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 U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, ACLU FOUNDATION OF LOUISIANA, AMERICAN CONSERVATIVE UNION FOUNDATION, CATO INSTITUTE, R STREET INSTITUTE, AND THE RUTHERFORD INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with

[1] Amici affirm that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioner and respondent filed blanket consents to amicus briefs with the Clerk of Court.

approximately two million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU Foundation of Louisiana is one of its statewide affiliates.

The American Conservative Union Foundation (ACUF) is a 501(c)(3) organization based in Alexandria, Virginia. Established in 1983, ACUF is dedicated to educating Americans about conservative beliefs and policies at all levels of government. Its Nolan Center for Justice works to reform America's criminal justice system to improve public safety, foster greater government accountability, and advance human dignity. It is the organization's view that Constitutional injuries require a meaningful remedy. They cannot be ignored for the sake of convenience, particularly when the end result is the deprivation of life or liberty. In this case, that means that those who stand convicted by nonunanimous verdicts should be entitled to a remedy, whether their case is on direct or collateral review.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The R Street Institute is a non-profit, non-partisan public policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective

government, including properly calibrated legal and regulatory frameworks that support economic growth. The R Street Institute is interested in this case because of the significant constitutional issues and fundamental issue of fairness and accuracy implicated by the Sixth Amendment's requirement that criminal jury verdicts be unanimous.

The Rutherford Institute is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues.

Amici ACLU, ACLU Foundation of Louisiana, and The Rutherford Institute filed amicus briefs in support of petitioner in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), in which they urged this Court to reaffirm that the Sixth Amendment, as applied to the States through the Fourteenth Amendment, guarantees defendants the right to a unanimous jury verdict. Amici respectfully submit this brief to assist the Court in resolving whether to apply the Court's holding in *Ramos* retroactively to cases on federal collateral review.

SUMMARY OF ARGUMENT

This Court has reserved retroactive application of rules of criminal procedure for the most exceptional of cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963), which recognized the right to appointed counsel, was one such exceptional case. This is another. The unanimous jury verdict is a fundamental feature of the Sixth Amendment.

Since our Nation's founding, it has protected criminal defendants from inaccurate verdicts that result from biased juries and overzealous prosecutors. It should apply to cases on collateral review, both because *Ramos* merely reaffirms an existing rule of criminal procedure and because the rule, even if new, is a watershed rule of criminal procedure.

I. In the first instance, the rule articulated in *Ramos* should apply to cases on collateral review because the right to a unanimous jury is not new. As it observed in *Ramos*, this Court has recognized for more than a century that the Sixth Amendment guarantees defendants a unanimous jury. And the Court made clear half a century ago that the Sixth Amendment applies to the States through the Fourteenth Amendment. As a result, criminal defendants in Louisiana and Oregon have long had the right to unanimous jury verdicts. This Court's outlier decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972)—like the precedent overruled in *Gideon*—should not alter the retroactive availability of a right that has existed for more than a century. Given *Apodaca*'s fractured nature and demonstrably incorrect departure from precedent, it should not give rise to the kind of reliance interests that motivate the retroactivity doctrine, particularly in light of the racist origins of the state laws at issue here.

II. Alternatively, even if this Court concludes that *Ramos* announced a new rule, the right to a unanimous jury is a watershed rule of criminal procedure entitled to retroactive application. It is as essential to accurate verdicts as the right to counsel, which this Court held in *Gideon* must be applied retroactively. Nonunanimous-jury rules seriously diminish the accuracy of jury verdicts. Commentators and courts have lauded the truth-seeking function of the unanimous-jury rule since its origins in

England. Our Nation's Framers recognized the unanimous jury as a bulwark against verdicts tainted by biases. So too, this Court has repeatedly recognized that full and equal participation by all jurors is essential to the reliability of verdicts and that unanimous juries further that interest. The right to a unanimous jury thus operates hand in hand with the "beyond a reasonable doubt" burden of proof—which this Court applied retroactively on direct review under the framework that predated *Teague v. Lane*, 489 U.S. 288 (1989)—to ensure that juries reach trustworthy verdicts.

Modern experience confirms these observations. Research shows that unanimous-rule juries tend to deliberate longer; ensure that each individual juror has a voice in deliberations; more often correct factual errors during deliberations; engage more frequently in evidence-driven (as opposed to result-oriented) deliberations; and tend to be more confident in their results. Modern experience also demonstrates, in stark detail, the pernicious effects of nonunanimous decision-making by juries. In Louisiana, Black defendants are 64 percent more likely than white defendants to be convicted by nonunanimous juries. Louisiana's rule has operated to marginalize Black jurors and to convict Black defendants, exactly as it was intended to do. The likelihood that falsely convicted defendants are languishing in Louisiana and Oregon prisons as a result of these States' rules is too serious to ignore.

The Court should recognize the jury-unanimity rule as a bedrock rule of criminal procedure entitled to retroactive application.

ARGUMENT

The quintessential case for retroactive application of a rule of criminal procedure is *Gideon v. Wainwright*, 372 U.S. 335 (1963), which extended to the States the Sixth Amendment right to appointed counsel in a case on collateral review. While *Gideon* was decided well before *Teague*, the Court has since noted that it would apply retroactively under that doctrine if decided today. And for similar reasons, the right to a unanimous jury ought to apply retroactively as well. Since our Nation's founding, the unanimous-jury right has operated, in parallel with the requirement to find guilt beyond a reasonable doubt, to ensure accurate verdicts and protect defendants against overzealous prosecutors and biased jurors. The unanimous-jury right is, and always has been, a core protection for criminal defendants. Defendants in Louisiana and Oregon were wrongly deprived of this right, and they deserve relief.

This case is of a piece with *Gideon*. As in *Gideon*, which overruled *Betts v. Brady*, 316 U.S. 455 (1942), as an outlier precedent, *Ramos* restored the right to a unanimous jury to its rightful place among the fundamental constitutional protections for criminal defendants. Because *Ramos*, like *Gideon*, did not so much recognize a new rule as reaffirm an existing one, the rule requiring a unanimous jury should apply to cases on collateral review. But even if this Court concludes that the rule is new, it is, again like *Gideon*, a watershed rule, critical to ensuring that juries reach accurate and fair verdicts. Under this Court's retroactivity framework, then, it should apply in cases on collateral review.

I. THE RIGHT TO A VERDICT BY A UNANIMOUS JURY IS NOT NEW

Under this Court's retroactivity framework, a *new* rule of criminal procedure does not apply to cases on collateral review unless it is a watershed rule. *See Teague,* 489 U.S. at 301 (new rules are those not "dictated by precedent existing at the time the defendant's conviction became final"); *see also Whorton v. Bockting*, 549 U.S. 406, 416 (2007) ("[A]n old rule applies both on direct and collateral review."). This Court in *Ramos* did not so much announce a new rule as reaffirm that the unanimity requirement of the Sixth Amendment, recognized by this Court in more than a century of precedent, is fully incorporated against the States by the Fourteenth Amendment. Accordingly, the holding of *Ramos* should apply to cases on collateral review.

A. *Ramos* Reaffirmed Longstanding Precedent

The Sixth Amendment has always required unanimity in jury verdicts. As this Court observed in *Ramos*, "at the time of the [Sixth] Amendment's adoption, the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict." *Ramos*, 140 S. Ct. at 1400. This Court has reiterated this unanimity requirement at least "13 times over 120 years," *id.* at 1399, most recently in *Ramos* itself. Importantly, this Court's articulation in *Ramos* of the Sixth Amendment right to a unanimous jury is not "a case where the original public meaning was lost to time and only recently recovered." *Id.* at 1396. To the contrary, the *Ramos* majority highlighted this Court's enduring and consistent recognition that the Sixth Amendment requires a unanimous jury verdict. *Id.* at 1393-97; *see also id.* at 1421 (Thomas, J. concurring) (acknowledging "the

Court's longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts").

As the Court also explained in *Ramos*, the Court has also long recognized, since at least 1968, that the Sixth Amendment jury trial right is "'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment." *Id.* at 1397 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968)). And as early as 1964, the Court held that "incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government." 140 S. Ct. at 1397 (citing *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)); *see also Malloy*, 378 U.S. at 10-11 ("The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." (internal quotation marks and citation omitted)); *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (unanimously rejecting arguments for dual-track incorporation).

As a result, the right affirmed anew in *Ramos* is really not new at all. *Ramos* simply reaffirms two longstanding strands of this Court's cases: those recognizing that the Sixth Amendment requires a unanimous jury and those incorporating the Sixth Amendment against the States under the Fourteenth Amendment. The unanimity requirement of the Sixth Amendment was fully incorporated against the States for more than 50 years before *Ramos*.

B. *Apodaca* Does Not Trigger Legitimate Reliance Interests

A single outlier decision blemishes this Court's longstanding recognition of the jury-unanimity right articulated in *Ramos*: *Apodaca v. Oregon*, 406 U.S. 404 (1972). *Apodaca* should not alter the conclusion that *Ramos* merely reaffirmed an existing rule. Just as *Gideon* did not create a new rule but simply recognized that *Betts v. Brady* was an outlier, *Ramos* simply recognized *Apodaca*'s erroneous departure from what the Constitution demanded.

As this Court emphasized in *Ramos*, *Apodaca* was a "gravely mistaken," "egregiously wrong," "outlier" opinion contradicting other, controlling Supreme Court precedent. *Ramos*, 140 S. Ct. at 1405; *id.* at 1416 (Kavanaugh, J., concurring in part); *id.* at 1409 (Sotomayor, J., concurring in part) ("*Apodaca* is a universe of one—uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision"). And the Court's decision in *Apodaca* was badly fractured; no reasoning united a majority of Justices. *See id.* at 1398-99.[2] As the *Ramos* plurality explained: "*Apodaca*'s judgment line resolved that case for the parties in that case. It is binding in that sense. But stripped from any reasoning, its judgment alone cannot be read to repudiate this Court's repeated *pre-existing* teachings on the Sixth and Fourteenth Amendments." *Id.*

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[2] Moreover, eight Justices of the *Apodaca* Court agreed that the Sixth Amendment "requires a unanimous verdict in federal criminal jury trials," *Johnson v. Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting), and a majority also agreed that the Sixth Amendment should "be enforced against the States according to the same standards that protect that right against federal encroachment." *Id.; see also Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).

at 1404 (plurality op.) (emphasis added); *see also McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010) (describing *Apodaca* as "the result of an unusual division among the Justices" that "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government"). Thus, *Apodaca* should give not rise to the kind of reliance interests that undergird *Teague*.

The practice of the States in the wake of *Apodaca* confirms the point. Nonunanimous verdicts have not "become part of our national culture." 140 S. Ct. at 1406 (majority op.) (internal quotation marks omitted). On the contrary, unanimous verdicts are required in 48 States and federal court. *Id.* The practice of Louisiana and Oregon was an outlier at the time of *Apodaca*, and remains an outlier today. Given the long pedigree of the unanimous jury right, and *Apodaca*'s fractured nature and tenuous reasoning, these States had every reason not to rely on *Apodaca*.

Finally, the origins of Louisiana's and Oregon's nonunanimous-verdict rules further militate against reliance on *Apodaca*. Each State adopted its nonunanimous-verdict rule for racially discriminatory reasons. *Ramos*, 140 S. Ct. at 1401. As relevant in this case, the purpose behind Louisiana's adoption of nonunanimous-jury verdicts was, as admitted by a committee chairman at its 1898 constitutional convention, "to establish the supremacy of the white race." *United States v. Louisiana*, 225 F. Supp. 353, 371 (E.D. La. 1963) (quoting *Official Journal of the Constitutional Convention of the State of Louisiana*, 374 (Feb. 8, 1898)), *aff'd*, 380 U.S. 145 (1965); *see also Ramos*, 140 S. Ct. at 1394 (recounting racist origins of Oregon law).

Louisiana and Oregon's calculated efforts to evade a constitutional guarantee for the purpose of excluding

Black jurors from meaningful participation in rendering criminal verdicts violated the constitutional rights of criminal defendants in both states. The origins of the laws at issue—which were never intended to "faithfully apply" federal law, *Teague*, 489 U.S. at 310 (internal quotation marks omitted)—obliterated any legitimate claim of reliance interests by Louisiana and Oregon. Stated otherwise, when a State purposefully enacts an abhorrent, racially discriminatory, and unconstitutional rule of criminal procedure, it bears the risk that, whenever this Court eventually strikes the unconstitutional rule, that relief will be provided retroactively.

C. *Gideon v. Wainwright* Supports Application of *Ramos* Retroactively

The circumstances of this case bear a striking resemblance to *Gideon v. Wainwright*. Although *Gideon* arose before this Court's modern retroactivity jurisprudence, it has long been recognized as the quintessential case for retroactive application of a rule of criminal procedure. In his opinion concurring in part and dissenting in part in *Mackey v. United States*, 401 U.S. 667 (1971)—which heavily influenced this Court's current retroactivity framework—Justice Harlan wrote:

> [I]n some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.

Id. at 693-94. He identified the right to counsel articulated in *Gideon* as one such example and reserved the possibility of other "possible exceptions." *Id.* at 694. This

Court has confirmed *Gideon*'s bedrock status. *See Whorton*, 549 U.S. at 419; *see also* Jennifer H. Berman, Padilla v. Kentucky*: Overcoming* Teague*'s "Watershed" Exception to Non-Retroactivity*, 15 U. Pa. J. Const. L. 667, 685 (2012).

In *Gideon*, the Court recognized the Sixth Amendment right to appointment of counsel and applied it in a state-court case in a collateral-relief posture. The Court described a long line of cases holding the right to counsel to be fundamental, and explained that the Court "made an abrupt break with its own well-considered precedents" when it took the opposite position twenty-one years earlier in *Betts*. *Gideon*, 372 U.S. at 344. The *Gideon* Court described *Betts* as an "an anachronism when handed down." *Id.* at 345. Overruling *Betts*, the Court in *Gideon* described its decision as a "return[] to these old precedents, sounder [it] believe[d] than the new." *Id.* at 344. As relevant here, the contrary precedent in *Betts* thus did not prevent retroactive application of the right to counsel reaffirmed in *Gideon*.

Gideon supports retroactive application of the jury-unanimity rule, either because the rule is not new or because the rule is a watershed rule of criminal procedure, *see* Part II, *infra*. Like *Betts*, *Apodaca*, when issued, was an "anachronism," and an "abrupt break" with the Court's well-established precedents. *See Ramos*, 140 S. Ct. at 1405. As in *Gideon*, the "gravely mistaken" *Apodaca* decision, *id.*, should not preclude retroactive application of the fundamental, ancient right to a trial by jury to those individuals in Louisiana and Oregon whose convictions were obtained by a less-than-unanimous jury.

II. IN THE ALTERNATIVE, THE RIGHT TO A VERDICT BY A UNANIMOUS JURY IS A WATERSHED RULE OF CRIMINAL PROCEDURE

Even if the right to a unanimous jury verdict were deemed new, it would be a watershed rule. *Cf. Whorton*, 549 U.S. at 419 (recognizing that the right to appointed counsel recognized in *Gideon* is a watershed rule of criminal procedure). *Teague* requires retroactive application of a new "watershed" rule of criminal procedure that "implicate[s] the fundamental fairness" of the criminal proceeding. 489 U.S. at 311-12. Such procedures are ones "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313. To be sure, this is a demanding standard. The question is not merely whether the procedure at issue is "fundamental to our system of criminal procedure" or is thought to make verdicts more accurate. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Rather, the question is whether the absence of the procedure "so seriously diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Id.* at 355-56 (alteration in original) (emphasis and internal quotation marks omitted).

The right to a unanimous jury is the exceptional rule that satisfies that standard.[3] The Sixth Amendment right to a jury trial is not just "fundamental to the American scheme of justice." *Ramos*, 140 S. Ct. at 1397 (citing *Duncan*, 391 U.S. at 148-50). It is a central feature of the legal apparatus designed to ensure that no one is convicted erroneously, as essential to that goal as the "beyond a

[3] The Chief Justice of the Louisiana Supreme Court agrees. *See* Order at 2, *Louisiana v. Gipson*, 2019-KH-01815 (La. 6/3/2020); 2020 WL 3427193, at *2 (separate opinion of Johnson, C.J.) (*Ramos* "plainly announced a watershed rule").

reasonable doubt" standard—a standard that this Court held, applying the pre-*Teague* framework, is essential to the accuracy of jury verdicts. The Constitution strives to produce accurate verdicts by requiring an extraordinary degree of certainty. That is why a jury must find guilt "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 361 (1970). And it is why the doubt of a single juror defeats conviction. *See Johnson v. Louisiana*, 406 U.S. 380, 391-92 (1972) (Douglas, J., dissenting) (A "unanimous jury is necessary if the great barricade known as proof beyond a reasonable doubt is to be maintained. . . . [O]ne is necessary for a proper effectuation of the other."), *overruled by Ramos*, 140 S. Ct. 1390. The unanimity requirement is a core feature of the jury-trial right, with the *purpose and effect* of increasing the accuracy of jury verdicts. Its centrality to the accuracy of jury verdicts requires its protection on collateral review.

A. The Historical Origins of the Right Confirm Its Critical Role in Protecting Against Inaccurate Verdicts

The modern jury-unanimity requirement originated in England. Brief for the ACLU as Amicus Curiae, p. 3, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). In his venerable commentaries, Blackstone wrote that no person could be found guilty of a serious crime unless "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769); *see also* Daniel D. Peck, *The Unanimous Jury Verdict: Its Valediction in Some Criminal Cases*, 4 Tex. Tech L. Rev. 185, 187 (1972) (examining origins of the unanimity requirement in England and writing that "[v]erdicts were thought to be more reliable if there were

a number of compurgators and a great quantum of evidence and thus only a unanimous verdict was considered trustworthy").

The Framers of the United States Constitution, who carried forward the unanimity requirement from the English tradition, recognized that jury unanimity was a critical protection against unjust and inaccurate convictions. Before the ratification of the Constitution in 1786, John Adams wrote, "[I]t is the unanimity of the jury that preserves the rights of mankind." John Adams, *A Defence of the Constitutions of Government of the United States* 376 (3d ed. 1797); *see also* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 777 (1833) ("unanimity in the verdict of the jury is indispensable").

While the Bill of Rights was being ratified, Justice James Wilson—"who was instrumental in framing the Constitution and who served as one of the original Members of this Court," *Victor v. Nebraska*, 511 U.S. 1, 10 (1994)—highlighted in his oft-cited lectures the complementary roles of the unanimity requirement and the requirement to find guilt beyond a reasonable doubt: "To the conviction of a crime, the *undoubting and the unanimous* sentiment of the twelve jurors is of indispensable necessity." 2 James Wilson, *Works of the Honourable James Wilson* 350 (Lorenzo Press 1804); *see also id.* at 306, 311, 342, 351, 360 (further noting the unanimity requirement).

Justice Wilson emphasized that the unanimity requirement was instrumental in protecting criminal defendants against verdicts tainted by bias:

> The greatest security [against biased verdicts] is provided by declaring, and by reducing to practice

> the declaration, that he shall not suffer, unless the selected body who act for his country say *unanimously and without hesitation*—he deserves to suffer. *By this practice, the party accused will be effectually protected from the concealed and poisoned darts of private malice and malignity*, and can never suffer but by the voice of his country.

Id. at 351 (emphases added).

Nineteenth-century commentators and courts reaffirmed that unanimous jury requirements ensured more accurate and reasoned decisionmaking, and tied the requirement to the burden of proof required to affirm a conviction. The Scottish lawyer William Forsyth opined that "to require that twelve men should be unanimous was simply to fix the amount of evidence which the law deemed to be conclusive of a matter in dispute." 1 William Forsyth, *History of Trial by Jury* 239 (1852). Similarly, Forsyth described the unanimity requirement as "furnish[ing] a safeguard against precipitancy, and ensur[ing] a full and adequate discussion of every question which can fairly admit of doubt." *Id.* at 247. The requirement of unanimity, he explained, carries with it the advantage that "[i]n the event of any difference of opinion it secures a discussion. It is not possible to poll the jury at once, and so without further trouble or consideration to come to the conclusion. Any one dissentient person can compel the other eleven fully and calmly to reconsider their opinions." *Id.* at 251.

Early courts explained that the purpose of the jury trial right was to protect innocent persons from conviction.

Discussing the jury trial right and the unanimity requirement in particular, the Supreme Court of Kansas

proclaimed that the "unanimous conclusion of twelve different minds, is the certainty of fact sought in the law," *State v. Bybee*, 17 Kan. 462, 467 (1877), noting that "the testimony of *each individual juror* should be led to the same conclusion." *Id.* (emphasis added). The Supreme Court of Ohio, discussing the unanimity requirement, likewise opined: "We are of opinion it was this very tribunal, thus constituted, that those who framed and adopted the constitution of this state intended to perpetuate and *make the safeguard of innocence*, by securing its benefits to every person accused of crime in any of its courts." *Work v. State*, 2 Ohio St. 296, 305 (1853) (emphasis added); *see also Ford v. Maryland*, 12 Md. 514 (1859) ("unanimity is indispensable to the sufficiency of a verdict" (emphasis omitted)).

The U.S. Court of Appeals for the D.C. Circuit similarly affirmed that a "unanimous verdict is, alone, competent to determine the fact in issue." *United States v. Lawrence*, 26 F. Cas. 886, 886 (C.C.D.C. 1835). Even the Supreme Court of Oregon, before Oregon's adoption of its nonunanimous-verdict rule, recognized that the "unanimous conclusion of twelve different minds is the *certainty of fact* sought in the law," *State v. Ivanhoe*, 35 Or. 150, 160 (1899) (emphasis added), further opining that "safe and just results" at trial can *only* be obtained "by deliberation, mutual concessions, and due deference . . . in a body where unanimity is required." *Id.* at 152.

Modern state courts have reaffirmed these principles. Discussing accuracy in capital convictions, the Delaware Supreme Court observed:

> From the inception of our Republic, the unanimity requirement and the beyond a reasonable doubt standard have been integral to the jury's role in ensuring that no defendant should suffer death

> unless a cross section of the community unanimously determines that should be the case, under a standard that requires them to have a *high degree of confidence* that execution is the just result.

Rauf v. State, 145 A.3d 430, 437 (Del. 2016) (per curiam). As that court observed, the unanimity requirement is inextricably interrelated to the requirement that guilt be proved "beyond a reasonable doubt." The two work hand in hand to ensure confidence in the accuracy of convictions.

B. This Court Has Repeatedly Recognized That the Rule Protects Against Inaccurate Verdicts

This Court's decisions confirm the crucial role of the unanimity requirement in producing accurate verdicts. As a general matter, the purpose of trial by jury, as noted in *Duncan v. Louisiana*, is to provide a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S. at 156. "Our conclusion," the Court explained, "is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, *essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants*." *Id.* at 157-58 (emphasis added). And this Court has acknowledged that the unanimity requirement is a "substantial and essential" feature of the jury-trial right. *Patton v. United States*, 281 U.S. 276, 290 (1930) (internal quotation marks omitted).

Nonunanimous decision-making is substantially likely to produce unreliable, biased verdicts. Decisionmaking by a less-than-unanimous jury was designed to exclude the voices of minority jurors, and has had that effect. The right to a unanimous jury thus provides an essential defense against biases that may infect a jury's decision when

minority voices are not present. *See Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) ("[P]rejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."); *see also Johnson*, 406 U.S. at 399 (Stewart, J., dissenting) ("The requirement that the verdict of the jury be unanimous . . . provides the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice.").

In a series of cases involving jury size and unanimity, the Court again reiterated that jury unanimity is critical to unbiased, reasoned, and accurate verdicts. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court considered whether the Sixth Amendment, incorporated through the Fourteenth Amendment, permitted Florida to use a six-person jury. *Id.* at 86.

The Court concluded that Florida could use a six-person jury, but it tied its reasoning to the unanimity requirement. It explained: there is "little reason to think that [the purposes of the jury requirement] are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained*." *Id.* (emphasis added). Drawing on this observation, the Court later held in *Burch v. Louisiana*, 441 U.S. 130 (1979), that six-person juries must be unanimous. *See id.* at 139.

The Court reiterated this point in *Brown v. Louisiana*, 447 U.S. 323 (1980), decided under the Court's prior retroactivity framework. *Brown* presented the question whether to apply the Court's decision in *Burch* requiring

unanimity in six-person juries to other cases on direct review. Applying the pre-*Teague* framework, which focused on whether "the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials," 447 U.S. at 328 (internal quotation marks omitted), the Court concluded that its decision in *Burch* should be applied to other cases on direct review.

In reaching this decision, the plurality repeatedly emphasized the truth-enhancing function of the unanimous jury:

> When the requirement of unanimity is abandoned, the vote of this "additional" juror is essentially superfluous. The prosecution's demonstrated inability to convince all the jurors of the accused's guilt certainly does nothing to allay our concern about the reliability and accuracy of the jury's verdict. And while the addition of another juror to the five-person panel may statistically increase the representativeness of that body, relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard.

447 U.S. at 333. As the Court recognized, when the prosecutor fails to convince all of the jurors of a defendant's guilt, a court cannot be sure that the resulting verdict is accurate and reliable.

A verdict is just as suspect when a prosecutor fails to convince two of twelve jurors as when she fails to convince one of six jurors. How can it be said that a prosecutor has established guilt beyond a reasonable doubt in such a circumstance? And how can the minority jurors be said to be represented on the jury when the majority jurors can

ignore their votes? The absence of a unanimity requirement seriously diminishes the accuracy of jury verdicts.

Finally, this Court's treatment of the interrelated requirement of proof beyond a reasonable doubt provides yet further confirmation of the truth-protecting nature of the unanimity requirement. In *Ivan v. City of New York*, 407 U.S. 203 (1972) (per curiam), this Court concluded, under the pre-*Teague* framework, that the new rule articulated in *Winship* would be given "complete" retroactive effect, and applied the standard retroactively on direct review in that case. *Id.* at 204-05. The Court reasoned that the reasonable doubt standard is essential to reducing convictions based on factual error and to upholding "the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of criminal law.'" *Id.* (quoting *In re Winship*, 397 U.S. at 363-64). In *Winship*, the Court explained that a conviction based upon the civil preponderance standard would amount to "a lack of fundamental fairness." 397 U.S. at 363. Later, *Teague* incorporated this "fundamental fairness" language into its watershed procedural rule exception to nonretroactivity. 489 U.S. at 312; *see also Hankerson v. North Carolina*, 432 U.S. 233, 243-44 (1977) ("Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." (quoting *Ivan*, 407 U.S. at 204)).

Albeit arising under the pre-*Teague* standard, *Ivan* retains force here. Given the role of the burden of proof in producing accurate verdicts, there is little doubt that the result in that case would have been the same even

when applied to cases on collateral review under the *Teague* standard. And just as conviction without proof beyond a reasonable doubt would be fundamentally unfair, so too are the convictions Louisiana and Oregon have obtained by evading the complementary protection of the Sixth Amendment's unanimity requirement.

C. Modern Experience Confirms That Unanimous Juries Reach More Accurate Results

Academic research confirms the truth-promoting role of the unanimous-jury requirement. Unanimous decisionmaking by juries yields numerous benefits that increase the accuracy of jury verdicts: unanimous-rule juries (1) tend to deliberate longer; (2) ensure that each individual juror has a voice in the deliberations; (3) more frequently correct factual errors during deliberations and engage more frequently in evidence-driven (as opposed to result-oriented) deliberations; and (4) tend to be more confident in their results.

1. Studies show that where unanimity is required, "jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached." American Bar Ass'n, *Principles for Juries and Jury Trials* 24 (2005) (citation omitted); *see also* Dennis J. Devine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (discussing data that tend to show that the absence of a unanimity requirement leads to less deliberation); J.H. Davis, et al., *The decision processes of 6- and 12-person mock juries assigned unanimous and two-thirds majority rules*, 32(1) J. Personality & Soc. Psychol. 1, 9, 12 (1975) (unanimous juries spend more time deliberating, while juries only required

to reach a two-thirds majority stopped deliberating immediately or within ten minutes of getting the requisite number of votes). Accordingly, quorum groups may reach decisions twice as quickly as jurors under a unanimity rule. R.D. Foss, *Structural effects in simulated jury decision making*, 40 J. Personality & Soc. Psychol. 1055, 1055-62 (1981).

2. Unanimity also increases the participation of minority-viewpoint jurors in deliberations. Summarizing empirical findings of the effects of unanimity on civil juries, one researcher found that "[j]urors in the minority participated more actively and were more influential in the mock juries who had to reach unanimity. In contrast, their counterparts operating under a majority-decision rule were much less active." Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1, 23-24 (2001). Studies have also found that majority-rule juries tend to dismiss the views of minority "holdout" jurors, despite "no evidence that these outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views." Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U.L. Rev. 201, 205 (2006). This reduced consideration of minority viewpoints in nonunanimous juries threatens robust debate and the legitimacy of jury verdicts. Jeffrey B. Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 179-205 (1994).

3. Unanimous-rule jurors reach more accurate factual conclusions than do majority-rule juries. Synthesizing empirical studies on juror deliberations, one commentator found that juries operating under majority rules correct each other's factual errors less frequently

than do jurors under a unanimity rule. John Guinther, *The Jury in America* 81 (1988). Unanimous-rule jury deliberations are accordingly more "evidence-driven," beginning more frequently with discussions of evidence than do majority-rule juries, whose deliberations tend to be more verdict-driven. *See* Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 Chi.-Kent L. Rev. 579, 587 (2007).

4. Jurors on unanimous-rule juries tend to be more confident in the accuracy of their verdicts. A review of empirical analyses on jury decisionmaking found that jurors serving on juries required to reach unanimous verdicts "have tended to report being more satisfied and confident that the jury reached the correct verdict." Devine, *supra*, at 669.

Given the demonstrated benefits of unanimous decisionmaking, it should come as no surprise that the public views unanimous juries as more accurate and fair. One large empirical survey found that participants believed that twelve-person, unanimous juries were the most accurate, most thorough, most likely to represent minorities, most likely to minimize bias and maximize fairness, as compared with smaller and majority-rule juries. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizen's Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 L. & Hum. Behav. 333, 337–38 & tbl.1 (1988). This research takes on an added importance in this moment where society is increasingly noticing racial inequities in the criminal justice system, including the exclusion of racial minorities on juries.

Together, this research and experience confirm that the unanimity requirement actually delivers on its intended purpose: to ensure the accuracy of convictions.

D. The Origins of the Nonunanimous-Jury Rule in Louisiana and Oregon Confirm That It Diminishes Accuracy

Finally, the nonunanimous-jury rule of Louisiana and Oregon was intended to diminish, and has the effect of diminishing, the accuracy of jury verdicts.

Louisiana's nonunanimous-jury rule was designed to discriminate against Blacks, and has been doing so since its inception more than 100 years ago. Eliminating unanimity was designed to render irrelevant Black jurors, whose participation on juries had recently been required by federal law. *See Ramos*, 140 S. Ct. at 1394 (Louisiana rule was designed "to ensure that African-American juror service would be meaningless" (internal quotation marks omitted)); *see also id.* (describing racist origins of Oregon's rule); *id.* at 1417 (Kavanaugh, J., concurring in part) (describing origins of Louisiana rule in more detail). Arguing that *Ramos* "plainly announced a watershed rule," Chief Justice Johnson of the Louisiana Supreme Court recently explained that "[t]he whole point of the law was to make it easier to convict African American defendants at criminal trials, even when some of the jurors themselves were African American." Order at 3, *Louisiana v. Gipson*, 2019-KH-01815 (La. 6/3/2020); 2020 WL 3427193, at *2.

Given these origins, "it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors." *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J, concurring in part). Nonunanimous-jury verdicts "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." *Id.* at 1418.

Data on nonunanimous-jury verdicts contained in the record of *State v. Melvin Cartez Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist.), and submitted to the Court in the Joint Appendix in *Ramos v. Louisiana*, confirm these observations. According to those data, Black defendants in Louisiana have been 30 percent more likely than white defendants to be convicted by nonunanimous juries. J.A. at 52-53, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924), 2018 WL 8545357, at *52-53. Additionally, Black jurors cast "empty" votes at 64 percent above the expected rate whereas white jurors cast "empty" votes at 32 percent less than the expected rate if empty votes were evenly dispersed amongst all jurors. *Id.* at *50-51. In other words, Louisiana's rule in reality "silence[s] the voices and negate[s] the votes" of Black jurors, *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part), far more often than those of white jurors—creating an unacceptable risk of inaccurate verdicts in cases involving Black defendants.

Nonunanimous-jury rules seriously compromise the accuracy of jury verdicts, to the detriment of criminal defendants in general and minority defendants in particular. That was the purpose of the at-issue rules, and that has been their effect.

* * *

A unanimous jury is a hallmark of a fair, reliable criminal trial in this country, and it has been so since our Nation's founding. Because of racist laws enacted by Louisiana and Oregon, criminal defendants in those States have been denied that hallmark protection for far too long, and they have been advocating for *Apodaca*'s abrogation since the day it was decided. Until now, the Court has recognized only one rule of criminal procedure entitled to retroactive application on collateral review under the

Teague doctrine: the right to appointed counsel. The right to a unanimous jury should be the second. As it did in *Gideon*, this Court should hold that its outlier decision in *Apodaca* does not foreclose retroactive application of the right to a unanimous jury in this case.

CONCLUSION

The judgment should be reversed, and petitioner's petition for habeas corpus relief should be granted.

Respectfully submitted,

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