No. 19-5807

In The Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner,

v.

DARREL VANNOY, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

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

BRIEF OF HUMAN RIGHTS FOR KIDS AND LOUISIANA CENTER FOR CHILDREN'S RIGHTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

JAMES DOLD
SUZANNE LA PIERRE
JOHN ELLEM
HUMAN RIGHTS FOR KIDS
P.O. Box 5960
Washington, DC 20016
(202) 573-7758

CAROL A. KOLINCHAK
JILL PASQUARELLA
LOUISIANA CENTER FOR CHILDREN'S RIGHTS
1100-B Milton Street
New Orleans, LA 70122
(504) 658-6842

BENNETT L. COHEN
**Counsel of Record*
TONY TORAIN
JACK BLUM
POLSINELLI PC
1401 Eye ("I") Street, N.W., Suite 800
Washington, DC 20005
(202) 783-3300
bcohen@polsinelli.com

Attorneys for Amici Curiae

July 21, 2020

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

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INTEREST OF AMICI[1]

Human Rights for Kids is a non-profit organization dedicated to the protection of children's rights. A central focus of our work is advocating in state legislatures and courts for comprehensive justice reform for children consistent with the U.N. Convention on the Rights of the Child.

The Louisiana Center for Children's Rights is a non-profit organization that represents over 90% of children in New Orleans who come into contact with the juvenile justice system and provides direct representation to youth facing life without parole sentences in Louisiana.

SUMMARY OF ARGUMENT

The impact of the unconstitutional non-unanimous jury rule has been disproportionately visited on black children, who, because of their vulnerability, are doubly impacted. The *Ramos v. Louisiana* decision[2] requires retroactive application under both of the *Teague* exceptions. Non-unanimous juries were adopted as an end-run around the Equal Protection Clause to criminalize being black. Therefore, *Ramos* is a substantive rule

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission. Both parties have consented.

[2] *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020).

under *Teague*. *Ramos* also established a new rule requiring jury unanimity in criminal proceedings. Unanimous juries operated in every state as a sacrosanct right until Louisiana and Oregon, motivated by racial animus, departed from this Constitutional protection.

Jury unanimity is a watershed rule of criminal procedure. This rule is inextricably interwoven with the presumption of innocence and the reasonable doubt standard that ensure the fairness and accuracy of jury trials. Moreover, the racial discrimination underlying both the enactment and the application of the non-unanimous jury rule constitutes structural error. The racist origin of the rule and its resulting impact on black defendants has significantly affected the accuracy of verdicts in criminal proceedings.

As *Ramos* meets both of *Teague*'s exceptions, and children have been especially harmed by these Constitutional violations, the Court should rule in favor of the Petitioner.

ARGUMENT

I. BLACK CHILDREN HAVE BEEN UNFAIRLY TREATED AND DISPROPORTIONATELY HARMED BY THE UNCONSTITUTIONAL LAWS IN LOUISIANA AND OREGON

This Court has not only held that children deserve many of the same protections in delinquency

proceedings as adults in criminal court,[3] but also that their child status entitles them to heightened constitutional protection.[4]

The *Gault* Court found that "failure to observe the fundamental requirements of due process has resulted in instances ... of unfairness to individuals and inadequate or inaccurate findings of fact."[5] Beginning with *Thompson v. Oklahoma*,[6] and continuing through *Miller v. Alabama*,[7] the Court has concluded that child status undermines "the penological justifications for imposing the harshest sentences on juvenile offenders."[8] These special protections have not been limited to the Eighth Amendment. In *J.D.B. v. North Carolina*, for example, the Court considered child status when conducting a *Miranda* custody analysis under the Fifth Amendment.[9]

This Court's decisions stand for more than the proposition that "kids are different." They are a universal recognition that children are more vulnerable to government oppression and tyranny than adults because they lack the ability to defend themselves. In *Gault*, Justice Harlan emphasized that "among the

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[3] *In re Gault*, 387 U.S. 1, 41 (1967).

[4] *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 567 U.S. 460 (2012).

[5] *Gault* at 20.

[6] *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

[7] 567 U.S. 460, 470-71 (2012).

[8] *Id.* at 472.

[9] *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

first premises of our constitutional system is the obligation to conduct any proceeding in which an individual may be deprived of liberty or property in a fashion consistent with the 'traditions and conscience of our people.' The importance of these procedural guarantees is doubly intensified here [where children are involved]."[10] Because children have been harmed by the violations at issue in Oregon and Louisiana, the procedural guarantees of the Sixth Amendment are also *doubly intensified*.

To understand the full impact of the non-unanimous jury rule on kids, it is important to review their treatment in the justice system over the past 40 years. Irrational policies rooted, in part by racism, spawned relaxed juvenile transfer laws beginning in the 1980s in nearly every state.[11] "These reforms lowered the minimum age for transfer, increased the number of transfer-eligible offenses, or expanded prosecutorial discretion and reduced judicial discretion in transfer decision-making."[12] As a result, over a six-year period beginning in 1993, the number of children housed in adult jails more than doubled.[13] By 2009,

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[10] *In re Gault*, 387 U.S. 1, 67 (J. Harlan, concurring and dissenting).

[11] *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, Patrick Griffin, *et al*., OJJDP (September 2011).

[12] *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, Richard E. Redding, OJJDP (June 2010).

[13] Statistical Briefing Book, OJJDP (https://www.ojjdp.gov/ojstatbb/corrections/qa08700.asp).

approximately 200,000 children were being tried as adults annually.[14]

This policy shift occurred alongside the emergence of the "super-predator theory"[15] that proclaimed the appearance of a new wave of children who were more violent and less remorseful than ever before.[16] Characterizing these kids as "Godless," "jobless" and "fatherless" monsters with "no respect for human life,"[17] a major proponent of this now discredited theory emphasized that "the trouble will be greatest in black inner-city neighborhoods."[18] Media "depicted these 'teen killers' and 'young thugs' primarily as children of color."[19] One study found that minority youth appeared in crime news significantly more than white youth (52% versus 35%).[20]

The impact of this history is critical for understanding how the public views black children in the criminal justice system. One study suggests that being primed "over and over through exposure to Black individuals or racially coded language could produce changes in judges' and juries' perceptions of culpability

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[14] *National Prison Rape Elimination Commission Report*, pg. 155 (June 2009).

[15] *The Coming of the Super-Predators*, John DiLulio, Washington Examiner (November 27, 1995).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 583.

[20] *Id.*

and their ensuring punitive judgments."[21] The association between "black" and criminality depicted in the study raises concerns about "lay people's typical notions about the innocence of juveniles."[22] Another study noted that "dehumanization is a necessary precondition for culturally and/or state-sanctioned violence."[23] In this study, beginning at the age of 10, "participants began to think of black children as significantly less innocent than other children at every age group."[24] The authors rhetorically asked, "What might be the consequences of this innocence gap in criminal justice contexts, where perceiving someone as not innocent has the most severe consequences?"[25]

The legislative history of Oregon's and Louisiana's statutes, as well as the social context in which they operated over the past 40 years, provides important background for the devastating impact these laws have had on black and brown children in particular.

In Oregon, around the time the "super-predator" theory emerged, voters approved Measure 11 creating mandatory minimum prison sentences for a number of crimes and requiring automatic transfer to adult court

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[21] *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, Aneeta Rattan, *et al*., PLoS One, pg. 4, May 2012, Volume 7, Issue 5.

[22] *Id.*

[23] *The Essence of Innocence: Consequences of Dehumanizing Black Children*, Phillip Goff, *et al*., Journal of Personality and Social Psychology, 2014, Vol. 106, No. 4, 526-545, 527.

[24] *Id.* at 529.

[25] *Id.*

of youth charged with certain felonies.[26] Today, there are approximately 520 individuals serving adult sentences for offenses alleged to have occurred when they were children.[27] Approximately 34% percent of these children are racial minorities.[28] Black children make up 13% of this population, even though they comprise just 2% of Oregon's total population.[29] The vast majority of youth currently incarcerated—80%—were convicted between 2010 and 2019, suggesting that many of them will be released within the decade.[30] The largest segment of the remaining population, a little more than 14%, were convicted during a 20-year span between 1990 and 2009.[31] Black children also comprise approximately 15% of all children serving life sentences.[32] In addition, black and brown children receive lengthier sentences on average when compared to white youth. Black children on average receive a sentence of 164 months, as compared to 151 months for Hispanic children and 145 months for white children.[33]

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[26] *The Color of Juvenile Transfer: Policy & Practice Recommendations*, Jeree Michele Thomas and Mel Wilson, pg. 7 (2017).

[27] A Statistical Report on Children Convicted in Criminal Court in Louisiana and Oregon, Human Rights for Kids (July 16, 2020) (https://humanrightsforkids.org/wp-content/uploads/2020/07/A-Statistical-Report-on-Children-Convicted-in-Criminal-Court-in-Louisiana-and-Oregon.pdf).

[28] *Id.*

[29] *Id.*; *U.S. Census Data*.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

Black children in Oregon are 13 times more likely to be prosecuted in adult court and subsequently receive a lengthier sentence.[34]

In Louisiana, approximately 2,277 individuals are serving adult prison sentences for offenses they were convicted of as children.[35] Eighty-three percent of these children are black![36] An in-depth analysis of this data reveals several significant findings. First, a little over 7% of the entire population was convicted prior to 1990.[37] The other 93% were convicted during the past thirty years. Approximately 341 children or 15% of the entire population were convicted between 1991 and 2000; 618 children, or 27% of the entire population, were convicted between 2001 and 2010; and 1,152 children or 50% of the entire population were convicted between 2011 and 2020.[38]

The latter group closely tracks the trend observed in Oregon, suggesting many of these children will be released in the coming decade. There is a noticeable increase of children convicted in adult court after 1990, coinciding with the easing of juvenile transfer laws, the

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[34] *The Color of Juvenile Transfer: Policy & Practice Recommendations*, Jeree Michele Thomas and Mel Wilson, pg. 8 (2017).

[35] A Statistical Report on Children Convicted in Criminal Court in Louisiana and Oregon, Human Rights for Kids (July 16, 2020) (https://humanrightsforkids.org/wp-content/uploads/2020/07/A-Statistical-Report-on-Children-Convicted-in-Criminal-Court-in-Louisiana-and-Oregon.pdf).

[36] *Id.*

[37] *Id.*

[38] *Id.*

advent of the super-predator theory, and the negative media portrayal of black children.[39] These stark racial disparities are also consistent across sentencing and age ranges. Of the 387 children listed as having a life sentence, 81% are black.[40] Approximately 80% of children serving life were sentenced between 1981 and 2010.[41] Moreover, 86% of 13 and 14 year-olds, 83% of 15 year-olds, 86% of 16 year-olds, and 82% of 17 year-olds who were convicted of offenses in Louisiana and are currently incarcerated, are black.[42]

Approximately 101 of these children, including 94 whose cases are final, were convicted by non-unanimous juries in violation of *Ramos*.[43] Ninety-one of them, or 90%, are black; 83 of them, or 82%, are serving life or de facto life sentences, meaning they may die in prison unless this Court finds that *Ramos* applies retroactively to cases on collateral review.[44]

Between its *Roper*, *Graham*, *Miller*, and *Ramos* violations, perhaps no state in the country has violated the Constitutional and human rights of children to the degree Louisiana has. The effective convergence of these violations has enabled the state to carry out one

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See Brief of the Promise of Justice Initiative* as Amici Curiae in Support of Petitioner, *Edwards v. Vannoy*, No. 19-5897 cert. granted May 4, 2020.

[44] *Id.*

of the intended purposes behind its non-unanimous jury rule: the expedited conviction and incarceration of black people, in this case, black children. Earlier this year, the Louisiana Supreme Court granted a motion filed by Brandon Boyd and remanded his case for reconsideration in light of *Ramos*.[45] Mr. Boyd, who is black and was 17 years old at the time of the alleged offense, pled not guilty to second degree murder, but was subsequently convicted by a non-unanimous jury.[46] Louisiana affirmed his sentence of life without parole last year.[47] In addition to the questionable grounds on which Mr. Boyd's sentence was affirmed,[48] reasonable doubt also exists as to his guilt. Because his case was still pending on direct appeal, he will receive the benefit of this Court's ruling in *Ramos*.

The procedural importance of jury unanimity in safeguarding the fairness of a trial and the accuracy of a conviction dictates that all children should receive the retroactive benefit of *Ramos*. Recalling Justice Harlan, when children are involved, "the importance of these procedural guarantees is doubly

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[45] *The State of Louisiana v. Brandon Boyd*, Per Curiam, No. 2019-KP-00953 (June 3, 2020).

[46] *Id.*; *see also Louisiana v. Brandon Boyd*, Louisiana First Circuit Court of Appeals, No. 2017-KA-0014R (2019).

[47] *Id.*

[48] *Brief of Juvenile Law Center, NAACP Legal Defense & Educational Fund, Inc., Lawyer's Committee for Civil Rights Under Law, and 65 Other Organizations and Individuals* as Amici Curiae in Support of Petitioner, *Jones v. Mississippi*, No. 18-1259, cert. granted March 9, 2020.

intensified...."[49] The stories of several black children who were convicted in violation of *Ramos* are detailed below.

A. JEROME MORGAN[50]

Jerome Morgan is an African-American who entered the foster care system when he was three years old. Despite growing up in a foster home, Jerome was an exceptional student, earning his way into McDonogh high school, a highly selective magnet school. In May 1993, Jerome attended a birthday party at a hotel ballroom in New Orleans. He was at the back of the room hanging out with friends when the room suddenly lit up, followed by several loud bangs. Jerome took cover until the shooting ended. The gunman immediately fled the scene and a witness to the shooting, Kevin Johnson, unsuccessfully chased him. Within minutes, the police arrived and everyone at the party, including Jerome, provided them with their names and contact information.

That night, 17-year-old Jerome helped save the life of Rogers Mitchell, one of the gunshot victims. Instead of being hailed as a hero, he was wrongly identified as the shooter and charged with murder. At trial, the prosecution relied mainly on eye witness

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[49] *In re Gault*, 387 U.S. 1, 67 (J. Harlan, concurring and dissenting).

[50] The narrative of Jerome Morgan was constructed through Mr. Morgan's recollection and the available record in *State v. Morgan*, 671 So.2d 998 (La.Ct.App. 1996).

identifications to establish their case. The defense presented several witnesses establishing that Jerome was not the shooter, including Rogers Mitchell. After a one-day trial, a jury voted to convict Jerome of second-degree murder by a vote of 10-2. The jurors who voted to acquit were the only two black jurors on the panel. Jerome was sentenced to life in prison without the possibility of parole.

In 2001, the Innocence Project discovered a 911 call log that prosecutors failed to disclose establishing that it was impossible for Jerome to have been the shooter. The prosecution's witnesses also recanted their identification of Jerome and admitted that they were coerced by the detectives to name him as the gunman. Thankfully, Jerome's murder conviction was overturned on January 17, 2014. His case was finally dismissed by the District Attorney on May 27, 2016. Since his release, Jerome has become a dedicated family man and advocate. He helped lead the effort to pass Amendment 2 in 2018, which abolished non-unanimous jury verdicts in Louisiana.

B. COREY ROBINSON[51]

One of six children, Corey Robinson is an African-American male who, prior to his incarceration, resided with his mother, stepfather and siblings. Corey's

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[51] The narrative was constructed through the recollection of Mr. Robinson's trial counsel, Candace Chambliss, and the appellate record, *Louisiana v. Corey Robinson*, No. 2009-KA-0922 (2010).

biological father was not consistently present in his childhood due to his own challenges with the criminal justice system.

In August 2005, Hurricane Katrina struck New Orleans. Corey's family did not evacuate and thus experienced much of the trauma that so many residents suffered in the notorious Superdome relocation and subsequent emergency removal efforts. In the process, Corey and his siblings became separated from their mother. Sadly, her pre-existing health problems became more pronounced in the aftermath of Katrina, and she was taken to a hospital, where she passed away. Corey was reunited with his stepfather at a shelter in Texas, where he learned of his mother's death.

Corey and his two brothers returned to New Orleans to live with their aunt, who had seven children of her own. Corey's sisters and stepfather remained in Texas. Corey's aunt resided in the 9th Ward, a low-income area that suffers from over-policing and extensive drug use and trafficking.

At age 15, Corey was arrested and charged with armed robbery. The victim, who was white, made a night-time, in-person, cross-racial identification of Corey after he had been detained by police officers near the scene of the alleged crime.

Corey's case did not go to trial until March 12, 2009. Much of this time, Corey was either living with his aunt, in a group home or with a foster family as a result of juvenile charges. At trial, a 12-member non-unanimous jury found Corey guilty of armed robbery

with use of a firearm. The overly suggestive identification was admitted at trial. A firearm was never recovered or presented at trial and other evidence in the defense's favor was barred.

There was one not guilty vote that came from a former attorney. Corey was thus convicted in violation of the rule announced in *Ramos*, and sentenced to 15 years in prison, despite the fact that at least one member of the jury had reasonable doubt about his guilt. He served part of his sentence in Angola State Penitentiary, where he was reunited with his biological father. Corey is still incarcerated and maintains his innocence to this day.

C. WILLIE GIPSON

In 1996, when he was 17 years old, Willie Gipson was convicted of second degree murder by a jury vote of 10-2.[52] He was sentenced to life without the possibility of parole. In February 2017, pursuant to this Court's rulings in *Miller* and *Montgomery*, Mr. Gipson received a new sentencing hearing where he received life with the possibility of parole.

The primary evidence against Mr. Gipson was that of a single eyewitness who, before identifying him from a photo array, told police "it would be kind of like hard to [identify the perpetrator]" and "maybe if I see

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[52] *Louisiana v. Gipson*, Supreme Court of Louisiana, No. 2019-KH-01815, pg. 8 (Johnson, C.J., dissenting).

the photos I probably could [identify the perpetrator] because I really didn't look, you know, really see him that well."[53] According to her testimony, the perpetrator "rolled up" on a bicycle as he shot the victim, but did not stop.[54] Although a bicycle was recovered by detectives at a nearby apartment complex, Mr. Gipson's fingerprints were not found on it, nor did he live at the complex.[55]

Despite the lack of any reliable evidence, a non-unanimous jury nevertheless convicted Mr. Gipson over the objections of two jurors.[56] Louisiana Supreme Court Chief Justice Johnson opposed the denial of Mr. Gipson's state habeas petition, forcefully arguing that "Ramos meets the test for retroactive application enunciated by the Supreme Court in *Teague v. Lane*."[57] Willie Gipson, a 17-year-old child wrongly convicted in violation of the Sixth Amendment, may die in prison if this Court does not rule in Petitioner's favor.

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[53] *Id.*

[54] *Louisiana v. Gipson*, Court of Appeals of Louisiana, Fourth Circuit, No. 98-KA-0177, pg. 2 (November 17, 1999).

[55] *Id.*

[56] *Id.*

[57] *Id.*

II. THE *RAMOS* DECISION IS A *SUBSTANTIVE* RULE UNDER *TEAGUE*.

Under the analysis first articulated in *Teague*, a new rule will only be applied retroactively if it is either a substantive rule or a "watershed" rule of criminal procedure.[58] While procedural rules governing jury trials typically implicate a "watershed rule" analysis under *Teague*, the *Ramos* decision exposed several equal protection violations under the Fourteenth Amendment. The non-unanimous jury rule at issue in Louisiana, for example, equated such convictions with lynching black defendants. One local paper endorsing the law wrote "nine times out of ten" non-unanimous juries removed the need for "popular justice."[59] This was echoed by the Judiciary Chairman who defended the new law: "we have also so changed the judicial system that the delays which have so often resulted in a man being hung by a mob will disappear."[60] Louisiana wasn't creating a new procedural rule to determine guilt or innocence. It was criminalizing blackness.

Indeed, media in Louisiana at the time regularly commented on the fact that "juries in these ... localities seem to think that it is their bounden duty to render a verdict of 'guilty as charged,' because the accused has black skin."[61] The non-unanimous jury rule was a

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[58] *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016).

[59] *Id.* at 1613.

[60] *Id.* at 1618.

[61] *The Jim Crow Jury*, Thomas W. Frampton, 71 Vanderbilt Law Review 1593, 1603 (2019).

facially-neutral legal mechanism by which Louisiana could circumvent the U.S. Constitution and lynch black defendants in open court. As the majority and concurrence noted in *Ramos*, not much has changed. Roughly ninety percent of the children who have been convicted by non-unanimous juries in Louisiana are black.[62] NINETY PERCENT.

The *Teague* balancing test between the finality interests of the state and the "countervailing imperative to ensure that criminal punishment is imposed only when authorized by law ... turns on the function of the rule ...," not "whether the underlying constitutional guarantee is characterized as procedural or substantive. It depends instead on whether the new rule itself has a procedural ... or a substantive function."[63] Amici argue that *Ramos* is retroactive because it struck down laws in Louisiana and Oregon that were designed and operated to criminalize discrete and insular minorities as a class. It shouldn't be a crime to be born black in America. The Court cannot allow a Constitutional transgression of this magnitude—criminalizing blackness—to persist out of concern for "reliance interests" or "sentence finality." The rights of black children to simply *exist* outweigh any interest that these states might shamefully muster to the contrary.

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[62] *See Brief of the Promise of Justice Initiative* as Amici Curiae in Support of Petitioner, *Edwards v. Vannoy*, No. 19-5897 cert. granted May 4, 2020.

[63] *Welch v. United States*, 136 S.Ct. at 1266.

III. AS A BEDROCK PROCEDURAL RULE AFFECTING FUNDAMENTAL FAIRNESS AND THE ACCURACY OF CONVICTIONS, *RAMOS* IS A WATERSHED RULE OF CRIMINAL PROCEDURE

To qualify as a "watershed rule" under *Teague*, a new rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction ... and it must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[64]

In *Duncan v. Louisiana*, the Court explained the jury trial right's extensive development at common law:

> ... by the time our Constitution was written, jury trial in criminal cases ha[d] been in existence in England for several centuries.... Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.[65]

By 1769, Blackstone explained that the common law jury trial right required that "the truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals

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[64] *Whorton v. Bockting*, 549 U.S. 406, 417-18 (2007) (internal quotations omitted).

[65] *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

and neighbors."[66] This right "came to America with English colonists."[67] Numerous early State Constitutions "explicitly required unanimity" for jury trials.[68] The Court has long recognized that the Framers largely adopted the full scope of the common law jury trial right, including jury unanimity.[69]

The understanding that unanimity was a fundamental principle of the jury trial right is also reflected in the nearly unanimous practice of the States. From the Founding until 1898, every state required unanimity in felony criminal verdicts.[70] This only changed thirty years after the promulgation of the Fourteenth Amendment, when Louisiana adopted a new constitution providing for non-unanimous felony jury verdicts in order to "establish the supremacy of the white race."[71] In 1934, amid similar aims and a resurgence in the Ku Klux Klan's influence, voters in Oregon also eliminated the jury unanimity requirement.[72]

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[66] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting Blackstone, Commentaries on the Laws of England 343 (1769)).

[67] *Duncan*, 391 U.S. at 152.

[68] *Ramos*, 140 S.Ct. at 1396.

[69] *Id.* at 1400.

[70] *See* Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 179 (1994).

[71] *Ramos*, 140 S.Ct. at 1393.

[72] Kaplan, *et al.*, *Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 4-5 (2016).

"This near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."[73] State practice, in conjunction with the Founders' understanding of the jury trial right, make it clear that jury unanimity is a bedrock procedural element, fundamental to the concept of ordered liberty.[74]

A. JURY UNANIMITY IS INEXTRICABLY LINKED TO BOTH THE "PRESUMPTION OF INNOCENCE" AND THE "BEYOND A REASONABLE DOUBT" STANDARD THAT SAFEGUARD THE FAIRNESS AND ACCURACY OF CRIMINAL JURY TRIALS

As this Court held in *Ramos*, the term "trial by an impartial jury" carried with it *some* meaning about the content and requirements of a jury trial. One of these requirements was unanimity.[75] To ensure the fairness and accuracy of the jury trial, the presumption of innocence, the "beyond a reasonable doubt" standard, and the unanimous jury rule are as essential to the Sixth Amendment as the right to a jury trial itself.[76]

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[73] *Burch v. Louisiana*, 441 U.S. 130, 138 (1979).

[74] *Teague*, 489 U.S. at 311.

[75] *Ramos v. Louisiana*, 140 S.Ct. 1390, 1395 (2020).

[76] *Johnson v. Louisiana*, 406 U.S. 356, 381 (1972) (Douglas, J., dissenting).

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "'enforcement lies at the foundation of the administration of our criminal law.'"[77]

The Court in *Winship* reasoned that the accused "would be at a severe disadvantage ... amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."[78]

Because "it is critical that the moral force of the criminal law not be diluted by a standard of proof that *leaves people in doubt whether innocent men are being condemned,*"[79] the Court held that every element of the offense must satisfy this standard.[80] It stands to reason that the *Winship* rule is of the watershed variety, as it established that defendants in criminal trials are entitled to a *presumption of innocence* that can only be overcome if the government proves every element of an alleged crime *beyond a reasonable doubt*.[81]

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[77] *In re Winship*, 397 U.S. 358, 363 (1970).

[78] *Id*. at 363.

[79] *Id*.

[80] *Id.*

[81] *Id.*

These two pillars of American jurisprudence reflect the belief held at common law that it is better to "err on the side of letting the guilty go free rather than sending the innocent to jail."[82]

> The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt.[83]

Thus, "proof beyond a reasonable doubt, unanimity of criminal verdicts and the presumption of innocence are basic features of the accusatorial system."[84] The absence of any one of them significantly diminishes the function of the others and negatively affects the fundamental fairness, as well as the accuracy, of the criminal proceedings themselves.

The constitutional violations at issue in *Ramos* helped solidify Louisiana as the "world's prison capital" with the highest incarceration rate in the nation.[85] Louisiana is also among the top five States for wrongful convictions.[86] Last year alone, two Louisiana men

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[82] *Id.*

[83] *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953).

[84] *Id.*

[85] *How Louisiana Became The World's 'Prison Capital'*, NPR, (https://www.npr.org/2012/06/05/154352977/how-louisiana-became-the-worlds-prison-capital).

[86] *Shadow of a Doubt*, Emily Bazelon, New York Times Magazine (January 15, 2020).

convicted by non-unanimous juries were exonerated.[87] Archie Williams spent 36 years wrongly imprisoned for rape and attempted murder. Royal Clark spent 17 years wrongly imprisoned for armed robbery.[88] Similarly, in Oregon, 18-year-old Nicholas McGuffin was wrongly convicted of manslaughter by a 10-2 jury and was exonerated in 2019.[89] Bradley Holbrook was convicted of child sex abuse by a 11-1 jury and was exonerated the year before.[90] Diluting the reasonable doubt standard through non-unanimous jury decisions has thus resulted in numerous instances of the innocent being condemned in both states.

B. IN UNDERMINING FUNDAMENTAL FAIRNESS, USE OF NON-UNANIMOUS JURIES CONSTITUTES STRUCTURAL ERROR EQUIVALENT TO THAT OF *GIDEON*

The voices of the dissenting Justices in *Apodaca* and *Johnson* recognized the affront to fundamental fairness caused by the non-unanimous jury rule. They were particularly concerned about the impact of the provision on the participation of minorities in jury deliberations in light of the historic commitment of the Court to safeguard "[t]he guarantee against systematic

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[87] *Louisiana v. Gipson*, No. 2019-KH-01815, C.J. Johnson, dissenting, footnote 5.

[88] *Id.*

[89] The National Registry of Exonerations, (http://www.law.umich.edu/special/exoneration/Pages/browse.aspx).

[90] *Id.*

discrimination in the selection of criminal court juries [that] is a fundamental of the Fourteenth Amendment."[91] Citing an unbroken line of cases beginning with *Strauder v. West Virginia*,[92] where the Court struck down a rule limiting jury participation to white men, Justice Stewart stated:

> The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure that such participation will be *meaningful*—the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class.[93]

The dissent's concerns have subsequently been validated by numerous studies showing the negative impact on the fairness of non-unanimous jury trials.[94] Minorities are underrepresented in jury pools, usually leading to their being outnumbered on petit juries,

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[91] *Johnson v. Louisiana*, 406 U.S. at 397 (Stewart, J., dissenting). *See also Apodaca v. Oregon*, 406 U.S. 404 (1972) and dissents at 406 U.S. 380-403.

[92] 100 U.S. 303 (1880).

[93] *Johnson v. Louisiana*, 406 U.S. at 397 (italics added).

[94] *See* studies cited in the briefs submitted in *Ramos*, including Petitioner's Brief at 32-33; ABA Amicus Brief at 2, 17-23; NAACP Brief at 8, 16-18; NACDL Brief at 6-7, 11-12, 15-16; Amicus Brief of Law Professors and Social Scientists *passim*; Amicus Brief of States of New York *et al*. at 13-25.

where their voices are often discounted and even ignored.[95] "Analysis of the 'most comprehensive data assembled to date on race, jury selection, and jury deliberation in U.S. courts' found black members of non-unanimous juries 250% more likely than their white counterparts to cast 'empty' votes—that is, votes to acquit that do not contribute to the verdict."[96] After "extensive social science and historical research," the ABA concluded "that non-unanimous verdicts are inconsistent with a fundamentally fair criminal justice system."[97]

Indeed, a non-unanimous jury rule is most appropriately viewed as structural error, *i.e.*, one affecting "the framework within which the trial proceeds, rather than simply an error in the trial process itself."[98] "Such errors 'infect the entire trial process,' and 'necessarily render a trial fundamentally unfair.' "[99] The structural error doctrine "ensure[s] insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial."[100] While the *Weaver* Court identified three broad rationales for finding structural error, of most relevance to this case is a

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[95] *See* studies cited in Petitioner's Brief at 32-33.

[96] *Id.* at 33.

[97] Brief of the American Bar Association as Amicus Curiae, at 2, n.3, *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020).

[98] *Neder v. United States*, 527 U.S. 1, 8 (1999).

[99] *Id.*

[100] *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907-08 (2017).

finding that "the error always results in fundamental unfairness."[101]

The blatant racial discrimination motivating enactment of the non-unanimous jury rule, and its demonstrated pernicious effects when put into practice, undeniably imperil the fundamental fairness of criminal jury trials in Louisiana and Oregon. This Court's decisions in *Strauder* and its progeny, striking down racial discrimination *inter alia* in the composition of grand and petit juries[102] and the use of peremptory challenges tinged with racial bias[103] resulting in "the exclusion from jury service of a substantial and identifiable class of citizens," shows how these indirect procedures undermine the fairness and legitimacy of the criminal justice system.[104]

This Court's decision in *Vasquez v. Hillery* provides the most guidance for this case.[105] In a collateral proceeding setting aside the defendant's conviction because of intentional racial discrimination in grand jury selection, the Court held that the practice "is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the

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[101] *Id*. at 1908.

[102] *Peters v. Kiff*, 407 U.S. 493 (1972) (opinion of Marshall, J.).

[103] *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

[104] *Peters*, 407 U.S. at 503.

[105] 474 U.S. 254 (1986) (While *Vasquez* did not invoke the structural error doctrine, subsequent Courts have viewed its reasoning premised on *"structural integrity"* as equivalent); *see*, *e.g.*, *Weaver v. Massachusetts*, 137 S.Ct. at 1911-12.

State to prevent."[106] In rejecting the state's administrative burden argument relating to retrials, the Court held that the error "strikes at the fundamental values of our society,"[107] and "undermines the structural integrity of the criminal tribunal itself...."[108] "Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, ... requires our continued adherence to a rule of mandatory reversal."[109] Disputing the state's contention that the error had no effect on the fundamental fairness of the trial, the Court stated:

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions ... even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.[110]

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[106] *Id.* at 262.

[107] *Id.*

[108] *Id.* at 263-64.

[109] *Id.* at 264.

[110] *Id.* at 263.

While the rule at issue in this case does not prevent members of minority communities from being *physically* empaneled, it accomplishes the same proscribed result indirectly by limiting, and in some cases eliminating, *meaningful* participation by this class of individuals in jury deliberations. Indeed, as comprehensively catalogued by this Court in *Ramos*, the purpose behind enactment of the non-unanimous jury rule in Louisiana was "to diminish the influence of black jurors ...,"[111] rendering their service "meaningless."[112]

The racially discriminatory purpose of the rule has been realized, affecting the *fundamental fairness of all* criminal jury trials in Louisiana, and thus satisfying the third rationale underlying the structural error doctrine. As such it shares common ground with the right to counsel as protected in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the absence of which renders the proceedings fundamentally unfair. While the *Gideon* Court did not identify its holding as based on structural error, subsequent Courts addressing the issue have routinely labelled it as such.[113] Indeed, the *Weaver* Court explicitly cited *Gideon* as an example of the third class of structural errors.[114]

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[111] *Ramos v. Louisiana*, 140 S.Ct. 1390, 1417 (2020) (Kavanaugh, J., concurring in part).

[112] *Id*. at 1394.

[113] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *see also Johnson v. United States*, 520 U.S. 461, 468-69 (1997).

[114] *Weaver v. Massachusetts*, 137 S.Ct. at 1908.

Justice Scalia has equated, and arguably elevated, a deficiency in trial by jury procedures similar to that proscribed in *Ramos* to the structural error status of a deprivation of the right to counsel situation, of which a *Gideon* violation is one incarnation.[115] In *Neder*, he cautioned against any actions infringing on that sacrosanct right: "When this Court deals with the content of this guarantee [trial by jury]—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy."[116]

Citing Blackstone, just as this Court did in *Ramos*,[117] he describes the right to trial by jury in criminal cases as "the grand bulwark of [the Englishman's] liberties." It is a cornerstone of American democracy in that it is "the only guarantee common to the 12 state constitutions that predated the Constitutional Convention ... appear[ing] in the constitution of every State to enter the Union thereafter."[118] "By comparison, the right to counsel—deprivation of which we have *also* held to be structural error—is a Johnny-come-lately: Defense counsel did not become a regular fixture of the criminal trial until the mid-1800's."[119]

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[115] *Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., dissenting).

[116] *Id.* at 30.

[117] *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020).

[118] *Neder*, 527 U.S. at 31 (internal citation omitted).

[119] *Id.* (citation omitted).

Justice Scalia's discussion in *Neder* of the fundamental importance of the right to an impartial jury trial parallels this Court's analysis in *Ramos* in which the Court concluded that the trial by jury provision of the Sixth Amendment requires jury unanimity. Given this common historical analysis, this Court should recognize that a non-unanimous jury rule is structural error that always affects fundamental fairness, as it impermissibly operates "on the spinal column of American democracy." Following Justice Scalia's lead, it should further hold that the *Ramos* ruling is of sufficient stature to satisfy *Teague*'s watershed rule exception, as use of a non-unanimous jury is structural error on a par with a deprivation of the right to counsel, which includes a *Gideon* transgression.

This Court has consistently pointed to the lack of counsel condemned in *Gideon* as an example of the type of rule that satisfies *Teague.*[120] The non-unanimous jury rule operates in the same manner and to the same extent as does a *Gideon* violation in abridging the fundamental fairness of *all* criminal jury trials. Both situations are systemic errors that affect *every* criminal proceeding in which they occur. As noted by Justice Scalia, the fundamental right to an impartial jury trial, which this Court has now held to include jury unanimity, is tantamount to, and arguably even more fundamental than, the right to counsel epitomized by *Gideon*. Moreover, Louisiana's non-unanimous jury

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[120] *See*, *e.g.*, *Whorton v. Bockting*, 549 U.S. at 419; *Beard v. Banks*, 542 U.S. 406, 417 (2004); *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

rule is the undisputed product of racial discrimination, whose sole intention was to eliminate meaningful participation by African-Americans in jury deliberations in violation not only of the Sixth Amendment, but also the Fourteenth. Given these circumstances, a rule qualifying as structural error that would require automatic reversal if proven on direct appeal[121] cannot be so emasculated in the context of collateral proceedings that no relief is available even when the devastating impact on both fundamental fairness and the accuracy of convictions is conclusively demonstrated.[122]

These facts alone should be sufficient to meet the *Gideon* standard of impact required to meet *Teague*'s watershed rule exception.

C. NON-UNANIMOUS JURIES POSE AN IMPERMISSIBLY LARGE RISK OF INACCURATE CONVICTIONS, ESPECIALLY TO BLACK DEFENDANTS

Teague's retroactivity test in the procedural context *inter alia* requires a showing of an impermissibly large risk "of an inaccurate conviction.[123] The briefing record in *Ramos*, combined with the demonstrated

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[121] *Weaver v. Massachusetts*, 137 S.Ct. at 1916; *see also Neder v. United States*, 527 U.S. at 7 (Breyer, J., dissenting).

[122] *Weaver*, 137 S.Ct. at 1911-12 (noting that its failure to find a structural error in that case did not call into question the validity of the Court's precedents, nor did it "address whether the result should be any different if the errors were raised ... on collateral review.").

[123] *Weaver v. Massachusetts*, 137 S.Ct. at 1916.

impact of the rule in Louisiana and Oregon, meets this standard.

The studies offered in *Ramos* show that verdict reliability is significantly diminished in non-unanimous jury contexts, as the need to debate and deliberate is significantly reduced.[124] "These verdict-driven decisions, as opposed to evidence-based ones, are less likely to reach an accurate verdict.[125] "There is a suggestion that this may have happened in the 10-2 verdict rendered in only 41 minutes in Apodaca's case."[126]

Once again, the concerns raised by the dissent in the *Apodaca* and *Johnson* cases about verdict inaccuracy have been validated in recent studies. The absence of unanimity improperly allows minority views to be silenced or ignored by a voting majority, raising the risk of inaccurate verdicts.[127] A non-unanimous jury rule "discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly

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[124] *See* studies cited in Amicus Brief of States of New York, *et al*. at 13-16.

[125] *See* studies cited in Amicus Brief of Law Professors and Social Scientists at 15.

[126] *Johnson v. Louisiana*, 406 U.S. at 389 (Douglas, J., dissenting).

[127] *See* studies cited in Amicus Brief of States of New York, *et al*. at 23.

questionable."[128] Unanimity also reduces the likelihood of error.[129]

This helps explain why Louisiana is second in the nation for the rate of wrongful convictions. "In 2017, the Innocence Project-New Orleans reported that [11] of [25] Louisiana exonerations resulted from trials where non-unanimous juries were used."[130] That these harms have been particularly harmful to black defendants is unsurprising. As Justice Kavanaugh observed:

> Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors.... The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors.[131]

Indeed, the Russell-Simerman dataset containing racial demographics collected from nearly 1,000 recent Louisiana jury trials confirms that the Jim Crow jury

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[128] Taylor-Thompson, *supra*, at 1273, cited in ABA Brief at 19.

[129] Hastie *et al*., *Inside the Jury* 60 tbl. 4.1, 62, 81, 88-89 (1983), cited in Amicus Brief of Law Professors and Social Scientists at 8.

[130] *See* ABA Resolution 100B, Report at 4 (May 1, 2018), cited in ABA Amicus Brief at 22, n.13.

[131] *Ramos v. Louisiana*, 140 S.Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part).

is alive and well in Louisiana.[132] The data reveals a compelling, disparate racial impact harming black defendants in criminal trials. This led Chief Justice Johnson of the Louisiana Supreme Court to observe:

> Approximately 32% of Louisiana's population is Black. Yet according to the Louisiana Department of Corrections, 69.9% of prisoners incarcerated for felony convictions are Black. Against this grossly disproportionate backdrop, it cannot be seriously contended that our longtime use of a law deliberately designed to enable majority-White juries to ignore the opinions and votes of Black jurors at trials of Black defendants has not affected the fundamental fairness of Louisiana's criminal legal system.[133]

In quoting Justice Kavanaugh's concurrence, Chief Justice Johnson underscores the negative impact on the accuracy of convictions under Louisiana's non-unanimous jury rule:

> "[I]t has 'allow[ed] convictions of some who would not be convicted under the proper constitutional rule, and [has] tolerate[d] and reinforce[d] a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects.... [134] For the last 120 years, it has silenced and sidelined African

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[132] *The Jim Crow Jury*, Thomas W. Frampton, 71 Vanderbilt Law Review 1593, 1625 (2019).

[133] *State v. Gipson*, No. 2019-KH-01815, at 4 (La. June 3, 2020) (Johnson, C.J., dissenting in denial of certiorari).

[134] *Id.* at *5, quoting *Ramos*, 140 S.Ct. at 1419.

> Americans in criminal proceedings and caused questionable convictions throughout Louisiana."[135]

The Chief Justice concludes that standing by itself, Justice Kavanaugh's accurate summary of the negative effects of the non-unanimous jury rule on the accuracy of Louisiana's convictions "satisfies the relevant portion of *Teague*'s test," thereby requiring retroactive application of the court's decision in *Ramos*.[136]

D. THE USE OF NON-UNANIMOUS JURIES PERPETUATES THE RACIAL DISCRIMINATION PROHIBITED IN *STRAUDER*

Non-unanimous jury decisions violate fundamental fairness by allowing discrimination to covertly enter the jury process and erode confidence in the jury's verdict. This Court's decision in *Batson v. Kentucky*[137] demonstrates how facially neutral rules can undermine fundamental fairness in jury trials. In holding that a prima facie case of deliberate discrimination could be established solely on evidence concerning the prosecutor's exercise of peremptory challenges at trial, *Batson* first reaffirmed its landmark decision in *Strauder*, observing that "selection procedures that purposefully exclude black persons from juries

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[135] *Id.* at 2.

[136] *Id.* at 5.

[137] 476 U.S. 79 (1986).

undermine public confidence in the fairness of our justice system."[138]

Certainly, the ability of an empaneled jury to be able to render a decision without the specter of racial bias carries the same constitutional importance as the actual jury selection process. To the extent a non-unanimous jury works to exclude certain jurors from participating in the outcome of a case, it is as constitutionally flawed as excluding individuals from jury selection based on race. To be clear, as powerful as the decision in *Batson* was, the *Ramos* holding is of even greater magnitude since it addressed the structural codification of racism. *Batson* prevents prosecutors from racial bias on a case-by-case basis. The *Ramos* decision invalidated racial bias in state laws that necessarily governed all cases.

Batson was not decided in a historical vacuum; its roots lie in *Strauder*'s Fourteenth Amendment protections:

> More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. ... In *Strauder*, the Court explained that ... [e]xclusion of black citizens from service as jurors constitutes a primary example of the

[138] *Batson*, 476 U.S. at 87.

> evil the Fourteenth Amendment was designed to cure.[139]

Amici now urge this Court to continue its unceasing efforts of eradicating discrimination by finding that non-unanimous jury decisions are void *ab initio*, applying to all trials whether on direct or collateral review. It is beyond chilling that the tentacles of racial discrimination are so far entrenched in our society that this Court is still being called upon to eliminate racial discrimination in jury selection 38 years after *Batson* was decided. In *Flowers v. Mississippi*,[140] a death penalty case involving a black defendant and white victims, Flowers was tried *six different times* for murder.[141] Over the course of these trials, the prosecutors used their preemptory challenges to systematically strike all black jurors.[142] Flowers was ultimately convicted and his sentence affirmed.[143] This Court reversed, noting that among the evidence that loomed large in assessing the *Batson* issue was the State's history and pattern of peremptory strikes.[144] The Court was particularly concerned that despite *Strauder*, many jurisdictions continue to use covert measures such as these to prevent black persons from serving on juries.

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[139] *Id.* at 85.

[140] *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019).

[141] *Id.*

[142] *Id.* at 2235.

[143] *Id.*

[144] *Id.*

But what good is *Batson* if a State can effectively make an end run around its holding by rendering the minority juror's decision effectively worthless? States can effectively say to this Court: "we will allow black jurors to be empaneled but their vote doesn't have to count."[145] As the *Flowers* Court noted, "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[146] Racial discrimination must be rooted out of every corner of our judicial system, no matter how covertly it is accomplished.

[145] *See Ramos v. Louisiana*, 140 S.Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part).

[146] *Flowers*, 139 S.Ct. at 2238, citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

JAMES DOLD
SUZANNE LA PIERRE
JOHN ELLEM
HUMAN RIGHTS FOR KIDS
P.O. Box 5960
Washington, DC 20016
(202) 573-7758

CAROL A. KOLINCHAK
JILL PASQUARELLA
LOUISIANA CENTER FOR CHILDREN'S RIGHTS
1100-B Milton Street
New Orleans, LA 70122
(504) 658-6842

BENNETT L. COHEN
**Counsel of Record*
TONY TORAIN
JACK BLUM
POLSINELLI PC
1401 Eye ("I") Street, N.W., Suite 800
Washington, DC 20005
(202) 783-3300
bcohen@polsinelli.com

Attorneys for Amici Curiae
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