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* STATE OF OREGON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

After *Apodaca v. Oregon*, 406 U.S. 404 (1972), held that the Sixth Amendment allowed nonunanimous juries in state court, Oregon conducted thousands of felony jury trials in which the jury was instructed that "ten or more jurors" could convict. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), overruled *Apodaca* and held that the Sixth Amendment requires unanimity to convict in state criminal trials. Does that rule apply retroactively to final convictions?

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In 1972, this Court held in *Apodaca* that nonunanimous 11-1 and 10-2 jury verdicts in state criminal trials do not violate the federal constitution. In the ensuing 48 years, Oregon relied on *Apodaca* to conduct many thousands of felony jury trials, with a uniform instruction telling jurors that ten or more of them must agree to the verdict. In April 2020, this Court in *Ramos* overruled *Apodaca* and held that unanimity is required. As a result, hundreds of cases on direct appeal will be retried. The issue in this case, however, is whether *Ramos* also applies retroactively to the much larger number of cases that may be subject to collateral review.

Oregon has a compelling interest in the finality of its convictions. Retroactive application of new rules has a significant impact on crime victims and requires retrials years after the fact when key evidence may be gone. Oregon thus has a direct interest in the issue here, which could undermine the finality of an enormous number of convictions and seriously strain its criminal justice system.

SUMMARY OF ARGUMENT

Under *Teague v. Lane*, 489 U.S. 288 (1989), a new constitutional rule of criminal procedure does not apply on collateral review unless it is a "watershed rule." A "watershed rule" is a rule without which the likelihood of an accurate conviction is seriously diminished, a standard that is "demanding by design," so demanding that the Court has never "announce[d] a new rule of criminal procedure

capable of meeting it." 140 S. Ct. at 1407 (plurality opinion). The *Ramos* plurality noted that *Teague*'s analysis is "expressly calibrated to address the reliance interests States have in the finality of their criminal judgments." *Id.* *Teague* thus "free[d]" the Court to overrule *Apodaca*, "while leaving questions about the reliance interest States possess in their final judgments" for another day in a proceeding "crafted to account for them." *Id.*

That day has arrived. This Court must now "rightly take into account the States' interest in the finality of their convictions." *Id.* Retroactive application of *Ramos* would frustrate the states' finality interests in their criminal convictions and their reliance on *Apodaca*—a decision that specifically upheld Oregon's rule allowing nonunanimous verdicts.

The two-part *Teague* framework confirms that the unanimity rule announced in *Ramos* does not apply retroactively on collateral review.

First, *Ramos* is a "new" rule. *Ramos* overruled *Apodaca*'s holding that the federal constitution does not require unanimity in state felony trials. A rule that can be established only by overruling precedent is necessarily new under *Teague* because it is not "dictated by precedent." Petitioner's contrary argument—that *Apodaca* was never precedent—mistakenly conflates horizontal stare decisis with vertical stare decisis. Lower courts were bound by *Apodaca*, and, at a minimum, reasonable jurists could conclude as much. That is all that *Teague* requires for a rule to be "new."

Second, *Ramos* is not a watershed procedural rule. *Ramos* overruled *Apodaca* not because jury unanimity is required to be confident in the accuracy of convictions, but based on the Court's understanding of what the Framers intended when they adopted the Sixth Amendment. Nor did *Ramos* alter our understanding of bedrock procedural elements essential to fairness. It was an incremental decision in a line of cases involving jury size and unanimity.

A holding that *Ramos* applies on collateral review would have a dramatic impact on Oregon's criminal justice system. In addition to cases with nonunanimous verdicts, some defendants are challenging *unanimous* verdicts, or cases in which the jury was not polled, on the theory that the ten-or-more-jurors instruction was a structural error. To date, over six hundred Oregon defendants on direct appeal have raised *Ramos* challenges, and that number grows every week. Retroactive application of *Ramos* to collateral review cases would call into question Oregon convictions spanning more than 80 years. For nearly 50 of those years, Oregon's criminal justice system was operating under the precedent of this Court's decision in *Apodaca*. This Court should apply its well-established precedent to hold that *Ramos* is not retroactive.

ARGUMENT

A. *Teague's* retroactivity analysis was designed to protect the very finality and reliance interests that are at stake.

The Court repeatedly has recognized that applying new rules on collateral review "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309. The "costs imposed upon the State by retroactive application of new rules of constitutional law" after a conviction is final on direct appeal "generally far outweigh the benefits of this application." *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring). To that end, established retroactivity principles give broad effect to a new rule for cases on direct appeal, but protect the state's finality and reliance interests by precluding retroactive application to cases on collateral review.

The interest in the finality of convictions is grounded in practical concerns: the need for closure, the potential for loss of evidence, and the limits on public resources. *See, e.g.*, Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 Wake Forest J.L. & Pol'y 179, 185 (2014) [Scott, *Collateral Review*] (identifying the primary considerations as "the costs of relitigation, the accuracy of new proceedings, and the damage to the reputation of the criminal justice system").

Closure. The need for a conclusive resolution to cases is tied to the legitimacy of any criminal justice system. "One of the law's very objects is the finality

of its judgments." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). That objective is particularly important in criminal law because "[n]either innocence nor just punishment can be vindicated until the final judgment is known." *Id.* "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309.

Closure is especially important to crime victims. In Oregon, a crime victim has constitutional and statutory rights in criminal proceedings. *See, e.g.*, Or. Const., Art I, § 42(1)(a), (f) (creating right for victims to attend proceedings and be consulted about plea negotiations); Or. Rev. Stat. § 107.013 (creating right for victims to appear at sentencing). One "cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over." *In re Sanders*, 981 P.2d 1038, 1042 (Cal. 1999). A victim who has finally found peace many years after being told that a conviction is final is, in a sense, victimized anew by learning that the legal system has opted to reopen the case many years after the trial was conducted.

Loss of evidence. Finality promotes accuracy, because the factual record at the original trial is likely to be more accurate than the record at any retrial. The passage of time generally results in the loss of at least some evidence. "[O]ver time, memories fade, evidence spoils, and witnesses die or otherwise become unavailable." Scott, *Collateral Review*, at 186. That problem is especially acute if years, or even decades, have passed. In Oregon, criminal defendants can seek post-conviction relief

based on new rules of constitutional law long after the conviction. *See, e.g.*, *White v. Premo*, 443 P.3d 597, 603 (Or. 2019) (allowing petition challenging 24-year-old murder conviction based on *Miller v. Alabama*, 567 U.S. 460 (2012)); *McKenzie v. Blewett*, Umatilla County, Case No. 20CV30476 (invoking *Ramos* and challenging 41-year-old conviction). "The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary." *Peyton v. Rowe*, 391 U.S. 54, 62 (1969) (quoting *Rowe v. Peyton*, 383 F.2d 709, 715 (4th Cir. 1967)). Particularly when a case involves violent crimes and lengthy sentences, the difficulty in retrying the case years after the fact jeopardizes public safety.

The application of a "new" procedural rule—one announced after the conviction is final—is particularly problematic in collateral challenges because "no one might have paid attention to the relevant facts during the original proceedings." *Id.* That is the case here because, before *Ramos*, many juries in Oregon were not polled to determine unanimity and, even if they were, the records of the polls may be lost. In those cases, the record would show only that a nonunanimous instruction was given that might have led to a nonunanimous verdict.

Far from increasing confidence in the accuracy of proceedings, requiring a state to retry criminal cases potentially decades after the fact risks significantly diminished accuracy.

Public resources. *Teague* was concerned about "*continually* forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and

appeals conformed to then-existing constitutional standards." 489 U.S. at 310 (emphasis in original). In Oregon, defendants are invoking *Ramos* to challenge convictions where the jury was unanimous, where the jury was not polled, and even where defendants waived a jury trial and the conviction was based on a guilty plea or bench trial. *See, e.g.*, *State v. Stuart*, A170222 (Or. Ct. App.) (using *Ramos* to challenge jury-trial waiver that preceded court trial); *State v. Gomez*, A172493 (Or. Ct. App.) (same); *McKenzie v. Blewett*, Umatilla County, Case No. 20CV30476 (using *Ramos* to challenge guilty plea); *DeForge v. Blewett*, Umatilla County, Case No. 20CV31210 (same). The breadth of the challenges being brought by Oregon defendants—unanimous juries, nonunanimous juries, unpolled juries, even cases with no jury due to plea or defendant's election of a bench trial—illustrates the potential impact if *Ramos* applies to final convictions. "Respect for finality helps to conserve the scarce public resources available to the criminal justice system." Scott, *Collateral Review* at 186.

B. *Ramos* announced a new procedural rule that, under *Teague*, does not apply retroactively.

Under *Teague*, a "new" procedural rule does not apply retroactively to cases on collateral review unless it is a "watershed rul[e]" that implicates "the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S 406, 416 (2007) (internal quotation marks omitted). The *Ramos* rule is a new procedural rule and does not fall within the watershed-rule exception.

1. *Ramos* overruled *Apodaca* and announced a "new" rule.

"[A] case announces a new rule when it breaks new ground or imposes a new obligation" on the government. *Teague*, 489 U.S. at 301. Stated differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis in original). And a holding is not so dictated unless it would have been "apparent to *all* reasonable jurists." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (emphasis added) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527–28 (1997)). Although that determination may be difficult if a case merely extends the reasoning from prior cases, the question is easy to answer here because "the explicit overruling of an earlier holding no doubt creates a new rule." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). *Ramos* overruled *Apodaca* and, thus, necessarily announced a new rule.

Petitioner tries to avoid that conclusion by arguing that *Apodaca* was never precedent in the first place. Pet. Br. 12–22. In *Ramos*, three justices concluded that *Apodaca* did not supply a "governing precedent" that would "bind this Court," because *Apodaca* turned on Justice Powell's fifth vote, which was based "on a dual-track theory of incorporation that a majority of the Court had already rejected (and continues to reject)." *Ramos*, 140 S. Ct. at 1402 (plurality opinion). Petitioner argues that that conclusion also necessarily means that *Apodaca* was not "precedent" for purposes of *Teague*. Pet. Br. 20.

Petitioner's theory is flawed for two basic reasons. First, the plurality's view of *Apodaca's* precedential value was rejected by a majority of the Court. *See Ramos*, 140 S. Ct. at 1420 n. 10 (Kavanaugh J., concurring) ("It appears that six Justices of the Court treat the result in *Apodaca* as a precedent. . . "). Second, even the three justices in the plurality who did not view *Apodaca* as binding recognized that the Court was announcing a new rule for *Teague*'s purposes. The plurality emphasized that "worries" that the *Ramos* rule would be retroactive on collateral review "outstrip[ped] the facts" because "under *Teague*, newly recognized rules of criminal procedure do not normally apply in collateral review." *Ramos*, 140 S. Ct. at 1407 (plurality opinion).

More fundamentally, petitioner conflates horizontal stare decisis with vertical stare decisis. Horizontal stare decisis is "the respect that this Court owes to its own precedents and the circumstances under which this Court may appropriately overrule a precedent." 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring). That was the central concern of the debate in *Ramos*. The three-justice plurality concluded that, because *Apodaca* turned on a theory of incorporation that had already been rejected, it should not "bind *this* Court" and was not entitled to any stare decisis protection. *Ramos*, 140 S. Ct. at 1402–04 (plurality opinion) (emphasis added).

In contrast, the *Teague* analysis here turns on vertical stare decisis, which is the principle that "the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court. "

140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring). Until it was overruled, *Apodaca* was binding on state-court judges regardless of whether the decision "appear[ed] to rest on reasons rejected in some other line of decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). As the Court has repeatedly reminded lower courts, only the *Court* may overrule one of its decisions. *See United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). So even if the three justices were correct that *Apodaca* was not binding precedent on *this* Court, it certainly bound state courts. State courts could *not* have relied on the same considerations that this court relied on in *Ramos* to overrule *Apodaca* themselves.

For the same reason, petitioner is wrong that *Ramos* was dictated by then-existing precedent establishing that incorporated rights applied equally against the states. *Apodaca* established an *exception* to that rule that was binding on lower courts and that continued to be binding until the Court overruled *Apodaca* in *Ramos*. *See McDonald v. Chicago*, 561 U.S. 742, 766 n.14 (2010) (citing *Apodaca* for the proposition that the Sixth Amendment "does not require a unanimous jury verdict in state criminal trials"); *Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019) (citing *Apodaca* and stating that "[t]he sole exception [to its incorporation doctrine] is [the Court's] holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings").

Still, petitioner suggests *Ramos* is not "new" because its rule and analysis is grounded in history and longstanding incorporation precedent. But the benchmark for assessing whether *Ramos* is "new" is not the original meaning of the Sixth and Fourteenth Amendments or the vintage of its supporting authorities. Instead, the benchmark is the constitutional interpretation in effect "when the defendant's conviction became final." *Beard v. Banks*, 542 U.S. 406, 411 (2004). *Apodaca* was the constitutional interpretation in effect when petitioner's conviction was final. The fact that *Ramos* not only overruled *Apodaca* but also replaced it with a rule that fully restored the common-law unanimity requirement and that comported with decades-old incorporation precedent does not make *Ramos* any less new. *See generally Schriro v. Summerlin*, 542 U.S. 348, 352–53 (2004) (assuming that the jury-trial rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), which was a return to the original understanding of the Sixth Amendment, was new).

Precedent confirms that conclusion. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court announced a Sixth Amendment confrontation rule that returned the doctrine to the Framer's original understanding. Yet *Crawford* was new because the Court had to overrule *Ohio v. Roberts*, 448 U.S. 56 (1980), to announce it and because, prior to *Crawford*, state courts "could have reached the conclusion that the *Roberts* rule" governed. *Whorton*, 549 U.S. at 416–17. The same holds true here. *Ramos* is new because the Court had to overrule *Apodaca* and because, prior to *Ramos*, reasonable jurists could and

would have concluded that *Apodaca* governed. *See Butler v. McKellar*, 494 U.S. 407, 412 (1990) ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new [governmental] obligation.'").

2. *Ramos* did not announce a watershed rule.

Because *Ramos* announced a new procedural rule, it does not apply on collateral review unless it is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton*, 549 U.S. at 416 (2007) (quoting *Saffle*, 494 U.S. at 495). The exception for watershed procedural rules is "'extremely narrow'—so narrow, in fact, that it is "unlikely" that any such rule has "yet to emerge." *Id.* at 417 (internal quotation marks omitted). In the years since *Teague*, the Court has "rejected every claim that a new rule satisfied the requirements for watershed status." *Id.* at 418 (citing examples).

To qualify as watershed, a new rule must meet two requirements. First, the rule must be "necessary to prevent an 'impermissibly large risk' of an inaccurate conviction." *Id.* (quoting *Summerlin*, 542 U.S. at 356; citing *Tyler v. Cain*, 533 U.S. 656, 665 (2001)). Second, the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* By both measures, the unanimity rule announced by *Ramos* falls short.

a. The unanimity rule is not necessary to prevent an impermissibly large risk of erroneous convictions.

To determine whether a rule creates an "impermissibly large risk" of an inaccurate conviction, this Court asks whether the prior rule is "so much more unreliable" than the new rule that the new rule is "one without which the likelihood of an accurate conviction is *seriously* diminished." *Id.* at 420 (emphasis in original). The standard is so demanding that no new rule other than the right to counsel announced by *Gideon v. Wainwright*, 372 U.S. 335 (1963), has met it.

The *Apodaca* rule—which allowed supermajority guilty verdicts—did not create an impermissibly large risk of erroneous convictions. In arguing to the contrary, petitioner and amici invoke studies of jury dynamics under different decisional rules. Pet. Br. 28–29; Law Professors and Social Scientists Br. at 4–12. But *Ramos* repudiated the resort to the results of social science as a criterion for interpreting the Sixth Amendment; as the Court explained, the problem with *Apodaca* is not that the plurality bungled the cost-benefit analysis based on social science, but that it "subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Ramos*, 140 S. Ct. at 1401.

But to the extent that social science bears on whether the rule greatly improves accuracy, studies suggest that "[the] outcomes of verdicts do not significantly vary with decision rule." Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 Hastings Const. L.Q. 141, 144 & n.

10 (2006) (collecting studies). Nor do data about erroneous convictions establish that nonunanimous verdict rules lead to more erroneous convictions than unanimous verdict rules; the rate of exonerations in Oregon is below the national average. *See generally* The National Registry of Exonerations (Map), *available at* https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx. (last visited Oct. 1, 2020).

The rule from *Williams v. Florida*, 399 U.S. 78 (1970), which permitted convictions based on verdicts by six-member juries, further confirms that the *Apodaca* rule does not seriously undermine accuracy. Many jurisdictions permit juries with fewer than 12 members in criminal cases. "A total of 11 states currently use juries composed of fewer than 12 jurors in felony and misdemeanor trials" and "[a]n additional 29 states allow juries of fewer than 12 in misdemeanor cases[.]" Barbara Luppi & Francesco Parisi, *Jury Size and the Hung-Jury Paradox*, 42 J. Legal Stud. 399, 402 (2013) (citing 2004 statistics). It may be debatable which rule is more protective against an inaccurate conviction: a six-person unanimous rule or a 12-person nonunanimous rule that would require 10 or more jurors to agree to convict. But, at a minimum, the jury-size rule from *Williams* demonstrates that 12 unanimous votes to convict is not the *sole* measure of a reliable conviction.

Equally important, the basis for the decision in *Ramos* was not a broad concern about improving accuracy over the *Apodaca* rule. Rather, the basis

was history—and, in particular, what jury-verdict rule the Framers intended when they adopted the Sixth Amendment. In that sense, the *Ramos* approach to the Sixth Amendment is broadly the same as *Crawford*'s approach to the Confrontation Clause, one based on what the Framers intended rather than an inquiry into which rule would lead to more accurate convictions: "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of factfinding in criminal trials." *Whorton*, 549 U.S. at 419. *Ramos* is no different.

b. The unanimity rule did not alter our understanding of bedrock procedural elements essential to fairness.

To qualify as a "watershed" rule, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 421. In that respect, the rule must be like the rule announced by *Gideon*—evincing "primacy" and "centrality." *Id.* (quoting *Saffle*, 494 U.S. at 495). The *Ramos* rule does not meet those requirements.

First, the *Ramos* rule leaves untouched the validity of unanimous verdicts involving fewer than 12 votes for guilt. As explained above, *Williams* permits convictions for serious offenses based on a verdict returned by at least six jurors, and a majority of states permit convictions for serious offenses based on juries smaller than 12. The same 10-2 verdicts in

a 12-member jury that *Ramos* would prohibit would be lawful if the jury had only the 10 concurring members. The *Williams* rule shows that the agreement of *12* jurors is not the only criterion of fairness.

Second, if a nonuanimous jury rule were fundamentally unfair, it would not be the prevailing rule of decision in courts martial, foreign jurisdictions' criminal trials, or state civil trials. Yet the Uniform Military Code of Justice permits nonuanimous guilty verdicts in courts martial. *See* Uniform Code of Military Justice, Article 52, *codified at* 10 U.S.C. § 852 (permitting conviction by a three-fourths supermajority for noncapital crimes). Other countries, including England, permit nonunanimous verdicts even in criminal cases. *See* Juries Act 1974, ch. 23, § 17 (Eng.); *see also* Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio St. J. Crim. L. 629, 635 (2008) (examining decision rules in various democratic countries and finding that Australia, Belgium, France, Scotland, and Wales, among other countries, permit nonunanimous verdicts in criminal cases under certain conditions). And several states permit nonunanimous verdicts in civil cases. *See* Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 Hastings Const. L.Q. 141, 196, n.9 (2006) (citing National Center for State Courts, Jury Decision-Making FAQs).

Finally, the *Ramos* rule comes nowhere near the centrality and primacy of *Gideon*, the only rule that the Court has identified to be a watershed procedural rule. By providing criminal defendants with access to

a qualified advocate to contest the government in court, *Gideon* introduced a "sweeping" and "fundamental" change to the nature of adversarial criminal proceedings. *Beard*, 542 U.S. at 418. And it did so in *all* felony cases across *all* jurisdictions.

Ramos, in contrast, represents an incremental decision in a line of cases involving jury size and unanimity. It can be traced at least back to *Williams*, which held that the Sixth Amendment allows states to use six-member juries for serious crimes. *Apodaca* was next and held that states could permit 11-1 and 10-2 supermajority guilty verdicts. *Ballew v. Georgia*, 435 U.S. 223 (1978), then held that the Sixth Amendment did not allow states to use a five-member jury panel. *Burch v. Louisiana*, 441 U.S. 130 (1979), added that, if a state permits a six-member jury, the jury must be unanimous. And *Ramos* revisited and overruled *Apodaca* and extended the unanimity rule from *Burch* to a 12-person jury. Though that change may make it slightly harder for a state to secure a criminal conviction, it is not a dramatic shift in the fairness of a trial.

Petitioner and amici argue that nonunanimous jury rules were adopted in part from discriminatory motivations and suggest that the rule itself therefore must be fundamentally unfair. Pet. Br. 37–38. But the cases on which petitioner relies—for example, *Batson v. Kentucky*, 476 U.S. 79 (1986)—have not created rules that this Court applied retroactively to collateral review. *See Ramos*, 140 S. Ct. at 1420 (Kavanaugh, J., concurring) (noting that *Allen v. Hardy*, 478 U.S. 255, 261 (1986) (per curiam), rejected retroactivity for *Batson*). In any event, the question

whether *Ramos* announced a watershed procedural rule does not turn on the motives of those who enacted the nonunanimous jury rule.

Moreover, a determination that *Ramos* is not a watershed procedural rule would not prevent other challenges alleging that a nonunanimity rule was discriminatory in its origins and effects. Criminal defendants have been, and remain, free to bring an equal protection challenge if they can establish the factual predicate for such a challenge. *See State v. Williams*, No. 15–CR–58698, 2016 WL 11695154 (Or. Cir. Ct. Dec. 15, 2016) (concluding that the defendant had not proven that Oregon's rule violated equal protection), *aff'd*, 441 P.3d 710 (Or. App. 2019), *rev'd on other grounds*, 466 P.3d 55 (Or. 2020). For those reasons, petitioner identifies no basis for concluding that *Ramos* is a watershed procedural rule.

C. Petitioner and amici significantly understate the potential impact of applying *Ramos* retroactively.

Petitioner and Amici Curiae Federal Public Defender for the District of Oregon and the Oregon Criminal Defense Lawyers' Association ("Oregon Defense Bar") appear to suggest that only cases with nonunanimous verdicts could "potentially require[]" litigation in collateral review. Oregon Defense Bar Amicus Br. 4; *see also* Pet. Br. 36–37. But cases that have already been filed show that the litigation will not be so limited.

In Oregon, the defense bar is regularly arguing that all convictions require reversal on direct appeal where the jury was instructed that it could return a

nonunanimous verdict, regardless of whether the verdict was in fact unanimous. The Oregon Supreme Court has granted discretionary review in five cases to decide whether *Ramos* requires reversal of convictions based on verdicts that were *unanimous* and convictions for which there was no jury poll. *State v. Kincheloe* (S067611); *State v. Ramos* (S067105); *State v. Ciraulo* (S067569); *State v. Chorney-Phillips* (S067557); *State v. Dilallo* (S067493). Defendants are even invoking *Ramos* to challenge the jury-trial waivers that preceded their court trials. *See, e.g.*, *State v. Stuart*, A170222 (Or. Ct. App.) (invoking *Ramos* to challenge jury-trial waiver that preceded court trial); *State v. Gomez*, A172493 (Or. Ct. App.) (same). To date, over six hundred defendants have raised *Ramos* challenges, and that number continues to grow every week.

The existence of these direct-review cases undercuts the Oregon Defense Bar's suggestion that the direct-appeal litigation is essentially over and that the only cases that require reversal are 276 cases for which the state conceded error in May 2020. That number represents merely the state's *initial* concessions for cases with a nonunanimous guilty verdict. The state already has conceded error in many more cases and will continue to do so for quite some time given the time lag between trial and the filing of a responsive brief on appeal. And the Oregon Defense Bar's brief neglects to mention that defendants are also challenging convictions based on unanimous verdicts or no-poll verdicts. *Amici* are wrong to suggest that the direct-appeal fallout has been minimal.

Challenges on collateral review, including federal challenges, also already go beyond cases that actually involved a nonunanimous jury. *See* Brief of Petitioner-Appellant, *Almanza-Garza v. Amsberry*, No. 20-35260 (9th Cir. July 17, 2020) (challenging *unanimous* conviction under *Ramos* structural-error theory). Indeed, the Oregon Defense Bar explains that defendants who were convicted based on unanimous verdicts are filing successive state post-conviction petitions and seeking to file federal habeas petitions. Oregon Defense Bar Br. 6. And petitioners are invoking *Ramos* to challenge court-trial and guilty-plea convictions on collateral review. *See e.g.*, Oregon Defense Bar Br. 6 (referencing those claims); *McKenzie v. Blewett*, Umatilla County, Case No. 20CV30476 (raising guilty-plea challenge); *DeForge v. Blewett*, Umatilla County, Case No. 20CV31210 (same); *Nichelson v. Blewett*, Umatilla County, Case No. 20CV29479 (raising court-trial challenge); *White v. Cain*, Malheur County Case, No. 20CV31757 (same).

Suggestions that litigation will be confined to convictions based on nonunanimous verdicts are simply incorrect. As the state has noted from the beginning, potentially thousands of convictions are at stake.

Indeed, if *Ramos* is retroactive on collateral review, *all* defendants could attempt to challenge their final convictions in state post-conviction proceedings. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 728–29 (2016) (holding that state courts must apply rules that are retroactive under *Teague* in state post-conviction proceedings if they are new

substantive rules but leaving open whether new watershed procedural rules must be applied retroactively). Unlike federal habeas relief, state post-conviction relief in Oregon is not limited to persons in custody. And although there is a statute of limitations for state post-conviction proceedings, Oregon's statute allows late or successive petitions when they are based on legal theories that could not reasonably have been raised sooner, even if the challenged convictions are decades old. *See Chavez v. State*, 438 P.3d 381, 387 (Or. 2019) (observing that, in Oregon, a state post-conviction petition is not untimely when it involves a claim that could not "reasonably could have been raised" within two years of the date that the conviction became final); *White*, 443 P.3d at 603 (allowing petition challenging 24-year-old murder conviction based on *Miller*). The federal district court also has been staying federal habeas actions to enable petitioners to return to state court in Oregon to litigate state post-conviction *Ramos* claims.

The Oregon Defense Bar suggests that the Court should assume that the bulk of *Ramos* collateral-review claims have already been filed, which they appear to estimate at 65 cases. Yet the ink is barely dry on *Ramos*, and convicted persons presumably will have every reason to seek collateral relief to challenge their convictions. The current number of collateral-review cases is thus likely the tip of the iceberg. But to the extent the current number of *Ramos* collateral-review cases is a preview of what is to come, it is far greater than amicus suggests. The Oregon Department of Justice (which handles only some of

the collateral challenges to convictions) has already received over 230 state post-conviction and federal-habeas petitions with *Ramos* claims. And in a recent seven-week period alone (August 10, 2020, through September 30, 2020), there were a total of roughly 125 state post-conviction relief *Ramos* claims filed.

Petitioner also highlights that the state may not elect to retry every defendant. Pet. Br. 37–38. True enough, but that is not a point in petitioner's favor. The state may choose not to retry cases because of evidence lost to time (even in the most serious cases) or because of a lack of resources, not because of doubts about the merits. Retroactivity principles account for those very concerns.

CONCLUSION

This Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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