No. 19-5807

In the Supreme Court of the United States

THEDRICK EDWARDS,
Petitioner,

v.

DARREL VANNOY, WARDEN,
Respondent.

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

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, non-profit civil rights organization formed in 1963 at the request of President Kennedy. The Lawyers' Committee enlists the American bar's leadership and resources to protect and defend the civil rights of African Americans and other people of color. As part of its mission, the Lawyers' Committee works to combat racial inequities and the criminalization of poverty in the criminal justice system.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 to support the civil rights movement in the South, CCR continues to challenge all facets of the systemic racism embedded in this country's criminal justice system, which is so plainly manifested in the application of the death penalty.

SUMMARY OF ARGUMENT

This Court should hold that *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), applies retroactively to cases on collateral review for four different reasons:

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

1. *Ramos* announced a "watershed" rule that falls into the exception for procedural rules under *Teague v. Lane*, 489 U.S. 288 (1989). Louisiana and Oregon created non-unanimous jury systems with the indisputable intent to introduce race-based inaccuracy into the criminal justice system. Derived in Louisiana from a Jim Crow-era racist fear of Black influence, and in Oregon from a racist fear of non-white and immigrant influence, these systems have achieved their intended purposes of reinforcing racial inequities, subordinating racial minorities, and diminishing the accuracy of guilty verdicts for minority defendants.

2. Under *Teague*, the Court's rule in *Ramos* should be considered a substantive one that demands retroactive application. Non-unanimous jury systems inflict unconstitutional racially discriminatory harm, which is beyond the power of the State to inflict. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). Because that harm operates independent of any risk of wrongful conviction, *Ramos* recognized a substantive rule that demands retroactive application under *Teague*.

3. Rules barring discrimination do not implicate the interests *Teague* cited as justifying non-retroactivity. The *Ramos* rule's purpose—ending racial discrimination through unanimous verdicts—eclipses the goals of finality and comity espoused by *Teague*. The systems struck down by *Ramos* undermined the criminal justice system's goals of deterrence, reliability, and finality. Similarly, any comity interests are negated when the underlying convictions were achieved by racist aims that produced racist results. And the

Ramos rule, unlike the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986), is inextricable from the aims of accuracy and truth-finding in criminal trials.

4. The Equal Protection Clause requires retroactive application of *Ramos* to restore individuals deprived of their freedom by racially discriminatory systems with the opportunity to return to "the position they would have occupied" but for the rule's application. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

ARGUMENT

I. Non-Unanimous Jury Systems "Seriously Diminish" Accuracy of Convictions in a Racially Discriminatory Way, Triggering a *Teague* Exception.

A. Non-Unanimous Jury Systems Were Created for Racially Discriminatory Purposes.

The two states to adopt non-unanimous jury systems created them for the vile purposes of silencing minority voices and convicting minorities. This is not only morally abhorrent but also compels the conclusion that the bar on those systems should be retroactive under *Teague*'s exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."

Montgomery, 136 S. Ct. at 728 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)).[2]

The Court in *Ramos* emphasized the discriminatory, racist purposes of the non-unanimous jury system when declaring it unconstitutional. *Ramos*, 140 S. Ct. at 1394 (discussing racist origins of non-unanimous jury laws); *id.* at 1401 (same); *id.* at 1408 (Sotomayor, J., concurring) ("[T]he racially biased origins of the Louisiana and Oregon laws uniquely matter here."); *id.* at 1417 (Kavanaugh, J., concurring) ("In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors.").[3]

1. Louisiana Created Its Law To Eliminate the Influence of Black Jurors.

In 1880, on the heels of the ratification of the Fourteenth Amendment and passage of the Civil Rights Act of 1875, the Court held in *Strauder v. West Virginia*, 100 U.S. 303 (1880), that states could not bar

[2] *Amici* agree with Petitioner that the *Ramos* rule is not new and therefore retroactive. *See generally* Pet. Brief. *Amici* write separately, in part, to provide the Court with further analysis that, even if new, the *Ramos* rule is excepted under *Teague*.

[3] Justice Alito, in dissent in *Ramos*, argued that this original motivation, though deplorable, was not relevant because such laws could be adopted for nondiscriminatory reasons. *Ramos*, 140 S. Ct. at 1425–1426. Subsequently, however, he acknowledged that "I lost, and *Ramos* is now precedent" for the proposition that the discriminatory origins of statutes matter in assessing their constitutionality. *Espinoza v. Montana Dep't of Revenue*, No. 18-1195, 35–36 (U.S. Jun. 30, 2020).

Black jurors. Previously, Louisiana required a unanimous jury for a felony conviction. *See Louisiana v. Hankton*, 122 So. 3d 1028, 1031–32 n.5 (La. Ct. App. 4th Cir. 2013). Once the ruling whites could not deny Black participation on juries as a matter of law, they had to get creative.

Louisiana newspapers promulgated a fear that Black jurors simply would subvert the interests of justice. *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1617 (2018) (quoting Louisiana newspaper articles from the relevant period). That reporting captured the racist underpinnings of that fear, characterizing Black jurors "as ignorant, incapable of determining credibility, and susceptible to bribery." Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 376 (2012). The white majority worried that Black jurors would not vote to convict Black defendants. *See* Frampton, *supra*, at 1603.

Fewer convictions of Black defendants also threatened Louisiana's practice of convict leasing, which involved the State leasing penal labor to plantation owners and corporations to work on farms. "The abolition of slavery changed the penitentiary from a predominantly white institution to one that was majority black. It changed the direction of prison work from industrial to agricultural labor, as white politicians sought to reinstitute a form of control over its newly freed workforce." Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana*, loc. 234 (2015) (ebook) (explaining that after

the Civil War, convict leasing overwhelmingly targeted Black men); Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2009).

Because a convict was "leased" only for the duration of his sentence, there was little-to-no economic incentive for private lessees to maintain safe work environments. Aiello, *supra*, at loc. 259–65 ("Unlike a slave system that kept workers with an owner for life, and therefore made them a long-term investment, [the lessee] had custody of his 'slaves' only for the duration of their sentence . . . and made the potential for [a convict's] illness and death that much greater."). "In economic terms, it made sense to keep the convict at a subsistence, if not lower, level. . . . 'Before the war we owned the negroes. . . . But these convicts we don't own 'em. One dies, get another.'" Nathan Cardon, *"Less than Mayhem": Louisiana's Convict Lease, 1864-1901*, Louisiana History: The Journal of the Louisiana Historical Association 423 (2017); *see also* Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928*, 3 (Univ. of S. Car. Press 1996). An official of the Prison Reform Association of Louisiana estimated that the death rate per 1,000 prisoners per year from 1893 to 1901 was more than 100, which made Louisiana one of the most brutal convict lease systems in the world. Mark T. Carleton, *The Politics of the Convict Lease System in Louisiana: 1868-1901*, Louisiana History: The Journal of the Louisiana Historical Association 6 (1967).

In 1880, to ensure that the State had an ample supply of convicts to sustain its convict-leasing needs,

particularly in light of so many convicts dying because of astoundingly poor conditions, the Louisiana legislature lowered the verdict requirement to allow for non-unanimous jury decisions. *See Acts Passed by the General Assembly of the State of Louisiana at the Regular Session* 141–142 (New Orleans, E.A. Brandao 1880). "Supply had to meet demand. And so the Louisiana legislature created a new law in 1880 that removed the unanimity requirement. . . . The law created a larger criminal population . . . and reenslaved more and more of the state's black population." Aiello, *supra*, at loc. 267–68.

In 1898, the State adopted the non-unanimous jury system into the Louisiana Constitution during a constitutional convention focused on eradicating any meaningful civic participation of Black citizens. *See generally Official Journal of Proceedings of the Constitutional Convention of the State of Louisiana* (New Orleans, H.J. Hearsey 1898) ("Louisiana Convention Record"). The convention adopted the rule that only nine of twelve jurors needed to vote guilty for a conviction, ensuring that three jurors could be ignored. At the time, 14.7% of jury-eligible Louisianans were Black, making it unlikely that more than three Black jurors would be on the same jury. *See* Ex. 21 at 27, *State v. Maxie*, 13-CR-72522 (La. 11th Jud. Dist. Ct. Oct. 11, 2018) (Testimony of Prof. Lawrence Powell); *id.*, slip op. at 28, J.A. 57; *see also Ramos*, 140 S. Ct. at 1394 (noting convention crafted rule "[w]ith a careful eye on racial demographics").

Convention delegates did not hide their racist goals. The convention president proclaimed that the purpose

of the convention was "to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics." Louisiana Convention Record, at 9. The Judiciary Committee Chair declared that the "mission was . . . to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done. . . ." *Id.* at 375; *see also* 33 Cong. Rec. 1063–64 (1900) (Statement of U.S. Senator McEnery from Louisiana describing 1898 convention as aimed at preventing "ignorant blacks" from "getting control of the State").

Louisiana's reenactment of the non-unanimous jury system in 1973 without mention of its racist origins did not in any way sweep those origins under the rug. *See Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring).

2. Oregon Created Its Law To Eliminate the Influence of Non-White and Immigrant Jurors.

Discriminatory, racist fear of minority influence also led to the creation of Oregon's non-unanimous jury system in 1934. *Id.* at 1394 ("Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'") (quoting Opinion and Order at 16, *State v. Williams*, No. 15–CR–58698 (C. C. Ore., Dec. 15, 2016)).

Oregon's fear encompassed Black persons, whom Oregon classified as "immigrants" and prohibited from entering the State until 1927. *Williams*, at 11. In the

1920s, Oregon had the largest Ku Klux Klan chapter west of the Mississippi, totaling more than 200,000 members.[4] In 1934, only seven years after Oregon permitted Black persons to return, its legislature adopted a non-unanimous jury system. *Id.* at 11–12.

Three prominent court-related news stories in Oregon papers led to the State's action. In each instance, Oregon newspapers focused on the racial composition of juries that prevented guilty verdicts, which fueled the public's fears. *Williams*, at 13–14.

First, the "Massie Affair" in Honolulu involved a deadlocked jury in a case alleging the rape of a white woman by five non-white men. A May 7, 1932 column in *The Morning Oregonian* contended that the "native and mixed-blooded people" exhibited a "lack of responsibility" by "freeing the assaulters of Mrs. Massie."

Second, *The Morning Oregonian*, on November 3, 1933, claimed that the influx of immigrants and their children was a cause of widespread jury fixing in Boston: "[M]any people in the world are unfit for democratic institutions . . . , for instance, the complete lack of a sense of responsibility on the part of the recent mixed murder jury in Honolulu."

And third, a critical trial occurred within Oregon. Jake Silverman, a Jewish man charged with murder, ultimately received three years in prison for manslaughter after eleven jurors wanted to convict on

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[4] Oregon Historical Society: The Oregon Encyclopedia, *Blacks in Oregon*, https://oregonencyclopedia.org/articles/blacks_in_oregon/#.XwsKjEVKiM8.

second-degree murder, but one wanted to acquit. *Williams*, at 14–15. The compromise verdict fueled continued public outrage. *The Morning Oregonian*, on November 25, 1933, linked the verdict to "the vast immigration into America from southern and eastern Europe." *See also id.* at 15–16 (noting that media coverage focused on issues of race and jury composition). Within weeks of that trial, the Oregon legislature asked citizens to vote on a constitutional amendment that would allow convictions if ten out of twelve jurors voted guilty. *Id.* (explaining that arguments supporting passage of amendment included specific references to Silverman trial).

"[T]he inescapable conclusion is that the historical evidence supports a racial undercurrent to 302-33 [Oregon's non-unanimous jury system]." *Id.* at 16. Accordingly, *Williams* made a finding of fact "that race and ethnicity was a motivating factor in the passage of 302-33, and that the measure was intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on Oregon juries." *Id.*

B. Introduction of Racial Bias into the Criminal Justice System Necessarily "Seriously Diminish[es]" Accuracy.

Under *Teague*, a "'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding" will have retroactive effect. *Whorton v. Bockting*, 549 U.S. 406, 417 (2007) (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)). To qualify as "watershed," a rule must be "necessary to prevent an impermissibly large risk of an inaccurate conviction." *Id.* at 418 (internal quotations

omitted). The rule must also "constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421. *Ramos* qualifies because the Court rejected a system that was designed to, and did, produce inaccurate results in criminal trials.

As discussed in Petitioner's brief, even absent a racist intent, a non-unanimous jury system lacks the thorough, careful, and reliable deliberations of a unanimous system. *See* Pet. Br. at 22–34. Unanimity requires the entire jury to consider, accept, or reject minority viewpoints.

Add racial bias to the equation and the risk that non-unanimous juries produce inaccurate convictions becomes not just "impermissibly large," but overwhelmingly so. "[D]iscrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice,'" damaging the jury system both in "fact" and in "perception." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). While "racial prejudice" is the "paradigmatic capricious and irrational sentencing factor," *Graham v. Collins*, 506 U.S. 461, 484 (1993) (Thomas, J., concurring), racial prejudice at the verdict stage is equally capricious, irrational, and thus highly subject to erroneous convictions.

Louisiana and Oregon enacted non-unanimity statutes to put more non-whites in jail. "[T]he whole point of adopting the non-unanimous jury requirement" was to "make a difference in practice" by "silenc[ing] the voices and negat[ing] the votes of black jurors."

Ramos, 140 S. Ct. at 1417–1418 (Kavanaugh, J., concurring). As the data shows, the system worked the way the adopters intended.

While some may argue that a particular conviction might not have turned out differently under a unanimity requirement, that type of counterfactual reasoning is particularly inapt here. A non-unanimous verdict is, by definition, inaccurate: "[a] 'verdict, taken from eleven, [is] no verdict' at all." *Id.* at 1395 (quoting James Bradley Thayer, *A Preliminary Treatise On Evidence At The Common Law* 88–89, n.4 (Boston, Little, Brown & Co. 1898)). It is no response to say that some who voted to acquit might have changed their minds—to do so is to disregard the votes those jurors actually cast, which was the whole point of the non-unanimous jury system. The Court should not repeat that error.

C. Non-unanimous Jury Systems Have Produced Wrongful Convictions, Disproportionately So for Minority Defendants.

As explained, the creators of the non-unanimous jury system succeeded in accomplishing their racist motives, but the insidious nature of non-unanimous juries inevitably makes the total universe of wrongful convictions difficult to catalogue. While exonerations provide straightforward evidence of diminished accuracy, high rates of non-unanimous jury convictions and high incarceration rates for people of color serve as useful proxies.

1. Exonerations

Exonerations of Black defendants convicted by non-unanimous juries provide quintessential evidence of the system's seriously diminished accuracy. According to a 2015 report by the National Registry of Exonerations ("NRE"), Louisiana is second in the nation in the rate of wrongful convictions.[5]

And, according to the NRE, Orleans Parish, Louisiana (New Orleans) has the highest per capita rate of proven wrongful convictions of any major metropolitan county. *Id.* at 15. In fact, New Orleans's per capita rate of proven wrongful convictions is almost ten times the national average and more than 40% higher than the city with the second highest rate (Boston). Brief of Amicus Curiae from Innocence Project New Orleans and the Innocence Project, *Ramos v. Louisiana*, 2019 WL 2563177, at *6 (U.S. 2019) (No. 18-5924) ("Innocence Project Brief"). This rate exists in New Orleans despite the fact that thousands of items of evidence in closed or cold cases that could have been DNA tested to prove innocence were lost during the flooding following Hurricane Katrina in 2005. *See* Christopher Drew, *Rust in the Wheels of Justice*, N.Y. TIMES (Nov. 21, 2006).

Of the 32 exonerations in Louisiana where the jury was permitted to convict by a non-unanimous vote, at least 15—almost half—involved non-unanimous jury

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[5] *See* Nat'l Registry of Exonerations, *The First 1600 Exonerations Report* 14 (2015), http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf.

convictions of *innocent* persons.[6] *See* Innocence Project Brief, 2019 WL 2563177, at *8 n.12. All but three had been wrongly sentenced to life in prison without parole based on a non-unanimous verdict. Twelve of the fifteen were Black.

There is less data in Oregon in part because Oregon did not have an organization dedicated to investigating wrongful convictions in criminal cases until 2014. Since 1989, there have been 20 exonerations in Oregon, according to the NRE. At least three involved non-unanimous juries.[7]

While only Louisiana and Oregon used non-unanimous jury systems for convictions, Florida, Alabama, and Delaware used non-unanimous jury systems for sentencing, including for imposing capital

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[6] Counsel has located two subsequent exonerations of defendants convicted by a non-unanimous jury that have occurred since the Innocence Project Brief: *State v. Royal Clark*, Jefferson Parish Case No. 02-895; *State v. Catina Curley*, Orleans Parish Case No. 491-907. This represents only the number of cases that can be confirmed as a result of reported non-unanimous verdicts. There are likely several more that cannot be confirmed because complete information is unavailable in all of the 32 exonerations. The number of people still in prison wrongly convicted by non-unanimous juries (and who do not have the right to a state-appointed attorney following direct appeal) is likely significantly higher than those identified. *See* Samuel R. Gross & Michael Shaffer, Nat'l Registry of Exonerations, *Exonerations in the United States, 1989-2012*, 16 n.26 (2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

[7] *State v. Pamela Reser*, No. CR98654B (Yamhill Cty. 1999); *State v. Bradley Holbrook* (Yamhill Cty. 2002); *State v. Joshua Horner* (Deschutes Cty. 2017).

punishment.[8] As with convictions, the use of the non-unanimous jury system in sentencing is fatally flawed and inaccurate.[9] Since 1972, there have been 32 exonerations of persons sentenced to death in those three states; in 30 of these cases, the jury vote was determinable. *Id.* In 28 of those 30 exonerations, at least one juror voted against a death sentence—a rate of 93.3%. *Id.*

Allowing non-unanimity played a role in diminishing the accuracy of the outcomes in those cases. Other innocent people certainly remain incarcerated because of non-unanimous jury verdicts, but their convictions remain intact because of the difficulty in overturning a conviction based on an innocence claim. *See* Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard Univ. Press 2012) (finding that, of 250 of the first DNA exonerees, 90% of those who challenged their convictions prior to DNA testing failed).

Finally, it is inevitable that many of the non-unanimous convictions led to convictions of more serious crimes and longer sentences than would have been the case had unanimity been required, which

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[8] Those states altered that practice after this Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). Cf. *State v. Poole*, 292 So. 3d 694 (Fla. 2020).

[9] *See* Death Penalty Information Center, *DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions*, (Mar. 13, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions.

often leads to compromise and agreement on lesser included offenses. Because a non-unanimous verdict is "no verdict at all," those "verdicts" are "wrongful convictions" for purposes of this analysis, and doubtless have occurred in the racially disproportionate manner the respective states intended.

2. High Rate of Non-Unanimous Jury Convictions

As intended, non-unanimous jury verdicts led to higher rates of convictions, in particular for non-white defendants. *See State ex rel. Smith v. Sawyer*, 501 P.2d 792, 793 (Ore. 1972). In 2009, the Oregon Public Defense Services Commission prepared a report on the rates of non-unanimous convictions to address the "widely differing opinions on the frequency of non-unanimous verdicts."[10] That commission concluded that of 662 sample cases, more than 40% resulted in non-unanimous verdicts. Louisiana has similar rates, with one report showing "[r]oughly 40 percent of the people who are convicted after jury trials in Louisiana are convicted by nonunanimous juries."[11]

Non-unanimous jury convictions have a greater impact on people of color. In Louisiana, Blacks were more likely to be convicted by a non-unanimous jury than whites: available data shows that 43% of Black

[10] The Oregon Public Defense Services Commission, *On the Frequency of Non-Unanimous Felony Verdicts In Oregon* (May 21, 2009), http://www.lb7.uscourts.gov/documents/11-20911.pdf.

[11] Dan Swenson, *Understanding Louisiana's Nonunanimous Jury Law Findings: Interactive, Animated Slideshow*, The Advocate (Apr. 1, 2018), https://www.nola.com/article_6f93e1a3-8c1d-51b0-ae77-e3980ec8decb.html.

defendants were convicted by a non-unanimous jury, compared to 33% of white defendants.[12]

In Oregon there is little data reflecting the rates of non-unanimous jury verdicts against racial and ethnic minorities. But there is compelling anecdotal evidence that comports with the data from Louisiana. For example, in *Williams*, a non-unanimous jury found a Black defendant guilty of one count of sodomy and the judge sentenced him to 100 months of imprisonment, but at sentencing, the lone Black juror raised her hand and said that she voted to acquit and that the conviction was unfair. *Williams*, at 1–2. She later explained that the other jurors ignored her opinions, as well as those of the other dissenting juror, because they were verdict-driven and refused to consider the evidence. Brief of Amicus Curiae from Prominent and Former State Executive and Judicial Officers, Law Professors, and the OCDLA, *Ramos v. Louisiana*, 2019 WL 2563177, at *24 (U.S. 2019) (No. 18-5924).

The greater number of non-unanimous jury convictions against people of color likely stems from the ability to suppress minority juror votes. A 2018 analysis of non-unanimous Louisiana convictions showed that "black jurors found themselves casting 'empty votes'– that is, 'not guilty' votes overridden by the supermajority vote of the other jurors – with 164% of the frequency we would expect if jurors voted 'guilty'

[12] Jeff Adelson, et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, The Advocate (Apr. 1, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

and 'not guilty' in a racially balanced manner." Frampton, *supra*, at 1637.

These racially disparate results do not arise solely from outright racist sentiments (though some do), but also arise from implicit bias. Empirical evidence shows that implicit bias—the unintentional stereotyping that affects everyone's decision-making—has an impact on false memories and judgments about ambiguous evidence. *See* Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1126 (2012) ("[J]urors of one race treat defendants of another race worse with respect to verdict and sentencing."); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 404 (2007); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 339 (2010) (participants found ambiguous evidence significantly more indicative of guilt when perpetrator had dark skin). Empirical evidence also shows that requiring unanimity among jurors lessens the impact of racial bias. Smith & Sarma, *supra*, at 379, 395 (juries with no Black male members imposed death sentences in more than 71% of cases compared to 42.9% where at least one black person served). Allowing non-unanimous jury verdicts to stand thus increases the risk that convictions are infected by implicit racial bias, which is constitutionally unacceptable. *See Pena-Rodriguez*, 137 S. Ct. at 868 ("[R]acial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.").

3. High Rate of Incarceration for Racial Minorities

The high rate of incarceration for racial minorities in Louisiana and Oregon shows that the system is working as intended. Louisiana now "leads the nation and the entire world in the incarceration of African Americans per capita." Glenn Davis, Jr., *Wrongfully Convicted by Non-unanimous Jury, I Spent 15 Years in Prison for Crime I Didn't Commit*, The Advocate (Oct. 1, 2018). "Over 70% of all prisoners in Louisiana are African-American, despite the fact that African Americans constitute 32% of the State's population." Smith & Sarma, *supra* at 361, 365. By contrast, Mississippi—a similar, nearby state without non-unanimous juries—has the *fortieth* highest incarceration rate of Black people in the nation.[13] In Oregon, Blacks are incarcerated more often than whites at a rate of 5.6 to 1. Aliza B. Kaplan & Amy Saack, *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, 42 (2016). "[I]n 2014, one in twenty-one of all African American adult males were in prison." *Id.*

These data points likely reveal just the tip of the iceberg for wrongful convictions obtained through non-unanimous jury convictions.

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[13] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prison*, The Sentencing Project (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

II. New Rules Barring Racial Discrimination Are Substantive Under *Teague*.

The harm of Louisiana's and Oregon's racially discriminatory jury systems reaches beyond the threat of wrongful convictions. Aimed at producing inaccurate results, their systems' purposes of reinforcing racial inequities and subordinating racial minorities matter too.

Ramos should be retroactive because it is a substantive rule under *Teague* and its progeny. While *Ramos*'s rule does have procedural elements, a rule is not transmogrified from substantive to procedural merely because it is *both* procedural and substantive; rather, procedural rules regulate "*only* the manner of determining the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (emphasis added). Accordingly, where, as here, a rule has both procedural and substantive features, the Court must treat it analytically as substantive and apply it retroactively.

Substantive rules are those "guarantees accorded by the Constitution, regardless of the procedures followed." *Penry v. Lynaugh*, 492 U.S. 303, 329 (1989). Those guarantees are "categorical" and "place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery*, 136 S. Ct. at 729.

Protection from race discrimination is precisely such a guarantee. The State is categorically barred from establishing a caste system, whether explicitly or implicitly. *See Hunter v. Underwood*, 471 U.S. 222, 227–228 (1985) (finding that 1902 Alabama facially

neutral constitutional provision violated Equal Protection Clause due to racist intent and results). This bar places the infliction of a certain kind of harm "altogether beyond the State's power to impose." *Montgomery*, 136 S. Ct. at 729. Thus, as *Ramos* recognized, it is "categorically" beyond the State's power to use the jury system to "establish the supremacy of the white race." 140 S. Ct. at 1394 (quoting Louisiana Convention Record). Because the non-unanimous jury system was the product of racist intent and produced racially disparate outcomes, both it and the harm it inflicted was "barred by the Constitution" and was "by definition, unlawful." *Montgomery*, 136 S. Ct. at 729–730.

This harm cannot be equated to or bound up with the "ordinary" harms in the risk of wrongful conviction—even if the non-unanimous jury rule had no effect on the rate of wrongful convictions, the discriminatory harms would still be present. Accordingly, rules barring discriminatory harm are qualitatively different from procedural rules.

Preserving convictions by non-unanimous juries not only perverts our system of justice but, like all systems of discrimination, inflicts "serious social and personal harms" upon racial minorities. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984); *see also Heckler v. Mathews*, 465 U.S. 728, 739–740 (1984) ("[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community can cause serious non-economic injuries . . . ." (quoting

Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

Discriminatory harm is especially concerning when manifested in the criminal justice process. *See, e.g.*, *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

Moreover, "[t]he injury is not limited to the defendant." *Ballard v. United States*, 329 U.S. 187, 195 (1946). Just as race-based exclusion of petit jurors violates the *juror*'s rights under the Equal Protection Clause, *Powers v. Ohio*, 499 U.S. 400, 409 (1991), so too did the non-unanimous jury rule violate the rights of minority jurors whose voices Louisiana and Oregon purposefully silenced because of their race. By rendering irrelevant the votes of non-white jurors, Louisiana and Oregon imposed "a brand upon them" and the defendants, functioning as "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder*, 100 U.S. at 308.

The community is also harmed "by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); *see also Ballard*, 329 U.S. at 195 (noting harm to "the law as an institution" and "to the community at large"). Allowing convictions obtained under Jim Crow laws to stand "destroys the

appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 555–557. *Ramos* made clear that non-unanimous convictions must not stand in the future. The Court today should announce that *past* convictions under this scheme, regardless of finality, similarly must not stand.

Because *Ramos* barred the use of a discriminatory scheme, it announced a substantive rule rendering convictions obtained under that scheme "illegal and void." *Ex parte Siebold*, 100 U.S. 371, 376 (1880). The Court must apply this substantive rule retroactively.

III. *Teague* Does Not Preclude Retroactivity of New Rules Barring Unconstitutional Discriminatory Harm.

A. The Goals of the *Ramos* Rule Eclipse the Concerns with Retroactivity Espoused in *Teague*.

Regardless of how the Court categorizes the *Ramos* rule, it does not implicate the concerns that underlie *Teague*'s presumption against retroactivity. That presumption was based on the Court's concern with finality and comity. *Teague*, 489 U.S. at 308. Likewise, *Teague*'s exceptions embody concern for "the liberty interests of those imprisoned pursuant to rules later deemed unconstitutional." *Montgomery*, 136 S. Ct. at 736. These same aims support granting rules against discrimination retroactive effect regardless of whether they fit within *Teague*'s definition of "procedural" or "substantive." Instead, because here, as on direct review, "the interests and finality and

comity that caused [the Court] to implement the *Teague* standards of retroactivity are not at issue," or at minimal issue, the "only demands with which [the Court] need . . . concern [itself] are those of the Constitution." *Johnson v. Texas*, 509 U.S. 350, 378 (1993).

The interest in finality that militated against retroactivity in *Teague*, 489 U.S. at 307, is minimal here because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part). Though Justice Harlan was referring to "substantive" rules, the same principle applies in the context of discrimination: the criminal process should not "rest" at the conclusion of a process started with discriminatory intent and that produced discriminatory effects.

The importance of finality derives from the interest in preserving the deterrent effect of criminal law, *Teague*, 489 U.S. at 308–309, the risk of a less reliable result upon retrial, *see McCleskey v. Zant*, 499 U.S. 467, 491 (1991), and the "costs imposed" on states of resulting collateral post-conviction review. *Teague*, 489 U.S. at 310 (quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984)). These interests are undermined, not advanced, by denying retroactive effect to rules barring discrimination.

First, deterrence cannot be achieved through non-retroactivity because discrimination undermines the legitimacy of the criminal justice system. *E.g.*, *Rose*, 443 U.S. at 555–557; *J.E.B.*, 511 U.S. at 139–140.

Deterrence works by sending a message that those who violate the law—and only those who violate the law—will be punished. Meting out and maintaining arbitrary, race-based convictions sends the opposite message.

Second, reliability of the verdict is *advanced* by retroactivity because discrimination in the criminal justice system necessarily undermines the reliability of the original result. The non-unanimous jury system, established to inject race-based inaccuracy into the criminal justice process, spawns unreliability.

Additionally, the Court should recognize that preserving convictions obtained under laws designed with an intent that is constitutionally repugnant can never correspond with the fundamental value undergirding the interest in finality. At its essence, the interest in finality is an interest in maintaining the integrity of the criminal justice system. *See Teague*, 489 U.S. at 308–310. Although they often align, these interests are not always in lockstep. If an underlying proceeding denies a defendant his fair day in court because of a racially discriminatory law, the decision to leave the defendant's conviction untouched stands only to *diminish*, not enhance, the public's faith in the integrity of the system.

Nor should convictions obtained pursuant to discriminatory laws be entitled to comity. "Comity" entails the "proper respect for state functions." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). It is also animated by the desire to "avoid retrials, some of which, held so late in the day, may lead to freedom for

some petitioners whose initial convictions were in fact unaffected by the errors that took place at their initial trials." *O'Neal v. McAninch*, 513 U.S. 432, 443 (1995). Neither of these aspects of comity are advanced by continued respect for convictions obtained under a racially discriminatory rule. "State functions" are not entitled to respect when they are animated by racist aims and produce racist results. Nor is the concern over inaccurate results on re-trial worth consideration where the initial trials were tainted by a fundamentally inaccurate system and racial prejudice.

Finally, *Ramos* implicates the liberty interests of the incarcerated—the same concern underlying the *Teague* exceptions—and here, those liberty interests outweigh any costs imposed on the states. The "interests of those imprisoned pursuant to rules later deemed unconstitutional" are especially pronounced in cases such as this one where those rules inflicted the indignities of discrimination upon the defendant. *Montgomery*, 136 S. Ct. at 736. In those instances, the harm is compounded because imprisonment is a daily "assertion of [the individual's] inferiority." *Strauder*, 100 U.S. at 308. Here, those interests outweigh those of the states because, as Justice Gorsuch observed during oral argument in *Ramos*, the states' reliance interests should not compel the Court to "forever ensconce an incorrect view of the United States Constitution in perpetuity, for all states and all people, denying them the right that we believe was originally given to them."[14]

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[14] *Ramos* Oral Arg. Trans. 58:6-10, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-5924_4gcj.pdf.

It is unthinkable "to perpetuate something we all know to be wrong only because we fear the consequence of being right." 140 S. Ct. at 1408. In these cases, the interests in finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

B. *Batson v. Kentucky* Is Distinguishable.

The Court's rejection of retroactivity for *Batson v. Kentucky*, 476 U.S. 79 (1986), which also concerned race discrimination in the context of juries, is not at odds with the above analysis. *Ramos* differs from *Batson* in several ways.

First, *Ramos*'s retroactivity must be decided under *Teague*'s framework whereas *Batson*'s retroactivity was decided before *Teague* in *Allen v. Hardy*, 478 U.S. 255 (1986), under the framework that *Teague* overturned. *Teague*, 489 U.S. at 295. Although *Teague* held that *Allen* prevented the petitioner from arguing *Batson*'s retroactivity, that aspect of *Teague* reflects more the doctrine of *stare decisis* than vitality of the reasoning in *Allen*.

Second, *Batson* is distinguishable because the non-unanimous jury rule vitiates the accuracy of criminal trial outcomes where *Batson* merely had "some bearing" on it. *Allen*, 478 U.S. at 259. *Allen* found that *Batson* was not retroactive specifically because the *Batson* rule only *somewhat* improved the accuracy of criminal trials. *Id.* ("By serving a criminal defendant's interest in neutral jury selection procedures, the rule in

Batson may have *some* bearing on the truthfinding function of a criminal trial.") (emphasis added).

In other words, *Batson*, which simply adjusted the evidentiary standard to establish discrimination in peremptory strikes, did not create a sea change that would result in radically more reliable case outcomes. *Ramos*, conversely, involves a new rule to enhance accuracy and improve fact-finding in criminal trials by eliminating laws based in racism. Before *Ramos*, Louisiana's and Oregon's rules allowing criminal convictions by non-unanimous juries were designed explicitly to thwart both the accuracy and truth-finding functions of trials "to establish the supremacy of the white race": "courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules." *Ramos*, 140 S. Ct. at 1394. Because procedural rules can be applied retroactively only where they "implicat[e] the fundamental fairness and accuracy of the criminal proceeding," *Montgomery*, 136 S. Ct. at 728, this difference alone is dispositive.

Third, *Batson* concerned individual choices by prosecutors in specific cases, not a discriminatory statutory framework fundamental to the jury system. Accordingly, giving *Batson* retroactive effect would have implicated *Teague*'s concern with finality. In each petition for post-conviction relief under a retroactive *Batson*, a court would first need to determine whether the facts supporting a *Batson* violation existed. Given that prior to *Batson* prosecutors were generally not questioned on individual juror strikes, courts considering *habeas* petitions would have had to guess

at a prosecutor's thought processes from years prior. But *Ramos*, if held retroactive, would require no such additional fact-finding because *all* non-unanimous jury convictions arrived under the old rule are constitutionally suspect. *See id.* at 1395 (emphasizing intrinsic value of unanimity).

Likewise, retroactivity for *Batson* would have imposed significant costs on states, as the state's judiciary and prosecutors would have had to handle not only the *habeas* petitions and resulting new trials, but also new fact-finding as to whether discrimination occurred in the first instance. By contrast, retroactivity for *Ramos*'s rule would not impose these additional fact-finding burdens—and the ordinary burdens it would impose would affect only two states.

Finally, though announcing a "new rule," *Batson* did not create a "categorical constitutional guarantee[]," *Montgomery*, 136 S. Ct. at 729, but rather adjusted the "evidentiary showing necessary to make out a prima facie case" of the existing right against race discrimination in jury selection. *Teague*, 489 U.S. at 295. By contrast, *Ramos* established a flat right to a unanimous jury verdict. This is precisely the sort of "sweeping and fundamental" rule *Teague* contemplated to be retroactive. *Beard v. Banks*, 542 U.S. 406, 418 (2004).

IV. As in Other Contexts, Victims of Racial Discrimination Must Be Restored to "the Position They Would Have Occupied" but for the Discrimination.

Because the non-unanimous jury system was designed with discriminatory intent and had discriminatory effects, the Court should look for guidance to its Equal Protection Clause jurisprudence. These principles counsel that those who have been deprived of their freedoms and subjected to the stigma of discriminatory systems must be provided the opportunity to return to "the position they would have occupied" but for the law's invidious effects. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (quoting *Milliken*, 433 U.S. at 280). In cases where those affected by discriminatory laws are confined by final convictions, retroactivity is the only means to wipe clean the criminal justice system of the stains of prejudice.

Teague explained that "which cases are closed, for which retroactivity-related purposes, and under what circumstances" may differ depending on "certain special concerns" in various contexts. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). One such "special concern" not elucidated by the Court in *Teague*, but informed by the Court's precedents, is the need to provide a remedy for the ongoing harms of discriminatory laws. When declaring a law unconstitutional leaves in place a wrong caused by that law's prior effect, the natural conclusion is "that some remedy must be provided." *See id.* at 760 (Scalia, J., concurring). In such cases, it "makes sense to speak of"

the Court's "remedial discretion" in relation to retroactivity. *Id.* Whether "the ordinary application of a new rule of law 'backwards' . . . involve[s] a further matter of remedies" will "depend . . . upon the kind of case, matter, and circumstances involved." *Id.* at 744–755.

The instant case, which involves the staying power of laws with a discriminatory purpose, is precisely the situation for which this Court's "remedial discretion" is most appropriate. While this Court's decision in *Ramos* rightfully resolved the issue of non-unanimous juries moving forward, it must also retroactively resolve the decades of racially disparate effects caused by laws this Court recognized were designed with an invidious purpose.

To resolve these lasting effects, the Court should apply *Ramos* retroactively. The principles of equal protection command special consideration for "eliminat[ing] [] the discriminatory effects of the past." *Virginia*, 518 U.S. at 547 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). To remedy these effects, the Court must "shape[]" an appropriate remedy that "place[s] persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied'" but for the discrimination. *Virginia*, 518 U.S. at 547 (quoting *Milliken*, 433 U.S. at 280).

Louisiana v. United States, 380 U.S. 145 (1965), is on point. *Louisiana* invalidated the voter registration "interpretation test" designed "to keep white citizens in control" by making it harder for Black residents to register to vote. *Id.* at 149. The Court found it

necessary to examine the lasting effects caused by the discriminatory intent. Rather than merely barring the discriminatory system and leaving Black voters without a restorative remedy, the Court ruled that all eligible Black voters impacted by the interpretation test would be registered to vote before any new registration requirements were put in place. *Id.* at 155. This remedy fully comported with the Court's "*duty* . . . so far as possible [to] eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 154 (emphasis added).

Though this case concerns criminal justice, it implicates the same constitutional principle of non-discrimination. Just like the test in *Louisiana*, the non-unanimous jury law was instituted to "establish the supremacy of the white race." *Ramos*, 140 S. Ct. at 1394. In fact, the discriminatory procedure in *Louisiana* had its origins in the same 1898 Louisiana Constitution responsible for Louisiana's non-unanimous jury system. *See* 380 U.S. at 147–148.

In *Ramos*, this Court examined the same "uncomfortable past" it examined in *Louisiana* and arrived at the right decision. *Ramos*, 140 S. Ct. at 1401 n.44. As in *Louisiana*, striking down the offending statute will not root out past discrimination. Now, as in *Louisiana*, the Court must look to the uncomfortable present. It must recognize that in cases like Petitioner's, retroactive application is necessary to fulfill the Court's "duty" to "eliminate the discriminatory effects of the past" as they persist in the present. *Louisiana*, 380 U.S. at 154.

Louisiana is no outlier. In the same spirit, lower courts have corrected for histories of discrimination by giving newly recognized constitutional rights retroactive effect. For example, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that bans on same-sex marriage violated the Equal Protection Clause, *id.* at 2602, has been repeatedly held to apply retroactively. *See, e.g.*, *Hard v. Attorney Gen.*, 648 Fed. App'x 853, 856 (11th Cir. 2016); *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 622 (E.D. Tex. 2016); *In re State*, 489 S.W.3d 454, 457 (Tex. 2016) (implicitly applying *Obergefell* retroactively). Similarly, courts have applied *United States v. Windsor*, 570 U.S. 744 (2013), retroactively. *See, e.g.*, *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155, 1165 (N.D. Cal. 2016).

Equal protection demands that the effects of racially discriminatory laws be "eliminated root and branch." *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 437–438 (1968). That principle is a "special concern" of the Court's Equal Protection Clause jurisprudence, *cf. Teague*, 489 U.S. at 310, and it should guide the Court to exercise its "remedial discretion," *Hyde*, 514 U.S. at 760 (Scalia, J., concurring), in applying *Ramos* retroactively.

CONCLUSION

For all of the above reasons, *amici* urge that the Court give retroactive effect to the rule announced in *Ramos v. Louisiana.*

Respectfully submitted,

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