisprudence from the highest court in this State, and the land, clearly upheld the constitutionality of . . . non-unanimous verdict[s]." *Id.* at 131. As for *Batson*, the Commissioner found that trial counsel had an opportunity to challenge the strikes and that "the allegedly targeted group was not actually excluded from the jury" because one Black juror had served. *Id.* at 135–36.

3. The Nineteenth Judicial District Court adopted the Commissioner's recommendation, finding that Mr. Edwards's unanimity and *Batson* claims were "factually insufficient to warrant relief or without merit." *Id.* at 144. The Louisiana Court of Appeal summarily denied further review, *id.* at 148, as did the Louisiana Supreme Court, *id.* at 149.

C. The district court denies habeas relief, and the Fifth Circuit refuses a certificate of appealability.

1. Mr. Edwards applied for a writ of habeas corpus in the Middle District of Louisiana. See 28 U.S.C. § 2254. Once again, he argued that Louisiana's non-unanimous jury practice violated his rights under the Sixth and Fourteenth Amendments. J.A. 176. He explained that incorporated Bill of Rights provisions must apply "identical[ly]" against the States and the federal government, and further noted that Louisiana's non-unanimous jury regime originated in "the Jim Crow era" to "make it easier to imprison newly emancipated African Americans." *Id.* at 178–79. The State did not object to Mr. Edwards's claim on procedural grounds but instead argued that it was without merit under *Apodaca*. *Id.* at 224; contra BIO 9–11.

The magistrate judge recommended denial. With respect to Mr. Edwards's unanimity claim, the magistrate judge found that "no violation of federal law" had occurred because "*Apodaca* remains settled." J.A. 251. The magistrate judge also noted that, "[s]ince deciding *Apodaca*, the . . . Supreme Court has repeatedly declined to grant certiorari to reconsider the constitutionality of non-unanimous verdicts in state proceedings." *Id.* The district court adopted the magistrate judge's recommendation, and denied Mr. Edwards's habeas petition on the merits. *Id.* at 281.

2. The Fifth Circuit denied a certificate of appealability. See 28 U.S.C. § 2253(c)(2). Mr. Edwards sought to take an appeal from the district court's denial of his unanimity claim, among other issues. J.A. 286. But the Fifth Circuit simply concluded that Mr. Edwards "fail[ed] to make the requisite showing." *Id.* at 299; see *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003). Mr. Edwards timely petitioned for certiorari,

arguing that *Apodaca* "lack[s] any precedential value" and is contrary to the unanimity guarantee of the Sixth and Fourteenth Amendments. Pet. 8.

D. This Court grants certiorari to decide whether *Ramos* applies retroactively.

While Mr. Edwards's petition was pending, this Court decided *Ramos* v. *Louisiana*. The majority held that unanimity is required under the Sixth Amendment's Jury Trial Clause as incorporated against the States, consistent with longstanding authority. 140 S. Ct. 1390, 1395–97 (2020).

Ramos made clear that *Apodaca* should be abandoned, but Members of this Court could not agree on a rationale. Three Justices wrote that neither the plurality nor Justice Powell's separate concurrence in *Apodaca* supplied a governing precedent. *Id.* at 1404 (opinion of Gorsuch, J., joined by Ginsburg & Breyer, JJ.). Justice Thomas agreed that the Constitution mandates a unanimous jury, and, for separate reasons, that *Apodaca* was not binding. *Id.* at 1424–25 (Thomas, J., concurring) (explaining that *Apodaca*'s "Fourteenth Amendment ruling does not bind us because the proper question here is the scope of the Privileges or Immunities Clause"). And two concurring Justices agreed that the Sixth Amendment requires unanimity, but believed *Apodaca* was being overruled. *Id.* at 1408 (Sotomayor, J., concurring); *id.* at 1420 (Kavanaugh, J., concurring).[3] Two weeks later, the Court granted certiorari here to determine whether *Ramos* applies retroactively on federal collateral review.

---

[3] *See also Ramos*, 140 S. Ct. at 1440 (treating *Apodaca* as precedent that "should not be overruled") (Alito, J., joined by Roberts, C.J., & Kagan, J., dissenting).

SUMMARY OF THE ARGUMENT

Teague v. *Lane* gives retroactive effect to "old" rules that are dictated by precedent, "watershed" new rules that implicate fundamental fairness and accuracy in criminal trials, and "substantive" new rules that place persons beyond the State's power to punish. 489 U.S. 288, 301, 311–13 (1989). *Ramos* is retroactive under *Teague* for either of the first two reasons, and there is no basis to hold otherwise.

I. *Ramos* applies retroactively on collateral review because it reaffirmed an "old rule" under *Teague* that was logically dictated by an extensive line of precedent—settled decades before Mr. Edwards's convictions became final. This Court has long recognized: (i) the Sixth Amendment guarantees the right to a unanimous verdict; (ii) the Jury Trial Clause is a fundamental right and is incorporated against the States; and (iii) all incorporated Bill of Rights provisions apply identically against the States and the federal government. The holding in *Ramos* necessarily follows under *Teague*'s objective approach: unanimity is required in both federal and state court.

The badly fractured decision in *Apodaca* does not change that conclusion. Neither the plurality opinion nor Justice Powell's separate concurrence in that case can be objectively read to erase this Court's preexisting Sixth and Fourteenth Amendment precedent. A majority of this Court has never endorsed the unusual decision in *Apodaca*. And even the State of Louisiana, in *Ramos*, balked at the prospect of arguing that *Apodaca* supplied a binding precedent.

II. If *Ramos* is instead viewed as a "new rule" of criminal procedure, it nevertheless applies retroactively because its profound contribution to fairness and accuracy in criminal proceedings in Louisiana

and Oregon makes it uniquely suited to being recognized as a "watershed rule." For decades, criminal defendants in those States were convicted pursuant to unconstitutional and discriminatory jury regimes. But, by dismantling *Apodaca*, this Court restored a bedrock procedural element essential to fairness in criminal trials. Centuries of history and precedent teach that unanimity is at the core of the jury trial right: after all, "[a] verdict, taken from eleven, [i]s no verdict at all." *Ramos*, 140 S. Ct. at 1395 (internal quotation marks omitted). Moreover, as a legal and practical matter, jury unanimity is necessary to prevent an impermissibly large risk of inaccurate convictions. *Ramos* is thus uniquely akin to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which this Court has consistently identified as a watershed rule. Both decisions restored bedrock principles of criminal procedure that significantly improve the fairness and accuracy of criminal trials.

III. *Ramos* affects "prior convictions in only two States." 140 S. Ct. at 1406. Only a small percentage of criminal cases in those States have involved non-unanimous jury verdicts. As a practical matter, an even smaller percentage will be retried. And because *Teague* is an inherently equitable doctrine, the racist origins of the non-unanimous jury statutes diminish the States' interest in finality and repose.

ARGUMENT

I. *RAMOS* DID NOT ANNOUNCE A NEW RULE OF CONSTITUTIONAL CRIMINAL PROCEDURE.

A. Long-settled precedent logically dictated the result in *Ramos*.

1. *Ramos* applies retroactively under *Teague* because it reaffirmed an "old rule" that was logically "*dictated* by precedent existing at the time the defendant's conviction became final." See *Teague*, 489 U.S. at 301; see also *Whorton* v. *Bockting*, 549 U.S. 406, 416 (2007) ("[A]n old rule applies both on direct and collateral review."). The States' interests in comity and finality are not impaired by retroactively applying well-established constitutional principles like jury unanimity, in part because reasonable jurists should have anticipated them. See *Mackey* v. *United States*, 401 U.S. 667, 695 (1971) (opinion of Harlan, J.); see also *Chaidez* v. *United States*, 568 U.S. 342, 347 (2013) ("[A] person [may] avail herself of [a] decision on collateral review" when this Court merely "appl[ies] a settled rule."); *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (explaining that there is "nothing new" about a claim based upon principles "enumerated . . . long ago").

This Court's decision in *Stringer* v. *Black*, 503 U.S. 222 (1992), illustrates how the Court distinguishes between old and new rules by looking to the logical implications of past precedent. There, a habeas petitioner sought the benefit of *Maynard* v. *Cartwright*, 486 U.S. 356 (1988), and *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), which prohibited the use of vague aggravating factors during capital sentencing in Oklahoma and Mississippi, respectively.

The Court held that neither case announced a "new rule," even though both were decided after the petitioner's Mississippi conviction became final. *Maynard* was "controlled" by *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), and *Clemons* followed "*a fortiori*" from precedent. *Stringer*, 503 U.S. at 228–29. The rule in question thus "emerge[d] not from any single case," but instead from a "long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing." *Id.* at 232. It did not matter that the precise issue had been "express[ly] . . . left open" in a previous case. *Id.* at 230. Nor did it matter that a preexisting Fifth Circuit decision concluded that *Godfrey* was inapplicable in Mississippi. *Id.* at 236. Upon conducting "an objective reading of the relevant cases," and assessing their logical consequence, this Court held that the rule at issue was "dictated by precedent"—notwithstanding the Fifth Circuit's "serious[ly] mistake[n]" views. *Id.* at 237.

2. By the same reasoning, *Ramos* was "controlled" by three well-settled principles logically dictating that the Jury Trial Clause requires a unanimous verdict in federal and state court alike. See 140 S. Ct. at 1395–97.

First, the Sixth Amendment's unanimity requirement is an "ancient guarantee" that is synonymous with the right to trial by jury. *Id.* at 1401. "The common law, state practices in the founding era, [and] opinions and treatises written soon afterward" unmistakably confirm that "[a] jury must reach a unanimous verdict in order to convict." *Id.* at 1395. This "vital" protection emerged in 14th century England, was preserved as an "essential" feature of jury trials in the American States, and became a "widely accepted" requirement by the time James Madison drafted the Sixth Amendment. *Id.* at 1395–96. Post-

ratification treatises further described jury unanimity as an "indispensable" right. *Id.* at 1396 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 777, p. 248 (1833)). And this understanding "persisted up to the time of the Fourteenth Amendment's ratification." *Id.* at 1422–23 (Thomas, J., concurring) (tracing the lineage of jury unanimity from "the early Republic" through "the Reconstruction era").

Given this entrenched history, it is unsurprising that the Sixth Amendment's unanimity requirement is also deeply rooted in precedent. "[T]his Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years." *Id.* at 1397 & nn.19–22.[4]

Second, the Sixth Amendment's jury trial right is "fundamental to the American scheme of justice" and therefore incorporated against the States through the Fourteenth Amendment. *Id.* at 1397.

Duncan v. *Louisiana* settled the incorporation question half a century ago, explaining that the Jury Trial Clause reflects a "profound judgment about the way in which law should be enforced and justice administered." 391 U.S. 145, 156 (1968) (discussing the

---

[4] *See, e.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2376–77 (2019) (plurality opinion); *Descamps* v. *United States*, 570 U.S. 254, 269 (2013); *S. Union Co.* v. *United States*, 567 U.S. 343, 356 (2012); *United States* v. *Booker*, 543 U.S. 220, 233–39 (2005); *Blakely* v. *Washington*, 542 U.S. 296, 301–02 (2004); *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000); *Richardson* v. *United States*, 526 U.S. 813, 817 (1999); *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995); *Johnson* v. *Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring); *Andres* v. *United States*, 333 U.S. 740, 748 (1948); *Patton* v. *United States*, 281 U.S. 276, 288 (1930); *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900); *Thompson* v. *Utah*, 170 U.S. 343, 351 (1898).

"deep commitment of the Nation to the right of jury trial"). This Court has continued to emphasize that the right to a jury is "a central foundation of our justice system and our democracy," and has served "an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases." *Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 860 (2017). The jury guarantee is a "basic protectio[n]," without which a criminal proceeding "cannot reliably serve its function." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). The Sixth Amendment thus secures a "fundamental" right, which applies against the States and has proven "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan*, 391 U.S. at 158.

Third, incorporated provisions of the Bill of Rights "bear the same content when asserted against States as they do when asserted against the federal government." *Ramos*, 140 S. Ct. at 1397.

This Court long ago "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964). Eschewing such an "incongruous" approach, Bill of Rights provisions 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." *Id.* at 10. For example, in cases like *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and *Gideon*, 372 U.S. 335, this Court decisively "overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States." *McDonald* v. *Chicago*, 561 U.S. 742, 766 (2010) (collecting cases). This general principle has

been recently reaffirmed. *Id.* at 765–66; see also *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019) ("[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.").

3. These three precepts were all well-settled decades before Mr. Edwards's conviction became final on direct appeal. And taken together, they necessarily dictate the rule set forth in *Ramos*.

It is a matter of both law and logic: "[I]f the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." 140 S. Ct. at 1397. Indeed, in *Ramos*, no Member of this Court expressed a contrary interpretation of the Constitution. Compare *id.* at 1405, with *id.* at 1425–26 (Alito, J., dissenting).[5] In view of the governing precedent, this undisputed perspective should not have come as a surprise. See *Stringer*, 503 U.S. at 237 (explaining that "the ultimate decision whether [a rule] was dictated by precedent is based on an objective reading of the relevant cases"). Thus, the holding in *Ramos* was not "break[ing] new ground" or "impos[ing] a new obligation" in any relevant sense. See *Teague*, 489 U.S. at 301. Instead, the rule directly emerged from longstanding authority interpreting the Sixth and Fourteenth Amendments, the consequence of which should have been apparent to all.

---

[5] Even under the Privileges or Immunities Clause, the ancient guarantee of jury unanimity is protected "against abridgment by the States." *Ramos*, 140 S. Ct. at 1424 (Thomas, J., concurring) (finding that the right to trial by jury is a "constitutionally enumerated right" for purposes of the Privileges or Immunities Clause). As Justice Thomas explained in *Ramos*, the petitioner's "felony conviction by a nonunanimous jury was unconstitutional." *Id.* at 1420–21.

The question here stands in stark contrast with *Chaidez*, which addressed whether *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), applies retroactively on collateral review. *Padilla* required criminal defense attorneys to inform non-citizen clients about the collateral risks of deportation related to guilty pleas. In contrast to the centuries of consistent history supporting jury unanimity, *Padilla* dealt with a relatively new immigration scheme contrived centuries after the Framing. *Padilla* announced a new rule because the Court "had to develop new law" distinguishing direct and collateral consequences *before* "answer[ing] a question about the Sixth Amendment's reach"—and it did so "in a way that altered the law of most jurisdictions." *Chaidez*, 568 U.S. at 352, 355. None of this Court's pre-existing precedent "*dictated*" the answer to the threshold question in *Padilla*. *Id.* at 353; see also *id.* at 348–49 (explaining that the Court "did something more" than "merely ma[ke] clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent").

Far from "develop[ing] new law," *id.* at 352, this Court decided *Ramos* based upon three lines of well-established precedent that logically dictated the result. And instead of "alter[ing] the law of most jurisdictions," *id.*, *Ramos* simply brought two outlier States in line with centuries of history, and the practice of the federal government and 48 other States. Because nothing in *Ramos* could be described as a novel doctrine, doctrinal development, or doctrinal evolution, it did not announce a new rule of constitutional criminal procedure under *Teague*.

B. *Apodaca* does not make *Ramos* a new rule for retroactivity purposes.

1. This Court has said that a rule is not "old" "unless it would have been 'apparent to all reasonable

jurists.'" *Chaidez*, 568 U.S. at 347. Like the common law's "reasonable person" standard, this concept factors "objectiv[ity]" into the equation—such that "the mere existence of conflicting authority does not necessarily mean a rule is new." *Wright* v. *West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring); see also *Beard* v. *Banks*, 542 U.S. 406, 416 n.5 (2004) ("[W]e do not suggest that the mere existence of a dissent suffices to show that [a] rule is new."); accord *id.* at 423 (Souter, J., dissenting) ("[T]he presence of actual disagreement among jurists and even among Members of this Court does not conclusively establish a rule's novelty.").

This makes sense in light of *Teague*'s approach to retroactivity, which seeks "to validate reasonable interpretations of existing precedents." *Stringer*, 503 U.S. at 237; see also *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997) (explaining that *Teague* does not apply where "a state court . . . acted objectively unreasonably by not extending . . . relief later sought in federal court"). The concept of a hypothetical, reasonable jurist therefore aids in "distinguish[ing] those developments in this Court's jurisprudence that state judges should have anticipated from those they could not have been expected to foresee." *Beard*, 542 U.S. at 423 (Souter, J., dissenting).

2. *Apodaca* does not make *Ramos*'s outcome a "new" rule under *Teague*'s objective framework. As explained in a companion decision to *Apodaca*, a majority of the Court agreed that "the Sixth Amendment requires a unanimous verdict in federal criminal jury trials." *Johnson* v. *Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting). And a majority further agreed that "the Sixth Amendment is to be enforced against the States according to the same

standards that protect that right against federal encroachment." *Id.*

Nonetheless, as a result of an anomalous alignment of votes, "the Court could do no more than issue a badly fractured set of opinions." *Ramos*, 140 S. Ct. at 1397. In the end, Justice Powell "offered up the essential fifth vote to uphold [the petitioner's] conviction"—but it was based upon the theory of "dual-track" incorporation that "he knew was . . . foreclosed by precedent." *Id.* at 1398; see also *id.* at 1409 (Sotomayor, J., concurring) (describing *Apodaca* as "uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision").

Four Justices in *Apodaca* "would not have hesitated to strike down" non-unanimous jury practices. *Id.* at 1397 (majority opinion). And given the clarity of this Court's prior precedent, they were astonished by the outcome in *Apodaca*. See *Johnson*, 406 U.S. at 383 (Douglas, J., dissenting) (describing the result as "anomalous" and one that cannot be "squared with the law of the land"); *id.* at 395 (Brennan, J., dissenting) (explaining that "[r]eaders . . . may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed"); *id.* at 400 (Marshall, J., dissenting) (the question in *Apodaca* was "too frighteningly simple to bear much discussion"); *Apodaca* v. *Oregon*, 406 U.S. 404, 414 (1972) (Stewart, J., dissenting) ("[I]t has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial," which was "made wholly applicable to state criminal trials"). Even Justice Powell recognized his dual-track incorporation argument came "late in the day." *Johnson*, 406 U.S. at 375 (Powell, J., concurring).

Simply put: *Apodaca* was at odds with pre-existing authority and did not itself generate new, binding precedent. *Ramos*, 140 S. Ct. at 1402 (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.); see also *id.* at 1424–25 (Thomas, J., concurring) (explaining that *Apodaca* was not "bind[ing]" because it failed to account for the Privileges or Immunities Clause). Like an unreasoned affirmance, *Apodaca* had no *ratio decidendi* even though its "judgment line resolved that case for the parties in that case." *Id.* at 1404 (opinion of Gorsuch, J., joined by Ginsburg & Breyer, JJ.). As a result, neither the plurality opinion in *Apodaca* nor Justice Powell's separate concurrence can be read objectively to "repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments." *Id.*; see also *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam) ("An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.").

3. To be sure, in the wake of *Apodaca*, Louisiana and Oregon both "chose to continue allowing nonunanimous verdicts." *Ramos*, 140 S. Ct. at 1398 (opinion of Gorsuch, J., joined by Ginsburg, Breyer, & Sotomayor, JJ.). But such practices have always conflicted with this Court's articulation of what the Constitution requires. *Id.* at 1398–99. Moreover, despite the result in *Apodaca*, it is telling that nonunanimous jury practice did not take root in *any* other State in the 47 years between *Apodaca* and *Ramos*. Nothing "suggest[s] that nonunanimous verdicts have 'become part of our national culture.'" *Id.* at 1406 (majority opinion).

This Court has never subsequently endorsed the plurality opinion in *Apodaca* or Justice Powell's sepa-

rate concurrence. *Id.* at 1405 ("[N]o one on the Court today is prepared to say [that *Apodaca*] was rightly decided."); *id.* at 1416 (Kavanaugh, J., concurring) ("*Apodaca* is egregiously wrong").

To the contrary, on multiple occasions before Mr. Edwards's conviction becoming final, this Court "continued to recognize the historical need for unanimity." *Id.* at 1399 (opinion of Gorsuch, J., joined by Ginsburg, Breyer, & Sotomayor, JJ.). In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), a case involving a New Jersey defendant convicted of unlawful possession of a firearm, this Court described the jury trial right as one of "surpassing importance." *Id.* at 476. Consulting Blackstone, this Court then explained that "*the truth of every accusation* . . . should . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours." *Id.* at 477 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)). Similarly, in *Blakely* v. *Washington*, 542 U.S. 296 (2004), a case involving a Washington guilty plea for kidnapping, this Court again explained that "[t]he Framers would not have thought it too much to demand that, before depriving a man of . . . his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours.'" *Id.* at 313.

Nor did this Court ever "f[ind] a way to make sense" of *Apodaca*. See *Ramos*, 140 S. Ct. at 1399 (opinion of Gorsuch, J., joined by Ginsburg, Breyer, & Sotomayor, JJ.). For example, in later cases like *McDonald*, this Court described the ruling in *Apodaca* as "the result of an unusual division among the Justices," and in any event "not an endorsement of the two-track approach to incorporation." 561 U.S. at 766 n.14 (explaining that "*Apodaca* . . . does not un-

dermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government"); see also *Timbs*, 139 S. Ct. at 687 n.1 (same).

In *Ramos*, the State of Louisiana was not even willing to argue that *Apodaca* supplied a binding precedent. 140 S. Ct. at 1402 (opinion of Gorsuch, J., joined by Ginsburg & Breyer, JJ.). In its respondent's brief, Louisiana stated that it was *not* "asking the Court to accord Justice Powell's solo opinion in *Apodaca* precedential force" and instead argued that the Sixth Amendment did not guarantee unanimity at all. Br. for Respondent at 47, *Ramos* v. *Louisiana*, No. 18-5924 (U.S. Aug. 16, 2019). And Louisiana confirmed the point during oral argument. Tr. of Oral Arg. at 37–38, *Ramos* v. *Louisiana*, No. 18-5924 (U.S. Oct. 7, 2019).

II. IF *RAMOS* ANNOUNCED A NEW RULE, IT IS A UNIQUE WATERSHED RULE.

A. *Ramos* announced a watershed rule implicating the fundamental fairness and accuracy of criminal proceedings.

1. *Teague* generally provides that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. This nonretroactivity principle flows from the "[t]he interest in leaving concluded litigation in a state of repose." *Id.* at 306.

But an exception exists for "watershed rules of criminal procedure." *Id.* at 311. As Justice Harlan explained, "the writ ought always to lie for claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.). New rules are

thus retroactive if they "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction," *id.*, and "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," *Desist* v. *United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting). When it comes to these "components of basic due process," a State's interest in finality must yield. *Teague*, 489 U.S. at 313.

Gideon is often cited as the paradigmatic example of a watershed rule.[6] *Gideon* revisited *Betts* v. *Brady*, 316 U.S. 455 (1942), where a divided Court refused to incorporate the Sixth Amendment right to counsel against the States through the Fourteenth Amendment. *Betts* "made an abrupt break with . . . well-considered precedents" and "departed from the sound wisdom" of pre-existing authority. *Gideon*, 372 U.S. at 344–45. By contrast, in *Gideon*, this Court reaffirmed that the right to counsel is "fundamental and essential to fair trials," and has been "[f]rom the very beginning." *Id.* at 344. For example, without appointed counsel, indigent defendants risk being "convicted upon . . . evidence irrelevant to the issue or otherwise inadmissible." *Id.* at 345. The Court thus overruled

---

[6] *See, e.g.*, *Whorton*, 549 U.S. at 419; *Beard*, 542 U.S. at 417; *O'Dell*, 521 U.S. at 167 (O'Connor, J., concurring); *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990); *Teague*, 489 U.S. at 311–12; *Mackey*, 401 U.S. at 693–94 (opinion of Harlan, J.); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151–52 (1970); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 82 (1965).

Betts to "restore constitutional principles established to achieve a fair system of justice." *Id.* at 344.[7]

2. Even more so than *Gideon*, *Ramos* announced a Sixth Amendment rule that both: (a) restored our understanding of a bedrock procedural element essential to the fairness of criminal proceedings (at least in Louisiana and Oregon); and (b) remedied an impermissibly large risk of inaccurate convictions.

a. *Ramos* "alter[ed] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." See *Teague*, 489 U.S. at 311.

The *Ramos* Court recognized that *Apodaca* was "unmoored . . . from the start," and "sits uneasily with 120 years of preceding case law." 140 S. Ct. at 1405. Canvassing relevant historical sources, the majority in *Ramos* explained that "unanimous verdicts had been required for about 400 years" before the Bill of Rights. *Id.* at 1396. In fact, unanimity was considered an "essential" and "indispensable" feature of the jury trial right—itself deemed "fundamental to the American scheme of justice." *Id.* at 1396–97. Not only was *Apodaca* "gravely mistaken," this Court said, but it also failed to reckon with "the racist origins of Louisiana's and Oregon's laws." *Id.* at 1405.

Ramos thus "restore[d] constitutional principles" essential to "achieve a fair system of justice" that are rooted even more deeply in tradition and the Constitution than the right to counsel. See *Gideon*, 372 U.S. at 344. The jury trial right traces back centuries be-

---

[7] Although *Gideon* was decided before *Teague*, it would have qualified as a "new rule" under modern retroactivity jurisprudence. *See Saffle*, 494 U.S. at 488 ("The explicit overruling of an earlier holding no doubt creates a new rule.").

fore the Bill of Rights, and constitutes an "ancient guarantee." *Ramos*, 140 S. Ct. at 1400–01. The Framers twice included the jury trial right in our Constitution. U.S. Const. amend. VI; see also U.S. Const. art. III, § 2. And this "grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan*, 391 U.S. at 157–58; see also *Ramos*, 140 S. Ct. at 1424 (Thomas, J, concurring) ("The Sixth Amendment right to a trial by jury is certainly a constitutionally enumerated right."); The Federalist No. 83 (Alexander Hamilton) (describing trial by jury as "the very palladium of free government").

The unanimity guarantee is an essential component of the Sixth Amendment jury trial right. *Ramos*, 140 S. Ct. at 1395–97; see also *id.* at 1409 (Sotomayor, J., concurring) (explaining that jury unanimity "ranks among the most essential" constitutional protections); *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'").[8]

---

[8] *See, e.g.*, *Am. Publ'g Co.* v. *Fisher*, 166 U.S. 464, 468 (1897) (describing unanimity as one of the "essential features of trial by jury at the common law"); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 777 (1833) (explaining that "unanimity in the verdict of the jury is indispensable"); 2 James Wilson, *Works of the Honourable James Wilson* 350 (1804) (explaining that unanimity is "of indispensable necessity"); 1 John Adams, *A Defence of the Constitutions of Government of the United States of America* 376 (1794) (explaining that unanimity "preserves the rights of mankind"); 3 William Blackstone, *Commentaries* *379 (explaining that the protection against conviction absent "unanimous consent" of the jury "is the most transcendent privilege which any subject can enjoy, or wish for").

The rejection of *Apodaca* in *Ramos* thus effected a profound and sweeping change in Louisiana and Oregon. See 140 S. Ct. at 1428 (Alito, J., dissenting) ("Louisiana and Oregon tried thousands of cases under rules allowing conviction by a vote of 11 to 1 or 10 to 2, and appellate courts in those States upheld these convictions based on *Apodaca*"); see also *Whorton*, 549 U.S. at 421 (noting that watershed rules effect "profound and sweeping change") (internal quotation marks omitted)). Prosecutors in those two States can no longer obtain convictions under jury regimes stained by a "legacy of racism," and all other States are now foreclosed from experimenting with similar non-unanimous jury practices. *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring) ("Louisiana's and Oregon's laws are fully—and rightly—relegated to the dustbin of history").

Structural error analysis confirms that *Gideon* and *Ramos* both implicate fundamental fairness. As this Court has held, "deprivation of the right to counsel [is] a 'structural' error that so 'affec[ts] the framework within which the trial proceeds' that courts may not even ask whether the error harmed the defendant." *Luis* v. *United States*, 136 S. Ct. 1083, 1089 (2016). A conviction by a non-unanimous jury results in "no verdict at all." *Ramos*, 140 S. Ct. at 1395 (internal quotation marks omitted). Such error would not likely be amenable to review for "harmless[ness]." *Id.* at 1408 (opinion of Gorsuch, J., joined by Ginsburg, Breyer, & Sotomayor, JJ.). As with *Gideon, Ramos* violations "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" See *Neder* v. *United States*, 527 U.S. 1, 8–9 (1999).

b. The rule announced in *Ramos* also "assure[s] that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." See *Teague*, 489 U.S. at 312. It does this in three ways.

First, if a jury fails to reach a unanimous verdict—whether guilty, or not guilty—there is "no verdict at all" and thus no factual determination. *Ramos*, 140 S. Ct. at 1395 (internal quotation marks omitted); see also 4 William Blackstone, *Commentaries* *343 ("[T]he *truth of every accusation*" must be "confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours" (emphasis added)). The resulting mistrial reflects a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970); see also 4 William Blackstone, *Commentaries* *358 ("[T]he law holds that it is better that ten guilty persons escape, than that one innocent suffer.").

Ramos thus puts the government to its proper burden of proof in the fact-finding process. The unanimity requirement approximates the nearest thing to "accuracy" envisioned by our criminal justice system. See *Descamps* v. *United States*, 570 U.S. 254, 269 (2013) ("The Sixth Amendment contemplates that a jury" will find essential "facts" "unanimously and beyond a reasonable doubt."); see also *Johnson*, 406 U.S. at 403 (Marshall, J., dissenting) ("The doubts of a single juror are . . . evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.").

In *Ramos*, the amicus brief of the Innocence Project detailed cases of inaccurate convictions by non-unanimous juries. "Non-unanimous jury verdicts of guilt have created an unacceptable risk of convicting

innocent Louisiana defendants." Br. of Innocence Project New Orleans et al. as Amici Curiae in Support of Petitioner at 3, *Ramos* v. *Louisiana*, No. 18-5924 (U.S. June 18, 2019); see also *id.* at 3–4 (providing detailed accounts of "13 innocent men," mostly young Black men, who were convicted by split juries and "spent a combined 206 years and four months in Louisiana's prisons" based upon "very slim evidence," and often "in the face of notable evidence casting a doubt on the State's case that was known and presented to the jury at trial"). These cases, and doubtless others, reflect an unusual need for collateral review and diminish the countervailing interest in repose.

Second, unanimous consent guarantees that a majority of jurors cannot simply overrule or ignore the perspective of dissenting jurors. Compare *Pena-Rodriguez*, 137 S. Ct. at 861 (describing the need for "deliberations that are honest, candid, robust, and based on common sense"), with *Johnson*, 406 U.S. at 396 (Brennan, J., dissenting) (lamenting a regime where "consideration of minority views may become nothing more than a matter of majority grace"). A requirement of unanimity fosters additional deliberation, careful consideration of the evidence from all viewpoints, and ultimately more accurate results. See *id.* at 388, 392 (Douglas, J., dissenting) (explaining that reliability flows from full "debate and deliberat[ion]," and describing how evidence may different "overtones" to different jurors).

Empirical evidence also suggests that unanimous juries apply facts to law more accurately than non-unanimous juries. See *Ramos*, 140 S. Ct. at 1401 (citing studies). For example, in one mock jury experiment, researchers created a condensed reenactment of an actual murder trial. Reid Hastie et al., *Inside the Jury* 38 (1983). There was consensus among legal

professionals surveyed that, given the facts, a first degree murder verdict was untenable. *Id.* at 62. Mock jurors were then selected from Massachusetts citizens called for jury duty in three counties over 15 months. *Id.* at 45, 51. Some of the mock juries were instructed they had to return a unanimous verdict, while others were instructed that consensus among eight or 10 jurors was sufficient. *Id.* at 50.

The results showed the accuracy-enhancing benefits of jury unanimity. While approximately 22% of all jurors were inclined towards the first degree murder verdict before deliberating, *none* of the unanimous juries returned that legally incorrect verdict—yet 13% of the non-unanimous juries *did*. *Id.* at 60. Jurors in majority rule groups were also significantly less likely to correct erroneous statements of law or fact made by other jurors during deliberations. *Id.* at 88. In addition, unanimous juries were more likely to ask for clarifications of the trial judge's instructions than majority rule groups. *Id.* at 90.

Third, unanimity ensures public "confidence in jury verdicts," which is a "central premise of the Sixth Amendment trial right." See *Pena-Rodriguez*, 137 S. Ct. at 869. As Members of this Court have recognized, "[p]ermitting the State to cut corners in criminal proceedings taxes the legitimacy of the entire criminal process." *Kansas* v. *Ventris*, 556 U.S. 586, 597 (2009) (Stevens, J., joined by Ginsburg, J., dissenting). This is particularly true for non-unanimous convictions. In a criminal justice system where factual findings are largely inscrutable and irrevocable, the community (on behalf of which the jury speaks) demands legitimacy through a unanimous consent rule.

B. *Ramos* is uniquely deserving of watershed status.

1. New watershed rules are "unlikely" to "emerge" in modern society, *Teague*, 489 U.S. at 313, but *Ramos* is the unlikely case because *Apodaca* itself was such an anomaly. See *Ramos*, 140 S. Ct. at 1406 ("[C]alling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company."); see also *id.* at 1409 (Sotomayor, J., concurring) ("*Apodaca* is a universe of one.").

Watershed rules are "components of basic due process" deemed "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313; see also *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.) (describing rules that might emerge with "time and growth in social capacity" or changing "judicial perceptions of what we can rightly demand of the adjudicatory process"). Although these rules have mostly been discovered, *Teague's* watershed exception cannot be a null set. This Court has repeatedly suggested that a *Gideon*-like rule would qualify for watershed status. See *supra* pp. 23–24 & n. 6. And, in past cases, Members of this Court have been willing to hold that certain procedural rules fit the bill. See, *e.g.*, *Tyler* v. *Cain*, 533 U.S. 656, 671–72 (2001) (four dissenting Justices considered *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam) (reasonable doubt instructions), to have established a watershed rule). By rejecting *Apodaca*, the Court in *Ramos* brought Louisiana and Oregon out of the Jim Crow era and into line with the federal government and remaining 48 States. 140 S. Ct. at 1406. If this is not a "watershed"

moment—at least, in Louisiana and Oregon—it is hard to imagine what would be.[9]

2. None of this Court's prior retroactivity cases offered such unique and compelling circumstances. As a result, recognizing that *Ramos* announced a watershed rule—in Louisiana and Oregon—would not unsettle precedent or otherwise result in a barrage of new cases seeking similar treatment. See *Graham* v. *Collins*, 506 U.S. 461, 478 (1993) (explaining that watershed status is reserved for "a small core of rules").

Whorton provides a point of contrast. In that case, the Court explained that *Crawford* v. *Washington*, 541 U.S. 36 (2004), did not qualify for watershed status. *Crawford* held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53–54. This evidentiary device, though important, was "in no way comparable to the *Gideon* rule." *Whorton*, 549 U.S. at 419. *Crawford* not only lacked the "primacy and centrality" of the fundamental right to counsel, *id.* at 421, but it could potentially *decrease* accuracy by permitting admission of "out-of-court *nontestimonial* statements." *Id.* at 419–20 (emphasis added).[10] *Ra-*

---

[9] Chief Justice Johnson, of the Louisiana Supreme Court, has argued that *Ramos* "plainly announced a watershed rule." *State* v. *Gipson*, No. 2019-KH-01815, 2020 WL 3427193, at *2 (La. June 3, 2020) (opinion of Johnson, C.J.). It ended a jury regime that, "[f]or the last 120 years, . . . has silenced and sidelined African Americans in criminal proceedings and caused questionable convictions throughout Louisiana." *Id.*

[10] Most new rules suffer from similar flaws. *See, e.g.*, *Beard*, 542 U.S. at 420 (holding that *Mills* v. *Maryland*, 486 U.S. 367 (1988), was not retroactive because it "applies fairly narrowly

mos stands apart as a "watershed" rule because unanimity is "essential" to the jury trial right, 140 S. Ct. at 1396, and also significantly improves fairness and accuracy in criminal trials.

C. This Court's pre-*Teague* decisions are no obstacle to holding that *Ramos* is a watershed rule.

1. It is no answer that this Court has previously refused to make retroactive other important jury trial rights. In *DeStefano* v. *Woods*, 392 U.S. 631 (1968) (per curiam), the Court held that *Duncan* warranted "only prospective application." *Id.* at 633. *Duncan*, of course, incorporated the Sixth Amendment jury trial right against the States. And in *Allen* v. *Hardy*, 478 U.S. 255 (1986) (per curiam), the Court held that *Batson* was "not . . . available . . . on federal habeas corpus review." *Id.* at 261. *Batson* prohibited States from discriminating based upon race when exercising peremptory challenges against potential jurors in criminal proceedings. Insofar as these pre-*Teague* decisions have any relevance, neither is an obstacle to recognizing *Ramos* as a watershed rule.

First, in *DeStefano*, the Court explained that *Duncan* concerned the choice between a constitutional jury and an otherwise trustworthy judge. It rejected the

---

and works no fundamental shift"); *Schriro* v. *Summerlin*, 542 U.S. 348, 356–58 (2004) (holding that *Ring* v. *Arizona*, 536 U.S. 584 (2002), was not retroactive because "a trial in which a judge finds only aggravating factors" does not "*seriously* diminish[] accuracy"); *O'Dell*, 521 U.S. at 167 (holding that *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), was not retroactive because it concerned "narrow right of rebuttal . . . in a limited class of capital cases"); *Sawyer* v. *Smith*, 497 U.S. 227, 244 (1990) (holding that *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), was not retroactive because it merely "provid[ed] an additional measure of protection against error").

notion that "every criminal trial . . . held before a *judge alone* is unfair or that a defendant may never be as fairly treated *by a judge* as he would be by a jury." *DeStefano*, 392 U.S. at 633–34 (emphasis added); see also *Duncan*, 391 U.S. at 156 (discussing "the more tutored but perhaps less sympathetic reaction of [a] single judge"). After all, during a bench trial, "other safeguards exist[] to ensure the integrity of the factfinding process." *Brown* v. *Louisiana*, 447 U.S. 323, 334 n.13 (1980) (plurality opinion). *Ramos* addressed a different concern altogether, providing "a constitutional rule directed toward ensuring the proper functioning of the jury in those cases in which it *has been provided*." See *id.*[11] Moreover, in *DeStefano*, the Court was wary of retroactivity because "denial of [a] jury trial ha[d] occurred in a very great number of cases." 392 U.S. at 634. But as described in more detail below (see pp. 35–37, *infra*), this case involves a comparatively small subset of defendants in only two States and the relevant reliance interests are uniquely weak.

Second, in *Allen*, the Court recognized that *Batson* was "designed 'to serve multiple ends.'" *Allen*, 478 U.S. at 259. Its holding, grounded in equal protection, "ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race." *Id.* By contrast, *Ramos*'s Sixth Amendment rule demands that the jury—once constituted—finds essential facts "unanimously and beyond a reasonable doubt." See *Descamps*, 570 U.S. at 269. The *Allen* Court also worried that retroactivi-

---

[11] This Court's discussion of judicial factfinding in *Schriro* is likewise inapposite. *See* 542 U.S. at 357 ("If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which *a judge* finds only aggravating factors could be." (emphasis added)).

ty might "seriously disrupt the administration of justice," swamping lower courts with fact-intensive habeas claims. 478 U.S. at 260. Courts would need to assess "the defendant's proof concerning the prosecutor's exercise of challenges," "ask the prosecutor to explain his reasons for the challenges," and confront "problems of lost evidence, faulty memory, and missing witnesses." *Id.* at 260–61. None of those concerns apply to *Ramos*'s bright-line rule: it would be far easier for a court to discern whether a given verdict was, in fact, non-unanimous.

2. Another pre-*Teague* case, *Brown,* 447 U.S. 323, provides a closer analogy. The question in *Brown* was whether *Burch* v. *Louisiana*, 441 U.S. 130 (1979)—which held that non-unanimous six-person juries are unconstitutional in state criminal trials for a non-petty offenses—should apply retroactively.[12] The plurality explained that retroactivity was "clearly require[d]," because divided six-person juries are a "threat to the truth-determining process itself." *Brown,* 447 U.S. at 334 (plurality opinion). Such practices lead to "less accurate factfinding and a greater risk of convicting an innocent person," while also "unfairly disadvantag[ing] . . . the defense" and diminishing "the opportunity for meaningful and appropriate minority representation." *Id.* at 332.

The plurality opinion also noted that *Burch* did not "invalidate a practice of heretofore unquestioned legitimacy," and the rule was "distinctly foreshadowed" in a prior decision. *Id.* at 335–36. Further, retroactivity would "not have a devastating impact on the ad-

---

[12] *Brown* was decided on direct review from the Louisiana Supreme Court. 447 U.S. at 326 (plurality opinion). At the time, "new rules" did not automatically apply retroactively to cases on direct review. *Danforth* v. *Minnesota*, 552 U.S. 264, 266 (2008).

ministration of the criminal law"—in part because "only two states" were implicated. *Id.* at 336. And "the number of persons who would have to be retried or released" was manageable, since *Burch* applied only where "the vote was in fact less than unanimous." *Id.* at 336–37. Here, as in *Burch*, the unanimity guarantee "fundamentally implicates 'the fairness of the trial'" and "the very integrity of the fact-finding process." *Id.* at 334.

III. RETROACTIVE APPLICATION OF *RAMOS* WILL NOT RESULT IN UPHEAVAL.

A. *Ramos* applies retroactively to a relatively small number of cases, and fewer still will require retrials.

Applying *Ramos* retroactively on federal collateral review will provide a remedy only for those in custody pursuant to a non-unanimous jury verdict. See 140 S. Ct. at 1406. In federal court, habeas petitioners must also overcome significant hurdles imposed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), see 28 U.S.C. §§ 2244, 2254. And experience with other retroactivity decisions teaches that it is unlikely that the States will have to retry every defendant who qualifies for relief.

Ramos potentially affects only *prior convictions*. See 140 S. Ct. at 1406. A defendant who knowingly and voluntarily waived her right to a jury trial right—*i.e.*, by pleading guilty or opting for a bench trial—has no viable claim under *Ramos*, significantly reducing *Ramos*'s practical reach. And "the vast majority of criminal convictions result from [guilty] pleas." See *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979); see also *Class* v. *United States*, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting) ("Roughly 95% of felony cases in the federal and state courts are re-

solved by guilty pleas."); *Missouri* v. *Frye*, 566 U.S. 134, 143 (2012) (similar).

This is true in Louisiana and Oregon. Louisiana sees fewer than 450 criminal jury trials per year—roughly one-third of one percent of the number of criminal cases filed (around 140,000 per year).[13] And the frequency of jury trials is not much higher in Oregon. In 2018, only 673 of 29,208 felony cases—or 2.3%—terminated by jury trial.[14] But even those low rates over-represent *Ramos*'s reach because they include trials that ended in acquittals and mistrials.

In any event, not all eligible habeas petitioners would be able to obtain federal relief under *Ramos*. AEDPA's procedural barriers are formidable. For example, with second or successive petitions, AEDPA sets a stringent one-year time limit that runs from the date that the relevant "new rule" was announced. 28 U.S.C. § 2244(d)(1)(C). And in some circuits, that deadline is not tolled while the court of appeals considers whether a petitioner should be granted leave to proceed under 28 U.S.C. § 2244(b)(3). See *In re Wilson*, 442 F.3d 872, 874 & n.3 (5th Cir. 2006). Moreover, even habeas relief does not necessitate retrial. Both the prosecution and the defense would have substantial incentives to reach a plea deal, especially where a defendant may have already served signifi-

---

[13] Sup. Ct. of La., *2019 Annual Report*, at 24–25 (2019), https://www.lasc.org/press_room/annual_reports/reports/2019_AR.pdf; Sup. Ct. of La., *2018 Annual Report*, at 24–25 (2018), https://www.lasc.org/press_room/annual_reports/reports/2018_Annual_Report.pdf.

[14] Or. Judicial Dep't, *Cases Tried Analysis – Manner of Disposition*, at 1 (2018), https://www.courts.oregon.gov/about/Documents/2018CasesTriedAnalysis-MannerofDisposition.pdf.

cant time in prison.[15] In the end, the resulting number of actual retrials in Louisiana and Oregon will burden their judicial systems *far less* than the burden associated with other rules or provisions this Court has applied retroactively in federal court. See *Johnson* v. *United States*, 135 S. Ct. 2551 (2015); cf. *Dillon* v. *United States*, 560 U.S. 817, 823 (2010).

B. The racist origins of non-unanimous jury rules vitiate Louisiana and Oregon's finality interests.

Teague is a principally equitable doctrine. See *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994) (explaining that "a State can waive the *Teague* bar"); see also *Withrow* v. *Williams*, 507 U.S. 680, 717 (1993) (Scalia, J., concurring) (noting that *Teague* "relied on equitable considerations"). In assessing the retroactive effect of *Ramos*, this Court can account for the discriminatory origins and racist purpose of Louisiana's and Oregon's non-unanimous verdict systems.

Ramos thoroughly described the "racist origins of Louisiana's and Oregon's laws." 140 S. Ct. at 1405; see also *id.* at 1410 (Sotomayor, J., concurring) (noting the "legacy of racism that generated Louisiana's and Oregon's laws," and explaining that "the States' legislatures never truly grappled with the laws' sordid history in reenacting them").

As a general matter, this Court concerns itself with only "legitimate reliance interest[s]." Cf. *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018). The explicitly discriminatory origins of the non-unanimity

---

[15] Some studies suggest than no more than one third of cases that end in mistrial are ever retried. *See* Paula L. Hannaford-Agor et al., Nat'l Inst. of Justice, *Are Hung Juries a Problem?*, at 5, 26–27 (Sept. 30, 2002), https://pdfs.semanticscholar.org/5e3c/5ff39710e93371533a5f3b272f1ca913c787.pdf.

rules in Louisiana and Oregon, and their systemic impact on marginalized groups, further undercuts the States' interests in comity and finality. See *Pena-Rodriguez*, 137 S. Ct. at 859 ("Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system."); *United States* v. *Fordice*, 505 U.S. 717, 729 (1992) (policies "traceable" to a State's *de jure* racial segregation and that still "have discriminatory effects" offend equal protection principles).

This Court's decision in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (systemic exclusion of Black persons from the grand jury), noted "more than a century" of precedent, which "repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the selection of the grand jury." *Id.* at 260–61. The Court rejected the suggestion that the State's interest in repose was sufficient to deny habeas relief—after all, "intentional discrimination in the selection of grand jurors is a grave constitutional trespass, . . . and wholly within the power of the State to prevent." *Id.* at 262 Providing the opportunity for a new trial was "not disproportionate to the evil that [the remedy] seeks to deter." *Id.* Much like *Hillery*, the unconstitutional convictions obtained in Louisiana and Oregon are irredeemably tainted by discriminatory laws that perpetuated structural racism in the States' legal systems.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

NAOMI A. IGRA
MATTHEW P. HENRY
BENJAMIN GILLIG
SIDLEY AUSTIN LLP
555 California Street
Suite 2000
San Francisco, CA 94104

ANDRÉ BÉLANGER *
YIGAL BANDER
JAMES P. MANASSEH
MANASSEH, GILL, KNIPE & BÉLANGER, P.L.C.
8075 Jefferson Highway
Baton Rouge, LA 70809
(225) 383-9703
andre@manassehandgill.com

COLLIN P. WEDEL
ANDREW B. TALAI
SUMMER A. WALL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013

Counsel for Petitioner

* Counsel of Record

July 15, 2020