No. 19-5807

IN THE

Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner,

v.

DARREL VANNOY,

Respondent.

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

BRIEF OF THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AND PHILLIPS BLACK, INC. AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

JOHN MILLS
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612
(888) 532-0897
j.mills@phillipsblack.org

Counsel for Phillips Black, Inc.

DEVI M. RAO
Counsel of Record
AMIR H. ALI
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street NW
11th Floor
Washington, DC 20001
(202) 869-3434
devi.rao@macarthurjustice.org

Counsel for Roderick & Solange MacArthur Justice Center

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules & Statutes

Other Authorities

No. 19-5807

IN THE

Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner,

v.

DARREL VANNOY,

Respondent.

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

BRIEF OF THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AND PHILLIPS BLACK, INC. AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICI CURIAE[1]

The MacArthur Justice Center ("MJC") is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights,

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

and for a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, including issues concerning habeas corpus, unlawful confinement, and the treatment of incarcerated people.

Phillips Black, Inc. is a non-profit organization dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under law. Phillips Black attorneys frequently publish scholarship and teach courses on federal criminal procedure, including on the retroactive application of rules of federal constitutional law in state courts.

MJC and Phillips Black both have an interest in the sound and fair administration of the criminal justice system. *Amici* submit this brief to highlight that, whatever the Court's view of the question presented here, this Court should make clear that Louisiana and Oregon may offer a state postconviction remedy to individuals convicted under the now-unconstitutional practice of nonunanimous juries for serious offenses.

SUMMARY OF ARGUMENT

Danforth v. Minnesota announced that this Court's rulings on retroactivity do not limit a state court's ability to provide a remedy under state law. 552 U.S. 264, 282 (2008). State courts are thus free to find new rules of constitutional law retroactive in state proceedings even where a *Teague* analysis would counsel otherwise. But neither Louisiana nor Oregon has had the chance to address whether this Court's rule regarding nonunanimous juries set out in *Ramos v. Louisiana* should be held retroactive, under *Teague* or otherwise. At a minimum, if this Court determines that the Constitution does not require that *Ramos*'s rule apply retroactively on federal habeas review, the Court must make clear that the Louisiana and Oregon courts are entitled to reach a different conclusion as a matter of state law pursuant to *Danforth*.

Ordinarily, under principles of federalism as enshrined in the federal habeas scheme, state courts are given the first opportunity to review both state and federal claims relating to state convictions, subject to subsequent review on federal habeas. During that process, state courts, per *Danforth*, have the authority to make an independent determination as to the retroactivity of federal rules under state law, free from considerations of comity that might limit retroactivity in the federal courts.

This case represents a departure from that usual order of operations, and, as a result, this Court has an obligation to make the states' freedom under *Danforth* explicit. Notwithstanding *Danforth*'s promise, this Court's rulings exert a powerful channeling effect on state courts. Because this Court granted certiorari before the state courts had a chance to rule on the

retroactivity of *Ramos*, this Court's *Teague* analysis may have the practical effect of limiting the states' view of the question under state law. The federalism values embodied in AEDPA counsel this Court to make clear to the state courts that they have the freedom to depart from this Court's analysis for purposes of determining retroactivity under state law.

An explicit affirmation of the state courts' *Danforth* authority would be particularly valuable because Louisiana and Oregon have recently suggested a willingness to think outside the *Teague* box to right the grievous wrongs of nonunanimous convictions. Both States have been solicitous of *Ramos* claims under plain error review or similar procedures, and justices on both States' supreme courts have questioned whether *Teague* is the appropriate framework for their state postconviction systems. Thus, Louisiana and Oregon may choose to join a number of other states that have departed from or modified *Teague* to account for compelling state interests—in this case, erasing the taint of the racist origins of the nonunanimous jury provisions. This Court should be careful not to chill that exploration, explicitly reserved for the states under *Danforth*.

Ramos was a long time coming and it would correct a long-lasting injustice to make it retroactive. But whatever this Court's view on the question presented here, this Court can help further correct the error of *Apodaca* by acknowledging that Petitioner and numerous other prisoners have pointed to serious considerations which may cause Louisiana and Oregon to make *Ramos* retroactively applicable.

ARGUMENT

I. Federalism Requires This Court to Make Clear that Louisiana Would Not Be Bound by Any Non-Retroactivity Decision in This Case.

This case reaches the Supreme Court in an unusual posture. Petitioner sought review in August of 2019 on the same question presented as that in *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020): whether the Fourteenth Amendment incorporates the Sixth Amendment right to a unanimous jury verdict. *See* Pet. for Writ of Cert. at i, *Ramos*, 140 S. Ct. 1390 (No. 18-5924). Two weeks after deciding *Ramos*, this Court granted the petition for certiorari on the amended question presented of whether *Ramos* applies retroactively to cases on federal collateral review. *Edwards v. Vannoy*, No. 19-5807, 2020 WL 2105209 (U.S. May 4, 2020). Of course, Petitioner did not raise this question or issue in any earlier proceeding—nor could he have, prior to this Court's *Ramos* decision. As such, this Court—"a court of final review and not first view," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*)—is set to hear a question that has not been resolved by *any* appellate court, state or federal.

The procedural history of this case is at odds with the values of federalism and comity underlying the federal habeas regime, which has long contemplated that state courts will have the first opportunity to adjudicate claims brought by state prisoners. *See, e.g.*, *Henry v. Mississippi*, 379 U.S. 443, 452-53 (1965) (in order to promote "harmonious federal-state judicial relations," federal courts should "afford[] [states] an opportunity to provide state procedures, direct or

collateral, for a full airing of federal claims"); *Picard v. Connor*, 404 U.S. 270, 275 (1971) ("[T]he federal claim must be fairly presented to the state courts" to "prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.'" (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886))). Through the passage of AEDPA, Congress reaffirmed the centrality of federalism and comity concerns in the federal habeas regime. *See* 28 U.S.C. § 2254(b)(1)(A) (state prisoner must first "exhaust[] the remedies available in the courts of the State" before bringing a writ of habeas corpus in federal court); *id.* § 2254(c) ("an applicant shall not be deemed to have exhausted . . . if he has the right under the law of the state to raise, by any available procedure, the question presented").

Affording states an opportunity to address retroactivity in the first instance makes especially good sense in the context of retroactivity. As this Court held in *Danforth v. Minnesota*, 552 U.S. 264 (2008), states are free to be more generous than the federal courts in applying new rules of criminal procedure retroactively. *See infra* Part II. But "anchoring effects [often] induce states to follow the Supreme Court's lead." Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of* Danforth v. Minnesota *and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights*, 44 FLA. ST. U. L. REV. 53, 71 (2016). Giving states the opportunity to answer retroactivity questions before this Court weighs in thus promotes a "more engaged debate" between the state and federal courts. *Id.* at 74; *see also* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 288 (2005) (arguing that the

overlap of state and federal power produces a type of "polyphonic federalism" that advances the broad goals of federalism).

And, indeed, recent cases addressing whether to give retroactive effect to this Court's constitutional rulings have come to this Court only after several years of percolation in state and federal courts. For example, the Court heard *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), regarding the retroactivity of *Miller v. Alabama*, 567 U.S. 460 (2012), four years after its decision in *Miller*. Likewise, state and lower federal courts had three years between this Court's ruling on the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), and its subsequent decision on *Crawford*'s retroactivity in *Whorton v. Bockting*, 549 U.S. 406 (2007), to assess the retroactivity question within their own local contexts.

Affording Louisiana and Oregon the chance to conduct their own retroactivity analysis in state postconviction proceedings outside the shadow of this Court's ruling would enable them to weigh salient local considerations, unencumbered by irrelevant federal concerns—allowing for a more dialectical form of federalism. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048-49 (1977) (observing that the idealized "dialogue" of the "habeas relationship . . . occurs only where the Supreme Court has not spoken with specificity"). But that ship has sailed. Because the Court granted certiorari in this case shortly after deciding *Ramos*, allowing the States

to weigh in first on *Ramos*'s retroactivity is no longer an option.[2]

As a result, any ruling from this Court on federal retroactivity, unless appropriately cabined, may have the unintended effect of influencing—and limiting—the Louisiana or Oregon courts' retroactivity rulings under state law. That would be especially unfortunate since the procedural posture of this case did not allow this Court the benefit of the wisdom of the state and federal courts' views on the question, *see Whorton*, 549 U.S. at 415 (noting view of state high courts), and because those States have recently suggested an openness to departing from the *Teague* analysis to right the grievous wrongs of nonunanimous convictions under state law. *See infra* at 14-15. In short, the values of federalism and comity underlying the federal habeas scheme counsel the Court to exercise restraint in answering a question that state courts have not yet had the opportunity to address.

---

[2] Given that the Court chose to grant this question presented and state court proceedings have now stalled, *see infra* at 11-12, the Court's failure to resolve the question would likely generate even more confusion in state proceedings. The Court should thus resolve the question, while acknowledging that neither Louisiana nor Oregon would be bound by any non-retroactivity decision of this Court. However, if the Court were to conclude that federalism counsels against resolving the question, it must make that reasoning explicit so that Louisiana and Oregon courts are aware they are being afforded the first opportunity to resolve the issue of retroactivity.

II. This Court's Intervention Risks Undermining the State Courts' Independent Consideration of Retroactivity Under State Law.

If the Court holds that the Constitution requires retroactive application of *Ramos*, that decision obviously would govern all postconviction proceedings, federal and state, and therefore state courts would benefit from knowing that now. But if the Court reaches any other result, basic notions of federalism require the Court make clear that state courts in Louisiana and Oregon remain free to provide more generous retroactivity in state postconviction proceedings.

The Louisiana and Oregon courts were in the process of applying *Ramos* to state cases when this Court granted the petition in this case on the federal retroactivity question. Since *Ramos* was decided, the Louisiana and Oregon courts have played their part in our federalist system and applied *Ramos*'s holding faithfully to cases pending on direct review. *See, e.g.*, *State v. Monroe*, No. 2020-K-00335, 2020 WL 3425106, at *1 (La. 6/3/20) ("The present matter was pending on direct review when *Ramos v. Louisiana* was decided, and therefore the holding of *Ramos* applies."); *State v. Eggleston*, 366 Or. 491 (2020) (remanding the case for appropriate disposition in light of *Ramos*). Indeed, those courts have been applying *Ramos* to cases pending on direct review even where the *Ramos* claim was not preserved, given the intervening change in law and the fact that the error was plain or patent on the face of the record. *See, e.g.*, *State v. Jenkins*, No. 2019-K-00696, 2020 WL 3423960, at *1 (La. 6/3/20) (part of mass remand,

instructing the lower court that "[i]f the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings, the court of appeal should nonetheless consider the issue as part of its error patent review"); *State v. Ravy*, No. 2019-K-01536, 2020 WL 3424030, at *1 (La. 6/3/20) (same); *State v. Varnado*, No. 2020-K-00356, 2020 WL 3425296, at *1 (La. 6/3/20) (same); *State v. Ulery*, 366 Or. 500, 501 (2020) (*en banc*) ("[A] defendant is entitled to reversal even where the challenge to a nonunanimous verdict was not preserved in the trial court and was raised for the first time on appeal" because "such a challenge may be raised as a 'plain error' that an appellate court should exercise its discretion to correct."). The Louisiana and Oregon courts have exercised independent judgment to apply *Ramos* in these cases as a matter of state procedural law. *See Dick v. Oregon*, No. 18-9130, 2020 WL 1978927, at *1 (U.S. Apr. 27, 2020) (Alito, J., concurring) (clarifying that, in all cases remanded in light of *Ramos*, "the Court is not deciding or expressing a view on whether the [*Ramos*] question was properly raised below but is instead leaving that question to be decided on remand").[3]

---

[3] Notably, Oregon's law on this point does not compel courts to engage in plain error review, but rather gives them the discretion to do so. Or. R. App. P. 5.45(1) ("[T]he appellate court may, in its discretion, consider a plain error."). "That discretion entails making a prudential call that takes into account an array of considerations[.]" *State v. Vanornum*, 354 Or. 614, 630 (2013). The Oregon Supreme Court chose to exercise its plain error discretion to review the *Ramos* error after concluding that the error was "a grave one"; the court weighed the State's "interest in avoiding the expense and difficulty associated with a retrial"

The Louisiana and Oregon courts' provision for review of unpreserved challenges based on nonunanimity—via "error patent" review in Louisiana and plain error review in Oregon—evinces attentiveness to and careful consideration of *Ramos*'s impact on state convictions. These courts can be trusted to bring this same careful consideration to the question of *Ramos*'s retroactivity in state postconviction proceedings—a question that litigants have in fact presented to the Louisiana Supreme Court,[4] and which that court has specifically reserved. *See, e.g.*, *State v. Celestine*, No. 2019-KO-01966, 2020 WL 3424854, at *1 (La. 6/3/20) ("Nothing herein should be construed as a determination as to whether [*Ramos*] will apply retroactively on state collateral review to those convictions and sentences that were final when *Ramos* was decided.").

But then this Court granted certiorari in this case on the question of *Ramos*'s retroactivity on federal

---

against the defendant's "significant interest in a new trial before a jury properly instructed that it must be unanimous to convict," and concluded that "the balance weighs in defendant's favor." *Ulery*, 366 Or. at 504. The State had conceded plain error in light of *Ramos* and "advised this court that, if [it] were to exercise [its] discretion to correct the unpreserved error, [it] should reverse defendant's convictions and remand for new trial." *Id.* at 502; *see also State v. Williams*, 366 Or. 495, 498 (2020) (*en banc*) (same).

[4] Multiple petitions for postconviction relief have asked the Louisiana courts to consider whether *Ramos* applies retroactively. *See, e.g.*, Pet. for Post-Conviction Relief at 8, *Jordan v. Bouttè*, Case No. 11-090-0111 (La. 19th Jud. Dist. Ct. May 7, 2020) (*available at* https://promiseofjustice.org/wp-content/uploads/2020/05/Rhonda-Jordan-PCR-Filing.pdf) (asking the Louisiana Supreme Court to apply *Ramos* retroactively in state postconviction proceedings). Similar petitions are expected in Oregon.

habeas. And the state courts, presumably reluctant to step on the toes of the Supreme Court, appear to be deferring ruling on the question of *Ramos*'s retroactivity on state collateral review until this Court reaches its decision as to *Ramos*'s retroactive application on federal habeas review. To illustrate, although some Louisiana Supreme Court justices would move forward with the state retroactivity analysis despite the federal retroactivity question currently pending before this Court, *see State v. Gipson*, No. 2019-KH-01815, 2020 WL 3427193, at *1 (La. 6/3/20) (Johnson, C.J., dissenting from the denial of the supervisory writ) ("I would grant the writ to clarify that the Supreme Court's recent decision in *Ramos* . . . should be applied retroactively to cases on state collateral review."); *State v. Rochon*, No. 2019-KH-01678, 2020 WL 3424328, at *1 (La. 6/3/20) ("Weimer, J., would grant and docket only on the issue of whether *Ramos* . . . should apply retroactively to defendants on collateral review."), the majority of justices understandably and predictably have deferred consideration of the state-law question until this Court disposes of the present case. *See Gipson*, 2020 WL 3427193, at *1 (Johnson, C.J., dissenting from the denial of the supervisory writ) (explaining that the majority of the justices chose to defer consideration until the Supreme Court decides the present case).

But a ruling from this Court under *Teague* will not necessarily dispose of the question of *Ramos*'s retroactivity as a matter of state law. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Court recognized that *Teague*, which addresses whether a decision applies retroactively on *federal* habeas review "does not in any way limit the authority of a state court,

when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*." *Id.* at 282. This recognition stemmed, in part, from "the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Id.* at 280. This Court also emphasized that the "remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law," and can be more expansive than the remedy provided by this Court. *Id.* at 288.

In recent years, a number of states have expanded on *Teague*'s protections in their postconviction proceedings based on state-specific considerations in a given case. *See, e.g.*, *Rhoades v. State*, 233 P.3d 61, 64, 70 (Idaho 2010) (explaining that the court will not apply the *Teague* framework rigidly, but rather will apply its "independent judgment, based upon the concerns of this Court and the uniqueness of our state, our Constitution, and our long-standing jurisprudence" (citation and internal quotation marks omitted)), *cert. denied*, 562 U.S. 1258 (2011); *State v. Forbes*, 119 P.3d 144, 146-47 (N.M. 2005) (looking to *Teague* "for guidance" but also relying on state-specific considerations), *cert. denied*, 549 U.S. 1274 (2007); *In re Tsai*, 351 P.3d 138, 143-44 (Wash. 2015) (applying the *Teague* framework but relying on state-specific considerations for the "new rule" analysis); *State v. Mares*, 335 P.3d 487, 499-504 (Wyo. 2014) (noting that the court may "apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise apply it where a particular state

interest is better served by a broader retroactivity ruling").[5]

Louisiana, for its part, has explicitly recognized that it is "not bound" to apply *Teague* in determining retroactivity in state postconviction proceedings. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992). And although Louisiana, like other states, has voluntarily considered the non-binding *Teague* standards to guide its retroactivity analysis in state postconviction proceedings, *see* Br. of Ct.-Appointed Amicus Curiae Arguing Against Jurisdiction at *2, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2015) (No. 14-280), (noting Louisiana's purely voluntary usage of the *Teague* standards to guide its retroactivity analysis since 1992), some members of the Louisiana Supreme Court recently have expressed interest in abandoning *Teague* and crafting new standards for retroactivity in Louisiana's state postconviction proceedings. In *State v. Gipson*, Chief Justice Johnson noted that the court is "not bound to continue using *Teague*'s test," and that there are "good reasons" to abandon it. 2020 WL 3427193, at *3 (Johnson, C.J., dissenting from the denial of the supervisory writ). Specifically, Chief Justice Johnson proposed that the Louisiana Supreme Court adopt a test that "includes a consideration of whether a stricken law had a racist origin, has had a disproportionate impact on

---

[5] Other states frame their retroactivity jurisprudence around some variant of the equitable concerns raised by this Court in *Linkletter v. Walker*, 381 U.S. 618 (1965). *See, e.g., State v. Smart*, 202 P.3d 1130, 1136 (Alaska 2009); *Falcon v. State*, 162 So. 3d 954, 956, 961 (Fla. 2015); *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003); *State v. Kennedy*, 735 S.E.2d 905, 923 (W. Va. 2012).

cognizable groups or has otherwise contributed to [Louisiana's] history of systemic discrimination against African Americans." *Id.* at *4. As *Danforth* holds, it is Louisiana's prerogative to do so.

While Oregon, like Louisiana, has applied *Teague* in its state postconviction proceedings, *see Saldana-Ramirez v. State*, 298 P.3d 59, 63 (Or. Ct. App. 2013), recent statements from its high court also indicate a desire to reconsider that approach. In *Verduzco v. State*, 357 Or. 553 (2015), the Oregon Supreme Court granted review to "consider the principles that Oregon courts should follow in exercising the authority that *Danforth* has recognized." *Id.* at 555. While the court ultimately found that it had no occasion to decide the issue, as the claim was procedurally barred under state law, it explicitly reserved for future decision whether "to adhere to the federal standard of retroactivity or . . . adopt a different standard." *Id.* at 574. Likewise, in *Chavez v. State*, 364 Or. 654 (2019), the Oregon Supreme Court explicitly reserved the question as to "whether [it] should clarify or further refine the factors that [it] consider[s] . . . in deciding whether a new constitutional rule will apply retroactively." *Id.* at 679; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1438 (2020) (Alito, J., dissenting) ("[I]n Oregon, the State most severely impacted by today's decision, watershed status may not matter since the State Supreme Court has reserved decision on whether state law gives prisoners a greater opportunity to invoke new precedents in state collateral proceedings.").

Charting a course separate from *Teague* based on state-specific considerations may be especially appropriate in Louisiana and Oregon, as it would

enable the courts to give full weight to the history of racism behind their States' nonunanimity laws and the racial harms that the laws have perpetuated for decades. *See Ramos*,140 S. Ct. at 1394 (noting that "courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules"); *see also id.* at 1401 n.44 ("acknowledging the racist history of Louisiana's and Oregon's laws" and discussing the need to examine the "uncomfortable past").

In short, Louisiana and Oregon courts might choose to depart from this Court's analysis when they are given the opportunity to answer the retroactivity question for themselves. This Court should minimize the shadow of any ruling it makes under *Teague* so as not to undermine whatever state-specific solutions Louisiana and Oregon may employ by explicitly noting that federalism allows the states to answer the question of *Ramos*'s retroactivity under state law for themselves. In other words, if this Court determines that the federal courts cannot provide a remedy for the violation of Petitioner's Sixth Amendment right, it should remind the state courts that they still might.

CONCLUSION

As a matter of federalism and comity, the Court should make clear that a decision holding *Ramos* non-retroactive on federal habeas review does not interfere with the states' power under *Danforth* to make *Ramos* retroactive under state law. Whatever this Court's view on its question presented, this Court can help further correct the error of *Apodaca* by acknowledging that Petitioner and numerous other prisoners have pointed to serious considerations which may cause

Louisiana and Oregon to make *Ramos* retroactively applicable.

Respectfully submitted,

JOHN MILLS
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612
(888) 532-0897
j.mills@phillipsblack.org

Counsel for Phillips Black, Inc.

DEVI M. RAO
Counsel of Record
AMIR H. ALI
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street NW
11th Floor
Washington, DC 20001
(202) 869-3434
devi.rao@macarthurjustice.org

Counsel for Roderick & Solange MacArthur Justice Center

JULY 2020