No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AARON CHOAT,

PETITIONER-APPELLEE,

v.

RICK COURSEY,

RESPONDENT-APPELLANT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether counsel provides ineffective assistance in violation of the Sixth Amendment to the United States Constitution when he fails to introduce exculpatory evidence and to impeach the State's key fact witness's testimony?

II.

Whether the rule of *Ramos v. Louisiana*, holding that a non-unanimous jury requirement violates the Sixth and Fourteenth Amendments to the United States Constitution, applies retroactively to cases on collateral review.

This question will be decided in *Edwards v. Vannoy*, No. 18-31095.

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The petitioner, Aaron Choat, respectfully requests that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Ninth Circuit entered on July 13, 2020.

OPINIONS BELOW

On July 13, 2020, the United States Court of Appeals for the Ninth Circuit issued an order denying a certificate of appealability. Appendix A.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2253(c) provides that:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . .
>
> (2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

The Sixth Amendment to the United States Constitution secures the criminally accused the rights to the effective assistance of counsel and to trial by an impartial jury.

Longstanding federal jurisprudence interpreting the Sixth and Fourteenth Amendments required jury unanimity in federal criminal trials and rejected "partial" incorporation of the Bill of Rights.

On April 20, 2020, this Court held in *Ramos v. Louisiana*, 590 U.S. __, 140 S. Ct. 1390, 2020 WL 1906545 (2020), that the Sixth Amendment, which is fully incorporated to the States by the Fourteenth Amendment, requires jury unanimity in all state criminal trials.

On May 4, 2020, this Court granted certiorari in *Edwards v. Vannoy*, No. 18-31095, to review whether *Ramos v. Louisiana* applies retroactively to cases on federal collateral review.

STATEMENT OF THE CASE

A. Criminal Trial And Direct Appeal Proceedings.

Petitioner Aaron Choat stands convicted by a non-unanimous Oregon jury of being the driver during a roll-over vehicle accident during which two occupants died and two others, including Petitioner, were injured. There was no conclusive evidence of who was driving the vehicle at the time of the accident. As a result, the identity of the driver was the central issue at trial.

No witness remembered the accident itself. The only other surviving occupant, Brett Sells, testified that Petitioner was driving earlier that night. The State mustered circumstantial evidence and expert testimony, including from a crash reconstructionist, to support its theory that Petitioner was driving at the time of the accident.

Defense counsel failed to expose that Sells, who had been drinking heavily, could not account for approximately two hours leading up to the accident. Moreover, defense counsel never called, and, thus, the jury never heard from, a critical exculpatory witness who could have established that a woman—not Petitioner—was driving at the time of the accident.

The jury could not agree on the most serious charges, acquitting Petitioner of first-degree manslaughter and third-degree assault. The jury also could not unanimously agree on the lesser offenses that required proof of recklessness, but

reached non-unanimous verdicts on these counts. Specifically, the jury was not unanimous by a count of 10 to 2 on two counts of second-degree manslaughter and by a count of 11 to 1 on a count of fourth-degree assault.[1] The jury's non-unanimous verdicts indicated a degree of residual doubt about Petitioner's guilt. Nevertheless, Oregon treated these non-unanimous verdicts as convictions and sentenced Petitioner to a term of 156 months in prison. *Id.* Even though his attorney stood flat-footed while the court instructed the jury it did not have to reach a unanimous decision, the Sixth and Fourteenth Amendments to the United States Constitution required unanimity. In any of forty-eight other states, Petitioner could not have been convicted on these counts without the agreement of the remaining jurors, and, without these convictions, he likely would have received a jail or probationary sentence.

[1] Unanimous verdicts were reached on charges of reckless driving, three counts of reckless endangerment, and driving under the influence. Conviction on these counts did not turn on whether Petitioner was the driver at the time of the accident because it was uncontested that he had driven earlier in the evening and that all four occupants of the vehicle drank to intoxication.

B. State Court Appeal and Post-Conviction Relief Proceedings.

Petitioner appealed on grounds not relevant here. The Oregon Court of Appeals affirmed in a written opinion and the Oregon Supreme Court denied review. *State v. Choat*, 251 Or. App. 669, 284 P.3d 578, *rev. denied* 352 Or. 666, 293 P.3d 1045 (2012) (Table).

Petitioner next sought post-conviction relief in the Oregon courts, challenging his conviction and sentence based on attorney ineffectiveness, including that trial counsel provided ineffective assistance when he failed to effectively cross-examine Sells and to rebut the State's crash reconstructionist's theories. The post-conviction trial court denied relief, finding there were no additional questions that could have been asked of Sells on cross examination and, essentially, that there was no unpursued challenge to the State's theory available to defense counsel.

Petitioner appealed, arguing that trial counsel provided ineffective assistance in failing to effectively cross-examine Sells, but otherwise arguing that the matter should be remanded for more specific findings because the post-conviction judgment did not comply with Oregon law. The Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *Choat v. Amsberry*, 275 Or. App. 1032, 367 P.3d 568 (Table), *rev. denied*, 359 Or. 166, 376 P.3d 283 (2016) (Table).

C. Federal Habeas Corpus Proceedings.

In the federal habeas corpus proceedings below, Petitioner alleged that trial counsel was ineffective when he failed to adequately challenge the State's evidence that Petitioner was driving at the time of the crash both by challenging Sells's testimony as well as the circumstantial and expert evidence that the State mustered to support its theory. Petitioner also alleged cumulative error and actual innocence, arising out of the same nucleus of operative facts. Specifically, Petitioner's contention was that defense counsel should have exposed that Sells's testimony failed to account for a significant period of time just before the accident and called an objective witness who had seen a female driving a vehicle with a similar description and similar passengers shortly before the accident.

Because his constitutional claim had not been fully exhausted in the state courts, Petitioner submitted evidence demonstrating his actual innocence and that it would be a miscarriage of justice not to address his claim in its entirety. Among other things, the innocence evidence provided context not provided at trial and demonstrated that Sells failed to account for the two-hour period before the accident. It also established that Oregon Department of Transportation (ODOT) employee Steven Skaggs observed a vehicle like that involved in the accident being driven by a female with a male in the front passenger seat (and a male, and perhaps another

female, in the rear driver-side and passenger-side seats, respectively) just a few miles from the accident site approximately twenty minutes before the accident. Pet. Ex. A-F.

On October 2, 2019, the Magistrate Judge issued a Findings and Recommendation, recommending the denial of relief and the denial of a Certificate of Appealability (COA). Appendix C. On December 6, 2019, the District Court denied relief, also refusing to grant a COA on the claims presented to that Court. Appendix B.

Thereafter, this Court decided *Ramos v. Louisiana*, holding that the Sixth Amendment requires unanimous jury verdicts to convict in state criminal cases, calling into question Petitioner's non-unanimous jury conviction. Subsequent to this Court's decision in *Ramos*, Petitioner filed a successive post-conviction petition in the Oregon state courts to exhaust his *Ramos* claim. That state-court petition remains pending.

Petitioner also filed a request for a COA in the United States Court of Appeals for the Ninth Circuit. Specifically, Petitioner requested a COA both on the claims briefed in the District Court as well as on a new claim that his conviction by a non-unanimous jury violated his Sixth and Fourteenth Amendment rights as held in *Ramos*. The motion explained that *Ramos* calls into question the constitutional

validity of Petitioner's conviction by a less-than-unanimous jury, giving rise to a previously unavailable or futile claim, and asked that Petitioner be afforded his day in federal court on this fundamental constitutional claim. In the alternative, Petitioner requested remand to the District Court with instructions to vacate the judgment, to grant leave to amend to include the *Ramos* claim in Petitioner's first federal petition, and to stay the matter pending this Court's decision in *Edwards* if the Ninth Circuit would otherwise find that the *Ramos* claim is waived because it was not raised in the District Court. In the second alternative, Petitioner requested that the Ninth Circuit treat his COA motion as an application for a second and successive habeas corpus petition on the *Ramos* claim and authorize additional proceedings in the District Court.

On July 13, 2020, the Ninth Circuit denied Petitioner's request for a COA and stated that Petitioner would need to file a separate application for a successive habeas corpus petition to raise his *Ramos* claim. Appendix A. Specifically, the Ninth Circuit stated:

> The certificate of appealability . . . is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." [citations omitted]
>
> In his request for a certificate of an appealability, appellant asserts a new claim that his conviction by a non-unanimous jury violated his

> constitutional rights but concedes that this claim was never raised in the district court proceedings and has not been exhausted in the state courts. This new claim is more properly pursued in an application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court that complies with the requirements of Ninth Circuit Rule 22-3.

Appendix A, at 1-2.

REASONS FOR GRANTING THE WRIT

Petitioner's conviction is the product of ineffective assistance of trial counsel in violation of his Sixth Amendment rights. This Court should grant the writ of certiorari. At a minimum, this Court should order summary reversal because the Ninth Circuit was clearly wrong in finding that Petitioner did not meet the standard for a COA.

Moreover, the non-unanimous 10-2 and 11-1 jury verdicts in this case violate the Sixth Amendment's guarantee of an impartial jury. Thus, in the alternative, this Court should hold this case in abeyance until it decides *Edwards v. Vannoy*, No. 18-31095, which will determine whether the rule of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), holding unconstitutional non-unanimous jury verdicts like Petitioner's, applies retroactively to federal habeas corpus cases.

A. Reasonable Jurists Could Debate That Relief Is Appropriate On Petitioner's Sixth Amendment Claim.

To obtain a certificate of appealability, a habeas petitioner must make a "substantial showing of the denial of constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. "[A] COA does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Rather, he "must '[s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

As this Court has explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. at 338. In *Slack*, 529 U.S. at 478, this Court held:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

> constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Petitioner's Sixth Amendment claim meets this standard for issuance of a COA. *Strickland v. Washington*, 466 U.S. 668, 688-90 (1984), stated that a court judging an IAC claim judges the reasonableness of counsel's conduct:

> on the facts of the particular case, viewed as of the time of counsel's conduct. . . . In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

In light of the circumstances of this case, it was unreasonable for counsel not to use all available impeachment and exculpatory evidence to challenge the State's theory that Petitioner was the driver of the vehicle at the time of the accident as this was the central issue at trial. Counsel's omission caused the adversarial process to fail to work in this particular case. The Ninth Circuit has repeatedly held that counsel has a duty to introduce exculpatory evidence like that at issue here. *E.g.*, *Riley v. Payne*, 352 F.3d 1313, 1318 (9th Cir. 2003) ("'[A] lawyer who fails to adequately investigate . . . and . . . introduce . . . evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.'") (citations omitted). Petitioner's Sixth Amendment claim satisfies the standard for issuance of a COA and it deserves encouragement to proceed further.

B. In The Alternative, This Court Should Hold This Case In Abeyance Until It Decides *Edwards v. Vannoy*.

Petitioner's Oregon conviction was by a non-unanimous jury in violation of his rights to due process, to an unbiased jury, and to have the State prove the charges beyond a reasonable doubt. The verdict and, as a result, Petitioner's convictions reflect lingering doubt. In April 2020, *Ramos* revisited this Court's fractured decisions in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), and held that the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict to convict. 140 S. Ct. at 1397. Raising this issue in Oregon was futile under existing precedent at the time of Petitioner's trial.[2] However, this Court has now held in *Ramos* that convictions like Petitioner's are unconstitutional. This Court subsequently granted review, in *Edwards v. Vannoy*, to address whether the rule of *Ramos*—that jury unanimity is required in state cases as in federal cases—should be applied retroactively to federal habeas corpus cases. Therefore, in the alternative, Petitioner requests that this Court hold his case in abeyance until this important issue has been decided. *See Hall v. Myrick*, No. 17-35709.

[2] The Oregon courts have summarily rejected non-unanimous-jury challenges for years. *E.g.*, *State v. Ibarra*, 293 Or. App. 268, 427 P.3d. 1127 (Or. Ap. 2018) (challenge to Oregon's use of non-unanimous juries and reliance on *Apodaca/Johnson* summarily denied as not presenting a substantial question of law).

Ramos should be applied retroactively to Petitioner's case because, despite the jurisprudential aberration that *Apodaca* represented, the jury unanimity requirement has always been fundamental to our system of criminal justice. As such, *Ramos* either reaffirmed a longstanding "old rule" that was undisturbed by the historical accident of *Apodaca*, or it announced a watershed "new rule" that restored a bed-rock principle of constitutional law in Louisiana and Oregon and seriously improved the fairness and accuracy of criminal trials. Either way, *Ramos* applies retroactively on collateral review.

In the meantime, in an abundance of caution, Petitioner now is seeking state-court post-conviction review of his *Ramos* claim to exhaust that claim as called for by this Court's decision in *Greene v. Fisher*, 565 U.S. 34, 41 (2011). It is not yet clear whether the Oregon courts will provide a forum for this claim. However, exhaustion is necessary when any new or additional facts fundamentally alter the nature of the claim; place the claim in a significantly different and stronger evidentiary posture than it was when the state courts considered it; or substantially improve the evidentiary basis of the claim; then the claim is not yet exhausted. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

1. *Ramos* is an Old Rule Undisturbed by the Historical Accident of *Apodaca*.

First, *Ramos* applies retroactively on collateral review because, under *Teague v. Lane*, 489 U.S. 288, 311 (1989), it reaffirmed an "old rule" that was logically dictated by an extensive line of precedent—settled decades before Petitioner's conviction became final. This Court has long recognized: (i) the Sixth Amendment guarantees the right to a unanimous verdict; (ii) the Jury Trial Clause is a fundamental right and is incorporated against the States; and (iii) all incorporated Bill of Rights provisions apply identically against the States and the federal government. The holding in *Ramos* necessarily follows under *Teague*'s objective approach: unanimity is required in both federal and state court. The State's interests in comity and finality are not impaired by retroactively applying well-established constitutional principles like jury unanimity, in part because reasonable jurists should have anticipated them. *See Mackey v. United States*, 401 U.S. 667, 695 (1971) (opinion of Harlan, J.); *see also Chaidez v. United States*, 568 U.S. 342, 347 (2013) ("[A] person [may] avail herself of [a] decision on collateral review" when this Court merely "appl[ies] a settled rule."); *Bousl*ey *v. United States*, 523 U.S. 614, 620 (1998) (explaining that there is "nothing new" about a claim based upon principles "enumerated . . . long ago").

The badly fractured decision in *Apodaca* does not change that conclusion. Neither the plurality opinion nor Justice Powell's separate concurrence in that case can be objectively read to erase this Court's pre-existing Sixth and Fourteenth Amendment precedent. A majority of this Court has never endorsed the unusual decision in *Apodaca*. Indeed, in numerous decisions after *Apodaca*, the pre-existing precedent was repeatedly reaffirmed and *Apodaca* was characterized as an outlier and aberration. Even the State of Louisiana, in *Ramos*, balked at the prospect of arguing that *Apodaca* supplied a binding precedent.

As explained in *Johnson* and *Apodaca*, a majority of the 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 further agreed that "the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment." *Id.* Indeed, eight Justices—every justice except Powell—agreed that the Sixth Amendment applies identically to both the Federal Government and the States. *See Johnson*, *supra*, at 395 [] (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca*, 406 U.S., at 406 [] (plurality opinion), and four other Justices took the view that the

Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, *id*., at 414-15 [] (Stewart, J., dissenting); *Johnson, supra*, at 381-82 [] (Douglas, J., dissenting).

As this Court later wrote of *Apodaca*:

> Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. *See Johnson*, *supra*, at 395-96 [] (Brennan, J., dissenting) ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments" (footnote omitted)).

McDonald, 561 U.S. at 766 n.4. To be sure, this language in *McDonald* followed a decade of Sixth Amendment decisions that are incompatible with the plurality result in *Apodaca*.

Indeed, *Ramos* was "controlled" by three well-settled principles logically dictating that the Jury Trial Clause requires unanimous verdicts in federal and state court alike. *See* 140 S. Ct. at 1395-97. First, the Sixth Amendment's unanimity requirement is an "ancient guarantee" that is synonymous with the right to trial by jury and dates back to common law. *Id.* at 1401. In 1948, this Court held in a federal case that the Sixth Amendment requires "[u]nanimity in jury verdicts." *Andres v. United States*, 333 U.S. 740, 748 (1948); *accord Thompson v. Utah*, 170 U.S. 343,

353 (1898) ("[L]ife and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors."). The requirement has also been widely discussed by this Court. *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369, 2376-77 (2019) (plurality opinion); *Descamps v. United States*, 570 U.S. 254, 269 (2013); *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012); *United States v. Booker*, 543 U.S. 220, 233-39 (2005); *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *United Stat*es *v.* G*audin*, 515 U.S. 506, 510 (1995); *Johnson*, 406 U.S. at 369 (Powell, J., concurring); *Andres*, 333 U.S. at 748; *Patton v. United States*, 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson*, 170 U.S. at 351-53.

Indeed, a series of decisions subsequent to *Apodaca/Johnson* recognized that the Jury Trial Clause requires both unanimity and proof beyond a reasonable doubt. *Apprendi* explained the historical foundation for recognition of the jury-trial right, including the "companion" rights of unanimity and proof beyond a reasonable doubt extends back centuries to common law. 530 U.S. at 471, 476, 477 ("[T]he truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.") (quoting 4 William Blackstone, *Commentaries*

on the Laws of England, 349-50 (1769)); *id.* at 478-80 (discussing the origins of the reasonable-doubt standard).

In *Blakely*, 542 U.S. 296, the Supreme Court concluded that the Sixth Amendment rights were precisely as understood by the Framers under:

> [L]ongstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)[.]

Id. at 301. As the Court held:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

Id. at 313-314. Blackstone's Commentaries on the meaning of the right to a jury trial is cited four times in *Blakely*. *Id.* at 301, 307 n.11, 313, 314. The Court continued to recognize that an individual's right to proof beyond a reasonable doubt of every fact justifying their conviction and incarceration is based in the Sixth Amendment:

> This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.

Cunningham v. California, 549 U.S. 270, 281 (2007). As the discussions in these decisions demonstrate, jury unanimity has been a component of the Sixth Amendment and fundamental to our criminal justice system since its founding despite the aberrational result in *Apodaca*.

Second, *Duncan v. Louisiana* settled the incorporation question half a century ago, explaining that the Jury Trial Clause reflects a "profound judgment about the way in which law should be enforced and justice ad-ministered." 391 U.S. 145, 156 (1968). Specifically, in 1968, the Supreme Court held in *Duncan* that the Sixth Amendment right to a jury trial applied to state court criminal proceedings through the Fourteenth Amendment:

> The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. State of Alabama*[]; whether it is 'basic in our system of jurisprudence,' *In re Oliver*[]; and whether it is 'a fundamental right, essential to a fair trial,' *Gideon v. Wainwright*[]; *Malloy v. Hogan*[]; *Pointer v. State of Texas*[].
>
> The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. . . . Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.

Id. at 148-50 (citations shortened and footnotes omitted).

Last, incorporated provisions of the Bill of Rights "bear the same content when asserted against States as they do when asserted against the federal government." *Ramos*, 140 S. Ct. at 1397. The Supreme Court long ago "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.'" *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964).

As Justice Scalia stated in concurrence in *Apprendi*, "[t]he founders of the American Republic were not prepared to leave [the jury trial guarantee] to the State." 530 U.S. at 498 (Scalia, J., concurring). That was the view of the majority in *Blakely*, with five members of the Court ruling that the "very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." 542 U.S. at 308. Then, in *Cunningham*, six justices confirmed that states must respect the Sixth Amendment guarantees confirmed by the Court, allowing states to modify their sentencing systems "so long as the State observes Sixth Amendment limitations declared in this Court's decisions." 549 U.S. at 293-94.

A decade ago, in *McDonald*, this Court again underscored that *Apodoca* was an outlier and that the Court had long held that the individual guarantees of the Bill of Rights could not be applied in a water-downed fashion to the states:

> [T]he Court abandoned "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," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Malloy [v. Hogan]*, 378 U.S. [1], . . . 10-11 [(1968)] (internal quotation marks omitted).
>
> Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* at 10[]; *see also Mapp v. Ohio*[]; *Ker v. California*[]; *Aguilar v. Texas*[]; *Pointer*[]; *Duncan*[]; *Benton*[]; *Wallace v. Jaffree*[].

561 U. S. at 765-66, n.14. *McDonald* concluded that *Apodaca*'s outcome "was the result of an unusual division among justices, not an endorsement of the two-track approach to incorporation." *Id.* Thus, *Apodaca* "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government" because it was merely "Justice Powell's concurrence in the judgment [that] broke the tie." *Id.*

This Court noted the Term before it decided *Ramos* that the "sole exception" to the Court's complete incorporation doctrine is the Court's 1972 fractured 4-1-4 decision in *Apodaca* that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Timbs v. Indiana*, 586 U.S. __, 139 S. Ct. 682, 687 n.1 (2019) ("[If] a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires" with the "sole exception" being *Apodaca*). Calling into question the precedential force of

Apodaca's fractured decision, this Court stated: "As we have explained, that 'exception to th[e] general rule . . . was the result of an unusual division among the Justices,' and it 'does not undermine the well established [sic] rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.'" *Id.* (citing *McDonald*, 561 U. S. at 766, n.14).

These three precepts were all well-settled decades before Petitioner's conviction became final on direct appeal. Taken together, they necessarily dictate the rule set forth in *Ramos*.

The State of Oregon should not now be rewarded and the unconstitutional convictions of Oregonians left in place just because Oregon claims it relied on *Apodaca*. The fact is that Oregon chose to maintain its non-unanimous jury practice for decades despite constitutional precedent indicating that the practice is unconstitutional. Oregon further chose to maintain this practice despite knowing the practice arose out of racial animus. In fact, in the history of this country, criminal convictions by a non-unanimous jury have only ever been possible in two states—Oregon and Louisiana. Both states adopted these processes with the intent and goal of disenfranchising the votes of the states' racial and religious minorities. Louisiana adopted its non-unanimous jury practice to "establish the supremacy of the white

race."[3] Oregon, which had already adopted a constitutional prohibition on African-Americans settling in the state, adopted the use of non-unanimous juries based on an intent to discriminate against individuals of Eastern European, particularly Jewish, descent.[4] Finally, Oregon maintained this practice despite that it permits criminal convictions based on less than the "beyond a reasonable doubt" standard. Oregon's ostrich-like behavior should not now be rewarded under the guise of "reasonable" reliance. Oregon's reliance on *Apodaca*, despite that the writing was on the wall, was simply not reasonable.

2. Alternatively, *Ramos* is a Watershed "New Rule" Under *Teague*.

Alternatively, if *Ramos* is instead viewed as a "new rule" of criminal procedure, it nevertheless applies retroactively because its profound contribution to fairness and accuracy in criminal proceedings in Louisiana and Oregon makes it uniquely suited to being recognized as a "watershed rule." For decades, criminal defendants in Oregon have been convicted pursuant to unconstitutional and discriminatory jury regimes. But, by dismantling *Apodaca*, this Court restored a

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[3] Semmes, Chairman of the Committee on the Judiciary, *Address at the Louisiana Constitutional Convention in 1898*, in Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 375 (H. Hearsey ed. 1898).

[4] *See* Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should Be Easy: Non-Unanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 Or. L. Rev. 1, 4-6 (2016).

bedrock procedural element essential to fairness in criminal trials. Centuries of history and precedent teach that unanimity is at the core of the jury trial right: after all, "[a] verdict, taken from eleven, [i]s no verdict at all." *Ramos*, 140 S. Ct. at 1395 (internal quotation marks omitted). Moreover, as a legal and practical matter, jury unanimity is necessary to prevent an impermissibly large risk of inaccurate convictions. *Ramos* is thus uniquely akin to *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has consistently identified as a watershed rule. Both decisions restored bedrock principles of criminal procedure that significantly improve the fairness and accuracy of criminal trials.

Ramos affects "prior convictions in only two States." 140 S. Ct. at 1406. Only a small percentage of criminal cases in those States have involved non-unanimous jury verdicts. As a practical matter, an even smaller percentage will be retried. And because *Teague* is an inherently equitable doctrine, the racist origins of the non-unanimous jury statutes diminish the States' interest in finality and repose.

Given this backdrop, Petitioner's conviction by a jury that was instructed that it did not have to reach a unanimous result warrants further review. Accordingly, Petitioner asks that the Court hold his case in abeyance until these important issues relating to non-unanimous jury verdicts and retroactivity will be definitely decided in *Edwards*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted. At a minimum, the case should be held in abeyance pending this Court's decision in *Edwards*.

DATED this 9th day of October, 2020.

s/ Nell Brown
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