No. 19-5807

In The
Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner,

versus

DARREL VANNOY, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF LOUISIANA PROFESSORS OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

HERBERT V. LARSON, JR.
Senior Professor of Practice
TULANE UNIVERSITY SCHOOL OF LAW
6329 Freret Street
New Orleans, Louisiana 70115
(504) 865-5839
hlarson@tulane.edu
Louisiana Bar No. 8052

Counsel of Record for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and instructors at the four law schools in Louisiana: Louisiana State University Paul M. Hebert Law Center; Loyola University New Orleans College of Law; Southern University Law Center; and Tulane University School of Law. Their research and teaching interests include constitutional law, criminal law, federal criminal procedure, and human rights law. As professors and instructors living and working in the State of Louisiana, they have a strong interest in ensuring that this Court is fully aware of the unique legal history of Louisiana, and the interaction between that history, and the legal history of the United States. More particularly, *amici* have an interest in bringing to the Court's attention the fact that the right to a unanimous jury in all felony trials was a right that was given to all citizens of Louisiana from the moment the territory became part of the United States, and that the deprivation of this right has been contrary to federal law since non-unanimous juries were first permitted by the State of Louisiana in 1880.

A full listing of *amici* appears in the Appendix.

[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Amici argue that the "rule" set out in *Ramos v. Louisiana*, ___ U.S. ___, 140 S.Ct. 1390 (2020) is not a "new rule," as that term has been defined by *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny. Stated another way, *amici* contend that *Ramos's* explicit holding – that the Sixth Amendment's guarantee of a "trial by an impartial jury" means that "a jury must reach a unanimous verdict in order to convict," *Ramos*, 140 S.Ct. at 1395 – has been an obligation of the State of Louisiana (and its predecessor the Territory of Orleans) since 1804.

The groundwork for this obligation was laid by the Treaty of Paris of April 30, 1803 (better known as the Louisiana Purchase); the obligation was explicitly imposed by congressional act in 1804; imposed again by federal territorial act in 1805; imposed again as a condition of statehood in 1811; it was made part of the Act of Statehood in 1812; it was re-imposed by an act of Congress in 1867; reaffirmed by the State Constitution of 1868; required by U.S. Constitutional Amendment in 1868; and then maintained by the State of Louisiana until 1880.

Although the State purported to abandon this obligation in 1880 – when it first passed legislation allowing for a non-unanimous jury – that effort was contrary to the guarantees required by one treaty, multiple federal legislative acts, and the Fourteenth Amendment. In short, all laws of the State of Louisiana since 1880 which purport to deny a criminal defendant

in a felony case a unanimous jury were and are unconstitutional.

Because the Court has not created a "new rule" for Louisiana, the *Teague* retroactivity analysis is inapplicable. Under a straightforward application of the holding of *Ramos*, all persons convicted by a less-than-unanimous jury in a Louisiana court are entitled to a new trial. And under Louisiana Code of Criminal Procedure Art. 930.8A(2),[2] those persons will have up to one year in which to seek relief in the state courts of Louisiana. Although the petitioner in this proceeding is seeking federal habeas relief, a determination by this Court that *Ramos* did not announce a new rule will be dispositive of the question in all federal and state post-conviction proceedings.

[2] Louisiana Code of Criminal Procedure Art. 930.8A(2) provides as follows: [A claim filed after the expiration of the two year limitation period may be filed if] "[t]he claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling." La. Code Crim. Proc. Ann. art. 930.8.

ARGUMENT

I. THE RIGHT TO TRIAL BY JURY IN LOUISIANA – 1804-1861

1. Introduction

The history of the acquisition of Louisiana, and its path to statehood, is "complicated."[3] But three legal facts in that history are beyond dispute: (1) the right to trial by jury did not exist in the Louisiana Territory before 1804; (2) when that right came into existence, in 1804, it was by virtue of a federal act, which granted it to the citizens of Louisiana as one of the common-law "rights, advantages, and immunities of citizens of the United States"; and (3) in 1804 the common-law right to a trial by jury meant juror unanimity – just as it does today.

2. A very brief history of la Louisiane

The territory subsequently forming the Louisiana Purchase was first explored by France, which claimed it as a colony in 1682. Named "la Louisiane" in honor of Louis XIV, it was administered by France from 1682 to 1763. But because the right to trial by jury did not exist in France until 1791, trial by jury did not exist in the territory.[4] Ownership of the territory was then

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[3] Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Jury Verdicts in Louisiana*, Louisiana State University Press, Baton Rouge (2019) – hereinafter "*Jim Crow's Last Stand*."

[4] James Chalmers, *The Codification of Criminal Procedure, in Essays in Criminal law in Honour of Sir Gerald Gordon*, 308 (2010).

transferred to Spanish control in 1763, where it remained until 1800. But the right to trial by jury did not come into existence in Spain until 1820.[5]

The Louisiana Territory was nominally under French control again between October 1, 1800,[6] and 1803, when it was sold to the United States. But France's reacquisition of the territory was not immediately made known to the United States,[7] and the formal transfer of ownership from Spain to France did not occur until November 30, 1803, *i.e.*, some six or seven months *after* the Treaty of Paris. This was also one month *after* Thomas Jefferson had signed into law the Act enabling him to "take possession of the territories ceded by France to the United States."[8]

3. The Louisiana Purchase, and the right to trial by jury

On April 30, 1803, the United States and France entered into "A Treaty between the United States of America and the French republic" for the purchase of

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[5] Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 Hastings Int'l & Comp.L.Rev. 241, 247 (1998).

[6] Treaty of San Ildefonso, Fr.-Spain, art. 3, Oct. 1, 1800.

[7] Leon D. Hubert, Jr., *History of Louisiana Criminal Procedure*, 33 Tul. L. Rev. 739 (1959).

[8] An act to enable the President of the United States to take possession of the territories ceded by France to the United States, by the treaty concluded at Paris on the thirtieth of April last, and for the temporary government thereof, 2 Stat. 245, 8th Cong. Chap. 1 (1803).

a vast tract of land known as "the colony or province of Louisiana."[9]

Article 3 of that Treaty provided as follows:

> Art.3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.[10]

The Treaty was ratified by the U.S. Senate on October 20, 1803,[11] and the United States took possession of the territory on October 31, 1803.[12]

Between October 31, 1803 and March 1804, both houses of Congress engaged in much debate, and held numerous votes on various bills sponsored by each house, all of them pertaining to the governance of this recent acquisition.[13] On March 23, 1804, an agreement was reached, and on March 26, 1804, Thomas Jefferson

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[9] Treaty Between the United States of America and the French Republic, Fr.-U.S., art. I, Apr. 30, 1803.

[10] *Id.* art. III.

[11] Journal of the Executive Proceedings of the Senate of the United States of America, Vol.1, at 450 (1803).

[12] Journal of the Senate of the United States of America, Vol.3, at 302 (1803).

[13] The issue of slavery in the territory was also a topic of much debate. 13 Annals of Cong. 382 (1804).

signed into law "An act erecting Louisiana into two Territories and providing for the Temporary Government thereof."[14]

This Act divided the Louisiana Purchase into two territories: the territory of Orleans, consisting of the southern portion of the Louisiana Purchase – a portion which included what is now the State of Louisiana;[15] and the remainder was to "be called the district of Louisiana."[16]

The Act created a judicial system for each of the two territories.[17] Significantly, the right to a trial by jury was created for the *territorial courts* for the territory of Orleans:

> SEC.5 The judicial power shall be vested in a superior court, and in such inferior courts, and justices of the peace, as the legislature of the territory may from time to time establish. *** In all criminal prosecutions which are capital, the trial shall be by a jury of twelve good and lawful men of the vicinage; and in all cases criminal and civil in the superior court, the

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[14] An Act erecting Louisiana into two Territories and providing for the Temporary Government thereof, 2 Stat. 283, 8 Cong. Chap. 36 (1804).

[15] The northern boundary of the territory of Orleans was fixed at the 33rd degree of north latitude, which is approximately where the northern border of Louisiana is now. *Id.* Sec. 1.

[16] *Id*. Sec. 12.

[17] *Id*. Sec. 5.

> trial shall be by a jury, if either of the parties require it.[18]

The Act of March 1804 remained in effect for only one year – until the Act of March 1805, when Thomas Jefferson signed into law "An Act further providing for the Government of the Territory of Orleans."[19] Although the Act modified the government of the territory of Orleans to make it identical to that of the Mississippi territory, it preserved the laws "in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof. . . ."[20]

More significantly, Section 7 of the Act of March 1805 created a path to statehood for the Territory of Orleans; it reiterated the guarantees of the Treaty of Paris, specifically the guarantees of Section Three of that Treaty, which ensured "the enjoyment of all the rights, advantages, and immunities of citizens of the United States . . . ;" and it required that any constitution of the new state "shall be republican, and not inconsistent with the constitution of the United States, nor inconsistent with the ordinance of the late Congress, passed the thirteenth day of July, one thousand seven hundred and eighty-seven. . . ."[21]

The "ordinance of the late Congress" referred to was "An Ordinance for the Government of the

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[18] *Id.* Sec. 12.

[19] An Act further providing for the government of the territory of Orleans, 2 Stat. 322, 8 Cong. Chap. 23 (1805).

[20] *Id*. Sec. 4.

[21] *Id*. Sec. 7.

Territories of the United States, North-West of the River Ohio,"[22] better known as the Northwest Ordinance. The *Article the Second* of that ordinance contained an enumeration of the rights of the territory's inhabitants, which provided in part: "The inhabitants of the said territory *shall always be entitled to the writ of habeas corpus, and of the trial by jury*."[23]

4. Criminal procedure in the Territory of Orleans from 1805 to 1812

If there was any doubt as to exactly what was required in criminal trials in the newly created Territory of Orleans, it was laid to rest by the Crimes Act of 1805, adopted on May 4, 1805 by the territorial legislature. Section 33 of Chap. 50 of the Act provided as follows:

> All the crimes, offenses and misdemeanors herein before named, shall be taken, intended and construed according to and in conformity with the common law of England; and the forms of indictment (divested however of unnecessary prolixity), the method of trial, the rules of evidence and all other proceedings whatsoever in the prosecution of the said crimes, offenses and misdemeanors, changing what ought to be changed, shall be, except as is by this act other-wise provided for, according to the said common law.[24]

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[22] Northwest Territory Ordinance of 1787, 1 Stat. 52 (1787).

[23] *Id*. art. II (emphasis added).

[24] La. Act of May 4, 1805, Section 33, Chap. 50.

As has been noted by this Court, and by multiple legal historians, "according to the said common law" meant unanimous verdicts in felony jury trials.[25]

5. The creation of the State of Louisiana, and the right to trial by jury

Before the Territory of Orleans could become a state, Congress was required to authorize it to do so – which it did on February 20, 1811.[26] Among the requirements imposed on the Territory for statehood were the following, as set forth in Sec. 3 of the Act:

> . . . [and if there is a majority vote for statehood] then the [statehood] convention shall in like manner declare, in behalf of the people of the said Territory, that it adopts the Constitution of the United States; whereupon the said convention shall be, and hereby is, authorized to form a constitution and State government for the people of the said Territory: *Provided*, the constitution to be formed . . . shall be consistent with the Constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty; that it shall secure to the citizen the trial by jury in all criminal cases, and the privilege of the writ of *habeas corpus*, conformable to the

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[25] *See*, *e.g.,* 4 William Blackstone*, Commentaries on the Laws of England* 343 (1769).

[26] An Act to enable the people of the Territory of Orleans, to form a constitution and state Government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes, Chap. 21, 2 Stat. 641 (1811).

> provisions of the Constitution of the United States * * *.[27]

As required by the Act, Louisiana then created its first constitution. Article VI, Section 18 of this constitution tracked the language of the Sixth Amendment to the United States Constitution:

> Sect. 18th. In all criminal prosecutions, the accused have the right of being heard by himself or counsel, of demanding the nature and cause of the accusation against him, of meeting the witnesses face to face, of having compulsory process for obtaining witnesses in his favour, and prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage, nor shall he be compelled to give evidence against himself.[28]

Finding that the proposed constitution met the requirements imposed by the Enabling Act, in March 1812, both the House and the Senate passed HR 88, entitled "An act for the admission of the State of Louisiana into the Union," which designated April 30, 1812 as the date of admission to the Union, because of the historical significance of that date.

6. Trial by jury in the State of Louisiana between 1812 and 1861.

From the date Louisiana was admitted to the Union in 1812, until the date it seceded from it (January

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[27] *Id*. Sec. 3.

[28] LA. Const. of 1812, art. 4, §18.

26, 1861), every felony jury trial in Louisiana required a unanimous verdict. In Edward Livingston's *Code of Criminal Law and Procedure*, commissioned by the Louisiana Legislature in 1822, and published in 1833,[29] the requirement of unanimity is discussed in more than 10 articles in the five chapters dealing with juries in criminal cases.[30]

Although Livingston's Code did not become law when published, it formed the basis for an official criminal code in 1841. That code was followed by another criminal code in 1855. Significantly, the Act of 1855 creating the criminal code repeats verbatim the language of the 1805 Act requiring the common law "method of trial" for criminal cases.[31]

II. THE RIGHT TO TRIAL BY JURY IN LOUISIANA – 1868-1880

1. The weakening of federal constitutional safeguards in Louisiana

Louisiana's legal history demonstrates a clear Congressional intent to grant Louisiana citizens the same privileges and immunities guaranteed other United States citizens by the Constitution's Bill of Rights – including the Sixth Amendment's right to unanimous juries. Initially, the State of Louisiana understood and upheld those rights. But through a series

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[29] Leon D. Hubert, *History of Louisiana Criminal Procedure*, 33 Tul.L.Rev. 739, 741-42 (1959).

[30] *Jim Crow's Last Stand*, *supra*, p.7.

[31] La. Act 121 of 1855, § 73.

of decisions, beginning with *Barron v. Baltimore*, 32 U.S. 243 (1833), the Court created a "legal opening," one that the State of Louisiana would ultimately exploit in its efforts to deprive its Black citizens of their constitutional rights.

In *Barron v. Baltimore*, the Court held that the Bill of Rights restricted only the Federal Government, not state governments. *See* 32 U.S. 243, 250 (1833) (determining that the Fifth Amendment "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states").

In the years that followed, the Court reaffirmed the reasoning in *Barron*, finding that the various other provisions of the Bill of Rights did not obligate the states. *See*, *e.g.*, *Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. (3 How.) 589, 610 (1845) (holding that the First Amendment does not apply to states); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434 (1847) (holding that the prohibition against double jeopardy, and other associated prohibitions, "were not designed as limits upon the State governments . . . [t]hey are exclusively restrictions upon federal power"); *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475, 479-804 (1867) (holding that the Eighth Amendment "does not apply to State but to National Legislation").

The Court's decision in *Permoli* is significant for another reason: the case established that Louisiana was not bound by the obligations initially imposed upon it as conditions for admission to the Union. 44

U.S. at 610. The *Permoli* Court held that the obligations imposed by the Congressional Act of 1811, including Louisiana's obligation to "secure to the citizen the trial by jury in all criminal cases . . . conformable to the provisions of the Constitution of the United States,"[32] were "all superseded by the state constitution" and therefore, not "in force, unless they were adopted by the constitution of Louisiana, as laws of the state." *Id.* at 610.

Thus, by 1861, the jurisprudential rule was well established: states were not bound by the Bill of Rights.

2. The Fourteenth Amendment: Congress's Response to Barron

Following the end of the Civil War in 1865, Congress began to pass legislation specifically designed to protect the rights of the newly liberated slaves residing in the states of the Confederacy, which were systematically being denied.[33] Representative Frederick Woodbridge described the need for this Congressional action: "[f]our million people have been born in a day . . . if Congress does not do something to provide for these people . . . [t]he accumulated prejudices of

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[32] An Act to enable the people of the Territory of Orleans, to form a constitution and state Government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes, Chap. 21, 2 2 Stat. 641 (1811).

[33] Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment*, 49 Conn. L. Rev. 1069, 1083 (2017).

centuries, together with the unmitigated wrath of those who have held them in bondage . . . will culminate upon their heads." Cong. Globe, 39th Cong., 1st Sess., Globe 1089 (1866).

The first significant legislative effort was the Civil Rights Act of 1866.[34] But unsure of its constitutional power to enforce the goals of that act, and desiring to act more broadly, the Republican majority in Congress proposed a constitutional amendment: the Fourteenth Amendment.[35]

The legislative history of the Amendment makes it abundantly clear that its Privileges or Immunities Clause was intended to abolish the rule in *Barron*, and to require the states to adhere to the Bill of Rights. Representative John Bingham,[36] the principal drafter of the Amendment's Privileges or Immunities Clause, introduced the first draft of the Clause to the House of Representatives. In a speech on the House floor,

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[34] An Act to protect all Persons in the United States in Their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27-30, enacted April 9, 1866; ratified 1870 (The Act was originally vetoed by Andrew Johnson, but his veto was overridden by Congress. The Act was not actually ratified until after the passage and ratification of the 14th Amendment).

[35] Roger Newman, *The Constitution and its Amendments*, Vol.4, p.8 (Macmillan, 1999); *see also* Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment*, 49 Conn. L. Rev. 1069, 1085 (2017).

[36] John Bingham was also a member of the Joint Congressional Committee on Reconstruction. *See* Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment*, 49 Conn. L. Rev. 1069, 1083 (2017).

Representative Bingham cited the *Barron* decision to show that, under the current rule of law, "the power of the Federal Government to enforce in the United States courts the bill of rights under the article of amendment to the Constitution had been denied." Cong. Globe, 39th Cong., 1st Sess., Globe 1089 (1866). Accordingly, Representative Bingham characterized the Privileges or Immunities Clause as "a proposition to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today." *Id.* at 1088.

Similar sentiments were expressed in the Senate. Upon introduction of the Fourteenth Amendment to the Senate, Senator Jacob Howard explained that the "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." Among these "great fundamental guarantees," Senator Howard listed the "rights guaranteed and secured by the first eight amendments of the Constitution," including a defendant's "right to be tried by an impartial jury of the vicinage." Cong. Globe, 39th Cong., 1st Sess., Globe 2765-2766 (1866).

The Amendment was passed by Congress and sent to President Andrew Johnson in June of 1866, with a resolution requesting that President Johnson transmit it to the states for ratification.[37]

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[37] Joint Resolution Proposing an Amendment to the Constitution of the United States, No. 48, 14 Stat. 358 (1866).

On June 16, 1866, Secretary of State William Seward transmitted the Fourteenth Amendment to the governors of all the states for ratification. The state legislatures of every former Confederate state, except Tennessee, refused to ratify it. In response to this rejection, Congress passed the four statutes known as the Reconstruction Acts of 1867-1868.[38] Collectively, these Acts required a state seeking readmission to the Union to, *inter alia*: (1) adopt a new constitution, one acceptable to Congress; (2) grant universal suffrage to all men over the age of 21, regardless of race; and (3) *ratify the Fourteenth Amendment*. *See* An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, 40 Cong., Sess. II, Chap. 70 (1868).

3. Louisiana's New Constitution and Its Readmission to the Union

Louisiana's "new" constitution of 1868 was certainly drafted to be acceptable to Congress: it began with a "Bill of Rights," one that paralleled the Federal one. Article 6 of that "Bill of Rights" provided, in part:

> ART. 6 – Prosecution shall be by indictment or information. The accused shall be entitled to a speedy public trial by an impartial jury of

[38] The first of the four was An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428-430, 39 Cong. Chap. 152, 153 (1867). The other three were passed on March 23, 1867, 15 Stat. 2-5, Chap. 6; July 19, 1867, 15 Stat. 14-16, Chap. 30; and March 11, 1868, 15 Stat. 41, Chap. 25.

> the parish in which the offence was committed, unless the venue be changed. * * * [39]

As was the case with previous guarantees of trial by jury, it was understood that the right incorporated a unanimity requirement. A code of judicial practice adopted pursuant to the 1868 Constitution specifically called for a twelve-man jury, one that was permitted to convict or acquit only "if it appear that all the jurors have agreed to the verdict."[40] But as was the case with the *Barron* decision, another decision from this Court disregarded the clear intent of Congress and ultimately gave leave to Louisiana to amend its laws and abandon these protections.

4. The *Slaughter-House Cases*: limiting the scope of the Privileges or Immunities Clause

Four short years after the Fourteenth Amendment's ratification, the Court handed down its opinion in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), holding that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." 83 U.S. at 79. Amongst this narrow group of rights, the Court listed "free access to [Federal] seaports," Federal protection

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[39] LA. Const. of 1868, art. 6.

[40] *Jim Crow's Last Stand*, *supra*, p.8 (quoting *The Code of Practice of the State of Louisiana* (New Orleans: The Republican, 1870)).

"when on the high seas or within the jurisdiction of a foreign government," the right to "peaceably assemble," and the "privilege of the writ of habeas corpus." *Id.* at 79-80.

As for the more "fundamental" civil rights, the Court determined these were privileges or immunities of *state* citizenship, exclusively, and were therefore, not protected by the Fourteenth Amendment. *Id.* at 76. Following the *Slaughter-House Cases*, the Court handed down two opinions that effectively foreclosed any application of the Bill of Rights to the states. *See Maxwell v. Dow*, 176 U.S. 581, 597-98 (1900); *In re Kemmler*, 136 U.S. 436, 448-49 (1890).

In short, the *Slaughter-House* Court refused to read the Privileges or Immunities Clause as making the Court "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens" or to "fetter and degrade the State governments by subjecting them to the control of Congress . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 83 U.S. at 78.

But the legislative history makes clear that this was, in fact, the express purpose of the Privileges or Immunities Clause.[41] Instead of respecting, and

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[41] As Justice Black pointed out, in the *Slaughter-House Cases* the Court was not presented with evidence "show[ing] that the special sponsors of the Amendment in the House and Senate had expressly explained one of its principal purposes to be to change the Constitution as construed in *Barron v. Baltimore* . . .

adhering to the drafters' primary purposes, the Court ignored them – thus opening the door to the very evils the Fourteenth Amendment had been adopted to prevent.

III. THE RIGHT TO TRIAL BY JURY IN LOUISIANA – 1880-2020

1. In the wake of the *Slaughter-House Cases*: Louisiana removes unanimous juries

Eight short years after the Court's decision in the *Slaughter-House Cases*, Louisiana began to exploit it. At its Constitutional Convention of 1880, the State of Louisiana began by restricting the right to vote. Louisiana's motives for doing so were clear. In a speech delivered to the entire convention, Thomas T. Land, a former Louisiana Supreme Court Justice, asserted that:

> The right of this convention to deny or abridge the right of suffrage is not only admitted in the fourteenth amendment, but the consequence of such denial or abridgement is declared to be a proportional reduction of the representation of the State in Congress. The proposition that this convention has the power to prescribe an educational or property qualification as a prerequisite to the exercise of the right of suffrage cannot be questioned or denied. * * * The effect would be to break

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and make the Bill of Rights applicable to the states." *Adamson v. California*, 332 U.S. 46, 75 (1947) (Black, J., dissenting).

> down the colored majorities in all the parishes of the state, and to place the government under the control and administration of the white man for the present and all future time. * * * The right of suffrage which has been conferred upon [the colored man] has been the direful spring from which all his woes have flowed, and from which all the woes of our people and state have flowed as if from a gushing fountain. * * * That he should be permitted to exercise this right is wrong in theory, wrong in principle, and violates the fundamental principles of every representative form of government which requires for its support an enlightened and interested constituency. * * * That this convention has the power to prescribe an educational or property qualification as a prerequisite to the right of voting can not be disputed under the constitution of the United States.[42]

That same year, the Louisiana Legislature passed a bill allowing for conviction by a vote of 9 of 12 jurors.[43] It was, in the words of historian Thomas Aiello, a change designed "to make criminal convictions of freedmen that much easier – [by] aiding the state's

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[42] A Speech Delivered by the Hon. Thomas T. Land, on the Subject of the Elective Franchise, in the Constitutional Convention at New Orleans, on July 10, 1879, The Daily City Item (New Orleans), July 15, 1879.

[43] Acts Passed by the General Assembly of the State of Louisiana at the Regular Session Begun and Held in the City of New Orleans on the Twelfth Day of January, 1880, 141-2.

criminal conviction rate and its fodder for convict lease."[44]

The Louisiana Constitution Convention of 1898, "dominated by celebrations of white supremacy,"[45] simply constitutionalized Jim Crow, by placing further restrictions on black voting rights,[46] and eliminating constitutional (unanimous verdict) jury trials. Although subsequent Louisiana constitutions, such as the Constitution of 1974, were not so dominated, the original motives of the drafters of the 1880 legislation and the 1898 Constitution could not be erased. Neither could the unconstitutionality of their efforts.

IV. RETROACTIVITY AND THE RIGHT TO TRIAL BY JURY IN LOUISIANA – 2020-2021.

In *Ramos*, the Court took the first step in correcting the 140 years of injustice worked by Louisiana's attempted repeal of the Sixth Amendment's unanimity requirement when it ruled that states are obligated to provide for unanimous jury verdicts in accordance with the Sixth Amendment. The question now before the Court is whether this rule is retroactive.

The first step in the Court's assessment is to determine whether the rule in *Ramos* was, in fact, a "*new*

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[44] *Jim Crow's Last Stand*, *supra*, p.19.

[45] *Jim Crow's Last Stand*, *supra*, p.17.

[46] The 1898 Constitution created a poll tax and imposed literacy and property-ownership requirements for voting. LA. Const. of 1898, arts. 197, 198.

rule." It is "often difficult to determine when a case announces a new rule." *Teague v. Lane*, 489 U.S. 288, 301 (1989). But in general, a case announces a "new rule" only when it "breaks new ground or imposes a new obligation on the government." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Teague*, 489 U.S. at 301 (internal quotations omitted)).

The detailed history recited above makes clear that requiring unanimous jury verdicts in criminal trials is not a new obligation on Louisiana. The Treaty of Paris of April 30, 1803 created the original obligation.[47] In accordance with that treaty, Congress obligated the original Orleans Territory to provide its citizens the jury trial right, in conformity with the Constitution. Congress conditioned Louisiana's statehood on its continued fulfillment of this obligation. And Congress ultimately reimposed the obligation through the Fourteenth Amendment.

Even if it is (and was) possible to ignore all legal developments before 1868, the Fourteenth Amendment cannot be ignored. Thus, the only real question then becomes which section of that Amendment obligated Louisiana: the Privileges or Immunities Clause, or the Due Process Clause? *Amici* submit that the Privileges or Immunities Clause obligated Louisiana to provide for the rights listed in the Sixth Amendment. To the extent the *Slaughter-House Cases* failed to

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[47] *Cf. McGirt v. Oklahoma*, 591 U.S. ___ (July 9, 2020).

appreciate the true scope of the Privileges or Immunities Clause, the Court should reconsider that holding.[48]

The *Slaughter-House Cases'* narrow reading of the Privileges or Immunities Clause is, as Justice Black pointed out, attributable to the Court's not being presented with evidence "show[ing] that the special sponsors of the Amendment in the House and Senate had expressly explained one of its principal purposes to be to change the Constitution as construed in *Barron v. Baltimore* . . . and make the Bill of Rights applicable to the states." *Adamson v. California*, 332 U.S. 46, 75 (1947) (Black, J., dissenting). The significance of this evidence is unquestionable; the Court based its narrow reading of the Privileges and Immunities Clause partially on the "absence of language" supporting the broader reading. *See Slaughter-House Cases*, 83 U.S. at 78.

Consequently, there is wide agreement among scholars and jurists that the *Slaughter-House Cases* were wrongly decided.[49]

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[48] Because the *Slaughter-House Cases* concern a Constitutional interpretation, the rule of *stare decisis* is not as "inflexible" as it would be otherwise. *Ramos*, 140 S.Ct. at 1413-14 (Kavanaugh, J., concurring in part). Additionally, the decision is "grievously or egregiously wrong", as it fails to account for the very evidence it found wanting: the drafters' clear intent to enforce the Bill of Rights against the states. *See id.* at 1414.

[49] *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases 70 Chi. Kent L. Rev. 627, 627 (1994) – collecting scholarly views; Wilson R. Huhn, *The Legacy of* Slaughterhouse, Bradwell *and* Cruickshank, 42 Akron L.Rev. 1051 (2009) – same.

And members of this Court have urged a return to the original meaning of the Privileges or Immunities Clause. *See Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Black, J., concurring) ("[i]n closing I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States"); *McDonald v. City of Chicago*, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part and concurring in the judgment) (rejecting "*Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship"); *id.* at 823 ("[t]he evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution"); *see also Timbs v. Indiana*, 139 S.Ct. 682, 691 (2019) (Gorsuch, J., concurring) (acknowledging "the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause").

Under a more historically accurate reading of the Privileges or Immunities Clause,[50] the outcome is

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[50] The word "privilege" has been associated with the right to trial by jury (and a unanimous verdict) since at least 1765. In his *Commentaries on the English Law*, Blackstone describes trial by jury as "an advantage over [the legal systems of] others," and "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 neighbors and equals." 3 William Blackstone, *Commentaries on the English Law*, 379 (1768).

clear: Louisiana has been federally obligated to provide for unanimous juries in felony trials since the Privileges or Immunities Clause was ratified in 1868. *Ramos* did not impose any new obligation on Louisiana.

The Court may decide, however, that the Sixth Amendment's protections were incorporated and made binding on Louisiana *via* the Fourteenth Amendment's Due Process Clause. In such case, the result remains the same: there is no "new rule." Louisiana has been obligated to adhere to the Sixth Amendment's protections since the Court's decision in *Duncan v. Louisiana*, 391 U.S. 145.

Ultimately, whether the Privileges or Immunities Clause or the Due Process Clause incorporates the Sixth Amendment's protections is inconsequential to this case – as long as the Court recognizes that it is the Fourteenth Amendment that obligates Louisiana, not the *Ramos* decision.

Requiring Louisiana to do what it has always been obligated to do is to enforce the law, not create it. Put another way, *Ramos* did not create any new obligation; it acknowledged a pre-existing obligation. And, as Justice Gorsuch recently wrote, those obligations must be honored:

> Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding

injustices over the law, both rewarding wrong, and failing those in the right.[51]

This case, and the others just like it in Louisiana, prove the truth of William Faulkner's observation that "[t]he past is never dead. It's not even past."[52] But these cases also present the Court with an opportunity to confront a very painful part of that truth, and correct one more vestige of the horrible legacy of slavery. The Court should seize it.

CONCLUSION

Wherefore, the Court should find that the Sixth Amendment's right to a unanimous jury, as recognized by *Ramos*, has been constitutionally guaranteed since 1868, and that accordingly *Ramos* did not announce a new rule.

Respectfully submitted,

HERBERT V. LARSON, JR.
Senior Professor of Practice
TULANE UNIVERSITY SCHOOL OF LAW
6329 Freret Street
New Orleans, Louisiana 70115
(504) 865-5839
hlarson@tulane.edu
Louisiana Bar No. 8052

Counsel of Record for Amici Curiae

[51] *McGirt v. Oklahoma*, 591 U.S. ___ (July 9, 2020), at p.42.

[52] William Faulkner, *Requiem for a Nun* (Random House, N.Y., 1951).