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 OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE [1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights organization. Since its founding in 1940, LDF has fought to secure the constitutional promise of equality for all people. LDF's advocacy has included efforts to enforce the Fourteenth Amendment's promise of equality, *see, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958), *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), and to overcome the persistent and pernicious influence of race in the criminal justice system by fighting to eradicate discrimination that affects jury verdicts, *see, e.g.*, *Ham v. South Carolina*, 409 U.S. 524 (1973), *Alexander v. Louisiana*, 405 U.S. 625 (1972), *Swain v. Alabama*, 380 U.S. 202 (1965). LDF submitted an amicus brief in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), urging this Court to hold that Louisiana's non-unanimous jury rule was unconstitutional under the Sixth Amendment's jury guarantee, which applies to all States through the Fourteenth Amendment. The question presented in this case—whether *Ramos* should apply retrospectively to cases on federal collateral review—has major implications for the disproportionately Black defendants sentenced by non-unanimous juries and would restore the lost voices of dissenting minority jurors.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

LDF submits this brief to aid the Court in deciding whether to give *Ramos* retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), this Court vindicated a fundamental rule of constitutional procedure. In holding that the Sixth Amendment's jury guarantee encompasses the requirement that a unanimous jury reach a guilty verdict in state criminal trials, this Court affirmed that defendants prosecuted in state court are entitled to the same constitutional guarantees enshrined in the Sixth Amendment for defendants in federal court. The Court also acknowledged and repudiated the racist and xenophobic origins of Louisiana's and Oregon's non-unanimous jury provisions, untethering criminal convictions in those States from their non-unanimous jury rules' discriminatory histories. The rule announced in *Ramos* automatically inured to the benefit of defendants whose cases were pending on direct appeal. And because of a recent amendment to Louisiana's State constitution, persons tried before a jury for serious crimes after January 1, 2019 must also be found guilty by a unanimous jury to be convicted. *Ramos*'s unanimity requirement should also apply retroactively to cases pending on federal collateral review.

Teague v. Lane, 489 U.S. 288, 305 (1989) generally bars retroactive application of new constitutional rules but provides an exception for "watershed rules of criminal procedure" [that]

"implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (internal quotations omitted). Assuming *arguendo* that *Ramos* announced a new rule, it fits that bill. The Court's rule requiring unanimity directly implicates the accuracy of a criminal conviction. The logic is straightforward. By definition, a habeas petitioner seeking to raise a meritorious *Ramos* claim likely would not have been convicted had *Ramos* been the rule at the time of their trial. Such petitioners were convicted by juries in which at least one juror voted to acquit. And *Ramos* constitutionalizes the rule that had long been in place in 48 states and federal courts: "a single juror's vote to acquit is enough to prevent a conviction." *Ramos*, 140 S. Ct. at 1393. *Ramos* is therefore *sui generis* from a *Teague* perspective. Unlike with any other constitutional rule of criminal procedure this Court has analyzed using the *Teague* framework, we *know* that a conviction obtained in violation of *Ramos*'s unanimity requirement is inaccurate because at least one juror voted to acquit.

The history of non-unanimous jury rules also supports retrospective application of *Ramos*'s unanimity requirement. This case arises out of Louisiana, whose non-unanimous jury rule was designed with the expressed racist goal of convicting Black defendants over the muted dissent of Black jurors. This design was also intended to undermine the accuracy of the factfinding process by convicting Black defendants because of their race, regardless of the evidence. For 120 years, until Louisiana voters amended their State Constitution to bar non-unanimous jury verdicts in 2018, Louisiana's non-

unanimous jury rule worked as designed. A rule that, by design and operation, undermined the integrity of the factfinding process by disregarding the voices of Black jurors epitomizes fundamental unfairness.

ARGUMENT

I. *Ramos* Clears *Teague's* Nonretroactivity Bar.

This Court has held that, as a general matter, "new [constitutional] rules . . . should not be applied retroactively to cases on collateral review."[2] *Teague*, 489 U.S. at 305. There are two recognized exceptions to this general rule. "First, courts must give retroactive effect to new substantive rules of constitutional law." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). Second, courts must give retroactive effect to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S at 352 (internal citations and quotations omitted). Put another way, a new constitutional rule of criminal procedure is watershed if it is "necessary to prevent an impermissibly large risk of an inaccurate conviction" and "'alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (citation omitted). "That a new procedural rule is fundamental in some abstract sense is not enough," however; "the rule must be one 'without which the likelihood of an accurate

[2] This Brief assumes that the rule announced in *Ramos* is a new rule. *But see* Brief of Petitioner at 12–21 (explaining why *Ramos* is an old rule under *Teague*).

conviction is *seriously* diminished.'" *Summerlin*, 542 U.S. at 352 (emphasis in original) (quoting *Teague*, 489 U.S. at 313). Since it decided *Teague*, this Court has not applied a new procedural rule retroactively, and it has said it is "unlikely" that a new watershed rule of criminal procedure has "yet to emerge." *Whorton*, 549 U.S. at 416 (citation omitted).

But *Ramos* is, by its nature, the exceptional procedural rule that—assuming it is in fact a new rule—and must apply retroactively under *Teague*. *Ramos*'s unanimity requirement unquestionably disturbs the accuracy of guilty verdicts reached and rendered by non-unanimous juries. And its holding alters our temporary misunderstanding of the Sixth Amendment's jury mandate as applied to the states, restoring the unanimity requirement that for centuries has been recognized as an essential component of a fair trial under Anglo-American law.

A. Jury Unanimity is Necessary to Prevent "An Impermissibly Large Risk" of an Inaccurate Conviction.

Retroactive application of *Ramos*'s unanimity rule is necessary to prevent "an impermissibly large risk" of an inaccurate conviction. *Whorton*, 549 U.S. at 418. More than merely "directed toward the enhancement of reliability and accuracy in some sense," *id*. (citation omitted), the unanimity rule announced in *Ramos* directly implicates the validity and accuracy of non-unanimous guilty verdicts.

Before *Ramos*, in the 48 states and federal courts that have long required jury unanimity, a single dissenting juror's vote to acquit would have

resulted in a mistrial. *See Ramos*, 140 S. Ct. at 1393 ("In 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction."). But Louisiana and Oregon "ha[d] long punished people based on 10-to-2 verdicts." *Id.* That changed after *Ramos*, which now requires that all convictions for serious crimes be supported by the assent and agreement of all twelve jurors.

A conviction obtained in violation of *Ramos* is inherently inaccurate: It signifies that at least one juror voted to acquit, and therefore, pursuant to the Sixth Amendment's unanimity rule, the defendant should not have been convicted. It also signifies that at trial, the prosecution failed to do what the Sixth and Fourteenth Amendments require before the government may take away someone's liberty: convince a unanimous jury of the person's peers that the person is guilty beyond a reasonable doubt.

Justice Marshall recognized this point in his dissenting opinion in *Johnson v. Louisiana*, 406 U.S. 399 (1972). In explaining why Louisiana's non-unanimous rule was unconstitutional, Justice Marshall pointed out that the "[t]he doubts of a single juror are . . . evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt." *Id.* at 403. Justice Marshall further recognized the essential link between the jury trial right and the burden of proof in criminal cases, which "[t]ogether . . . occupy a fundamental place in our constitutional scheme, protecting the individual defendant from the awesome power of the State." *Johnson*, 406 U.S. at 400.

Justice Marshall further distinguished between: (1) the scenario where the jury is composed of only nine people, and those nine vote to convict—in that case, "we can never know, and it is senseless to ask, whether the prosecutor might have persuaded additional jurors [of the defendant's guilt]"; and (2) the scenario where a minority of jurors "entertain doubts" of the defendant's guilt "after hearing all the evidence"—in that case, "the prosecutor has tried and failed to persuade those jurors of the defendant's guilt." *Johnson*, 406 U.S. at 400–01. "In such circumstances," he concluded, "it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a reasonable doubt." *Johnson*, 406 U.S. at 401.

Justice Marshall's *Johnson* dissent was vindicated by the majority of this Court in *Ramos*. It is now clear that a guilty verdict over dissenting jurors' votes to acquit is inaccurate because guilty verdicts, by definition, must be unanimous post *Ramos*. *See Ramos*, 140 S. Ct. at 1397. Non-unanimous guilty verdicts obtained prior to *Ramos* improperly lowered the government's burden from proving all the elements of the offense to all of the jurors beyond a reasonable doubt, to proving all the elements to *most* of the jurors. It follows that the rule announced in *Ramos* is necessary to prevent an impermissibly large risk of inaccurate convictions. *Whorton*, 549 U.S. at 418.

Ramos's recognition that the jury unanimity rule applies with equal force to the States also alters (or, more precisely stated, restores) our

understanding of the bedrock procedural elements essential to the fairness of criminal jury trials. "The requirement that a federal jury be unanimous is a bedrock principle of our criminal jurisprudence." *United States v. Lee*, 317 F.3d 26, 35 (1st Cir. 2003)) (citing *Richardson v. United States,* 526 U.S. 813, 817 (1999)). The jury unanimity rule had been "accepted as a vital right protected by the common law" since the 14th Century when the States ratified the Sixth Amendment in 1791. *Ramos*, 140 S. Ct. at 1395–96. *Ramos's* recognition that the jury unanimity rule extends to the States is, therefore, watershed.

In sum, a verdict of guilt in the face of dissenting jurors' votes to acquit is literally inaccurate because guilty verdicts, by definition, must be unanimous. *Ramos*, 140 S. Ct. at 1397. With *Ramos*, we now understand the government's burden in serious state criminal jury trials to be proof beyond a reasonable doubt as to each element of the offense as determined by *all* of the jurors. Thus, *Ramos* alters our understanding of the bedrock procedural elements of the Sixth Amendment's unanimity rule, which is central to ensuring that criminal trials are conducted in a just manner and come to a just conclusion.

B. *Ramos* Differs from Past New Rules Concerning the Sixth Amendment Jury Guarantee.

The rule announced in *Ramos* differs markedly from previous cases where the Court found a new rule of criminal procedure that implicated the jury

guarantee was not retroactive. In none of those cases did we know that at least one juror had voted to acquit, such that, by definition, there is an "impermissibly large risk" of an inaccurate conviction. *Whorton*, 549 U.S. at 418.

For example, in *Summerlin*, the Court considered whether *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury, not a judge, must make the factual findings necessary to impose the death penalty, should apply retroactively under *Teague*. A closely divided Court held that *Ring* was not retroactive because there was no evidence that judicial sentencing seriously diminished the accuracy of capital sentencing proceedings. *Summerlin*, 542 U.S. at 355-56. *Summerlin* relied on *DeStefano v. Woods*, 392 U.S. 631 (1968) (per curiam), which held that the Court's decisions in *Duncan v. Louisiana,* 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968)—respectively establishing the right to jury trial in all serious criminal cases and criminal contempt proceedings—did not apply retroactively. *Summerlin* explained that under *DeStefano*, "a trial held entirely without a jury [is] not impermissibly inaccurate . . ." *Summerlin*, 542 U.S. at 357.

The Court's logic in *Summerlin* and *DeStefano* does not apply in this case. The question whether a jury trial is inherently more accurate than a bench trial speaks to the reliability of one factfinding body over another, which has historically been the subject of some debate. *See Summerlin*, 542 U.S. at 356. This case presents a different question: whether, once a jury is selected and empaneled as the factfinding body in a criminal trial, a non-unanimous jury verdict

undermines the accuracy of a resulting criminal conviction. The answer is yes: a non-unanimous jury verdict casts doubt on the sufficiency of the evidence supporting a conviction and undermines the accuracy of the conviction. *Cf. Johnson*, 406 U.S. at 401 (Marshall, J., dissenting) (observing that "there is all the difference in the world between three jurors who are not there, and three jurors who entertain doubts after hearing all the evidence"); *see also Johnson v. Louisiana*, 406 U.S. 380, 388 (1972) (Douglas, J., dissenting) (discussing how the "diminution of verdict reliability flows from" a non-unanimous jury verdict).[3] A defendant convicted by a judge may well have been convicted if tried by a jury. But a conviction by a non-unanimous jury means that, when jurors made their final decision about the defendant's fate, at least one juror had a reasonable doubt and voted to acquit. Such a conviction therefore would not have occurred had unanimity been required. *See Ramos*, 140 S. Ct. at 1394 ("So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole."). Thus, the accuracy of the defendant's conviction is "seriously diminished" by the fact that not all jurors were convinced of the defendant's guilt beyond a reasonable doubt. *Summerlin*, 542 U.S. at 352 (emphasis and internal quotation marks omitted).[4]

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[3] *See also* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* 163 (e-dition, 1983) (noting that majority rule juries typically end their deliberations not when they achieve unanimity but when they attain the requisite quorum).

[4] To be sure, in some cases, the dissenting jurors may have changed their votes had unanimity been required and

For the same reason, *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), is inapposite here. In *Allen*, this Court held that *Batson v. Kentucky*, 476 U.S. 79 (1986), does not apply retroactively to cases pending on federal collateral review. Justice Kavanaugh suggested in his *Ramos* concurrence that *Allen* would dictate a similar non-retroactivity ruling in this case. *Ramos*, 140 S. Ct. at 1420 n.8 (Kavanaugh, J., concurring). But, with respect to *Teague*, a *Ramos* violation is unique and requires retroactive application even assuming the validity of *Allen*.

There is no disputing the "notable and consequential" nature of this Court's *Batson*'s decision "recogniz[ing] the pervasive racial discrimination woven into the traditional system of unfettered peremptory challenges." *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring). Discrimination in jury selection is one of the most serious injuries in our constitutional system. Not only are "[d]efendants . . . harmed . . . when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally," and "the very integrity of the courts is jeopardized . . . undermin[ing] public confidence in adjudication." *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005). By modifying the procedure for challenging discriminatory peremptory strikes, *Batson* effected an

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deliberations continued; in other cases, a unanimous jury may have compromised on a lesser charge. But the presence of at least one juror who had reasonable doubt and voted to acquit means that, at a minimum, the likelihood that the defendant would have been convicted of the same charge by a unanimous jury is "seriously diminished." *Id*.

important procedural shift to investigate instances of jury discrimination more accurately. *Batson* also recognized the fundamental principle that the race-based exclusion of a single juror violates the Constitution and indeed undermines the rule of law. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) ("Under the Equal Protection Clause, the Court stressed, even a single instance of race discrimination against a prospective juror is impermissible"). Justice Kavanaugh's *Ramos* concurrence properly recognizes these concerns. *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring).

The importance of *Batson* cannot be overstated, and its impact on the accuracy of trial outcomes is significant. "[W]here the prosecution uses its peremptory challenges to cull black and Hispanic jurors from the jury empaneled for the trial of a black defendant, the threat to the accuracy of the trial is significant and unacceptable." *Allen*, 478 U.S. 255, 263–64 (1986) (Marshall, J., dissenting). Amicus submits that Justice Marshall was correct to dissent in *Allen*, and that *Batson* should have applied retroactively.

Even accepting the validity of *Allen*, however, its retroactivity analysis is inapt because a *Ramos* violation is unique under *Teague*. When *Batson* is violated, the impact on the outcome of any specific verdict is "unknown and perhaps unknowable." *Allen*, 478 U.S. at 263 (Marshall, J., dissenting); *see, e.g.*, *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972) (explaining that the ultimate effect of removing from the jury room qualities of human nature and varieties of

human experience is "unknown and perhaps unknowable"). Considering the unknowable impact on the fact-finding process from a *Batson* violation, the Court in *Allen* concluded that *Batson* would have only "some impact on truthfinding" but would not have "such a fundamental impact on the integrity of factfinding as to compel retroactive application." *Allen*, 478 U.S. at 259.

The effect of a *Ramos* violation is not "unknown and [] unknowable." *Allen*, 478 U.S. at 263 (Marshall, J., dissenting). The opposite is true: it is verifiable that a defendant convicted by a non-unanimous jury likely would not have been convicted under *Ramos*'s unanimity requirement. *See Ramos*, 140 S. Ct. at 1393 ("So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.") (Gorsuch, J.). That is, we *know* it is likely that a conviction by a divided jury pre-*Ramos* would not have resulted in a conviction under *Ramos*.

When a jury deliberation resulted in a non-unanimous guilty verdict, the fact-finding process was necessarily undermined, and the non-unanimous jury verdict had "a fundamental impact on the integrity of factfinding . . . ." *Allen*, 478 U.S. at 259. *Ramos* therefore warrants retrospective application under *Teague*.

II. The Racist Design and Operation of Louisiana's and Oregon's Non-unanimous Jury Rules Support Retroactive Application of *Ramos*.

Beginning in 1898, Louisiana's non-unanimous jury rule "silenced and sidelined [Black jurors] in criminal proceedings and caused questionable convictions [for defendants] throughout Louisiana." *State v. Gipson*, No. 2019-KH-1815, at 2 (La. June 3, 2020) (Johnson, C.J., dissenting from denial of writ). As this Court recognized in *Ramos*, Louisiana implemented its non-unanimous jury provision "to ensure that African-American juror service would be meaningless," and Oregon similarly implemented its rule in an effort to "dilute the influence of racial, ethnic, and religious minorities on Oregon juries." *Ramos*, 140 S. Ct. at 1343 (citation omitted). These non-unanimous jury rules were designed to undermine the accuracy of criminal convictions by limiting juror deliberations and silencing the perspectives and votes of Black jurors. And, until rejected by Louisiana voters and this Court in *Ramos*, Louisiana's and Oregon's non-unanimous jury schemes functioned as intended.

A. Louisiana's Non-Unanimous Jury Provision Was Designed to Undermine the Accuracy of Criminal Convictions.

Louisiana's history of race-based juror exclusion and nullification dates to the 1800s. After Reconstruction ended and federal troops left the South, Louisiana Democrats called a Constitutional

Convention in 1898.[5] "[T]he sinister purpose of the Convention was to create a racial architecture in Louisiana that would circumvent the Reconstruction Amendments and marginalize the political power of black citizens."[6]

During the period leading up to the Convention, Black men were routinely convicted when charged with a crime, regardless of the evidence. As one local paper acknowledged, "'in some of the parishes of the State the hostility to the negro is . . . such . . . that . . . juries in these benighted localities seem to think that it is their bounden duty to render a verdict of 'guilty as charged,' because the accused has black skin.'"[7] But there was widespread fear among white Louisianans that if Black men served on juries, Black defendants "would simply not be convicted because of the African-American presence in the jury box."[8] After the Fourteenth Amendment was ratified, one popular newspaper lamented that "if a negro be on trial for any crime, [a Black juror] becomes at once his earnest champion, and a hung jury is the usual result."[9]

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[5] *See* 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, 374–76 (2012).

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

[7] *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Van. L. Rev. 1593, 1636–37 (2018) (quoting *Prejudiced Verdicts*, Opelousas Courier, Oct. 26, 1985, at 1).

[8] Smith & Sarma, *supra* note 5, at 376 (citation omitted).

[9] *Id.* at 375 (quoting *Future of the Freedman*, Daily Picayune, Aug. 31, 1873, at 5).

It was at this 1898 Convention that Louisiana adopted the State's non-unanimous jury provision.[10] The Convention's official record is replete with references to its racist goals. The Judiciary Committee Chair, Judge Thomas Semmes, bluntly declared that the purpose of the Convention was "to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done . . . ."[11] Convention delegates sought to placate the "popular sentiment of th[e] State," which, as one delegate put it, was the desire for "universal white manhood suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins."[12] At the end of the Convention, Convention President Kruttschnitt marveled at its success, congratulating the delates for drafting a constitution that would "perpetuate the supremacy of the Anglo-Saxon race in Louisiana."[13]

Consistent with their broader goal to perpetuate white supremacy, delegates adopted a non-unanimous jury provision designed both to exclude Black jurors from any meaningful voice, and to ensure that Black men would continue to be

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[10] The originally ratified provision first required that, for "cases in which the punishment is necessarily at hard labor," nine out of twelve jurors must vote for guilt. La. Const. art. 116 (1898). The provision was updated in 1974 to require that at least ten jurors vote for guilt. *See* La. Const. art. I, § 17 (1974).

[11] *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana: Held in New Orleans, Tuesday, February 8, 1898*, at 375 (printed by H.J. Hearsey, 1898).

[12] *Id.* at 380.

[13] *Id.* at 381.

convicted regardless of the evidence.

B. Louisiana's Non-Unanimous Jury Provision Functioned as Intended.

Until it was abandoned in 2018, Louisiana's non-unanimous jury rule functioned as intended.[14] Louisiana's "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 . . . affected the fundamental fairness of Louisiana's criminal legal system." *Gipson*, No. 2019-KH-1815, at 4. The discriminatory effects of Louisiana's non-unanimous jury provision are well-documented.

In "*The Jim Crow Jury*," Thomas Frampton recently documented that, with respect to non-unanimous jury verdicts rendered by racially mixed juries (11-1 or 10-2) between 2011 and 2017, a disproportionate number of verdicts returned were "guilty," and only a small number were "not guilty."[15] Black jurors disproportionately cast not guilty votes that were overridden by the guilty votes of the other

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[14] As Justice Alito highlights in his dissenting opinion in *Ramos*, both Louisiana and Oregon ratified post-adoption amendments to their non-unanimous jury provisions. *See Ramos*, 140 U.S. at 1425-40 (Alito, J., dissenting). But Louisiana's and Oregon's amendments to their non-unanimous jury provisions did not erase the racist history and design of the non-unanimous jury. *See United States v. Fordice*, 505 U.S. 717, 729 (1992) (policies that are "traceable" to a State's de jure racial segregation and that "still . . . have discriminatory effects" offend the Equal Protection Clause). Nor, as discussed below, did they restore accuracy to non-unanimous convictions.

[15] Frampton, *supra* note 7, at 1636–37.

jurors.[16] In other words, "black jurors found themselves casting 'empty votes'—that is, 'not guilty' votes overridden by the supermajority vote of the other jurors . . . ."[17] Louisiana's non-unanimous jury rule therefore continued to "inhibit inclusion" of minority jurors in the deliberative process.[18] "These cases demonstrate that the non-unanimous-decision rule operate[d] . . .just as it was intended to 120 years ago—to dilute the influence of black jurors."[19] By disproportionately muting the voices of African-American jurors on racially mixed juries, Louisiana further undercut the reliability and accuracy of non-unanimous guilty verdicts.

The quality of jury deliberation also suffered under Louisiana's non-unanimous jury regime. Studies on racial diversity in decision-making and jury deliberations show that on racially mixed juries, "white as well as black jurors describe the facts of the case more accurately and are more systematic about going through the evidence."[20] "[U]nanimous juries deliberate longer, discuss and debate the evidence more thoroughly, reach more reliable conclusions . . .

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[16] *Id*. at 1637.

[17] *Id*.

[18] Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1263 (2000).

[19] Frampton, *supra* note 7, at 1636; *see also id*. at 1637 ("[C]ompared to their white counterparts, black jurors were about 2.5 times as likely to be casting 'empty votes' to acquit at the close of deliberations.") (citation omitted).

[20] Emily Bazelon, *Two Jurors Voted to Acquit. He Was Convicted of Murder Anyway.*, N.Y. Times Magazine, Jan. 15, 2020 (citing Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality and Soc. Psych. 597 (2006)).

and are more tolerant and respectful of dissenting voices."[21] But when a jury was not required to reach unanimity before reaching a verdict, jury deliberations often halted "once a vote indicates that the required majority has formed . . . ."[22] Shorter deliberations often lead to less accurate judgments: non-unanimous juries "discourage[] painstaking analyses of the evidence and steer[] jurors toward swift judgments that too often are erroneous or at least highly questionable."[23]

And, just as it was intended to do when adopted in 1898, Louisiana's non-unanimous jury rule continued to harm Black defendants well into the 21st Century. Between 2011 and 2017, African American defendants "were more likely to be convicted in cases where at least one or two jurors harbored doubts."[24] In other words, African American defendants were overrepresented in the pool of defendants who were convicted non-unanimously; by contrast, white defendants "were overrepresented . . . among unanimous convictions and underrepresented . . . among nonunanimous convictions."[25] Thus, just as the delegates at the 1898 Constitutional Convention intended, Louisiana's non-unanimous juries continued to over-empower white jurors while disempowering Black jurors, to the detriment of Black defendants. This evidence highlights how the interaction between non-unanimous juries and race continued to seriously diminish the accuracy of the

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[21] Smith & Sarma, *supra* note 5, at 378–79.
[22] Taylor-Thompson, *supra* note 18, at 1272
[23] *Id.* at 1273.
[24] Frampton, *supra* note 7, at 1639.
[25] *Id.*

factfinding process in Louisiana prior to 2018. *Whorton*, 549 U.S. at 418.

Race must play no role in dispensing criminal punishment because a "basic premise of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). Yet, because of Louisiana's non-unanimous jury law, Black defendants were more likely to be convicted than their white counterparts. This shows that the non-unanimous jury rule seriously diminished the likelihood of an accurate outcome, i.e., an outcome where race has no role in whether a defendant is convicted.

The harms inflicted upon African Americans—jurors and defendants alike—by Louisiana's non-unanimous jury provision, persist. "Defendants convicted by non-unanimous jury verdicts are prisoners of a law that was designed to discriminate against them and disproportionately silence African American jurors." *Gipson*, No. 2019-KH-1815, at 9. The historical design and contemporary effect of Louisiana's non-unanimous jury rule are ongoing: "Simply pledging to uphold the Constitution in future criminal trials does not heal the wounds already inflicted on Louisiana's [Black] community by the use of this law for 120 years." *Id.* This Court should hold *Ramos*'s unanimity requirement applies retroactively to cases on federal collateral review.

CONCLUSION

LDF respectfully urges this Court to apply *Ramos* retroactively to cases on federal collateral review.

Respectfully submitted,

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