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 *AMICI CURIAE* CENTER ON RACE, INEQUALITY, AND THE LAW; FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY; INSTITUTE FOR RACIAL JUSTICE RESEARCH & ADVOCACY; CENTER ON RACE, LAW, AND JUSTICE; AND AOKI CENTER FOR CRITICAL RACE AND NATION STUDIES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The **Center on Race, Inequality, and the Law at New York University School of Law** ("Center") was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Among the Center's top priorities is wholesale reform of the criminal legal system, which has, since its inception, been infected by racial bias and plagued by inequality. The Center fulfills its mission through public education, research, advocacy, and litigation aimed at cleansing the criminal legal system of policies and practices that perpetuate racial injustice and inequitable outcomes. No part of this brief purports to represent the views of New York University School of Law or New York University.

The **Fred T. Korematsu Center for Law and Equality** is based at Seattle University School of Law and advances justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 120,000 Japanese Americans. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice and has a special interest

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for a named party authored this brief in whole or in part, and no counsel for a named party or a named party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

in identifying and remedying the ways that discrimination operates in our criminal legal system.

The Korematsu Center played a key role in organizing a statewide task force to study race and Washington State's criminal legal system, which ultimately drafted a report on this issue and presented it to the Washington Supreme Court in an official symposium, the first of its kind. In the report and in numerous amicus briefs filed in federal and state courts around the country, the Korematsu Center has sought to inform courts of the operation of implicit or unconscious bias in judicial proceedings. The Korematsu Center's involvement in conducting research and analysis on the nature and operation of discrimination, how it manifests itself to produce racially disparate outcomes, how judicial focus on intentional discrimination often fails to redress racial discrimination, and the significance of concealed or unconscious bias, makes the Korematsu Center especially suited to offer its perspective on the importance of allowing collateral challenges to nonunanimous convictions. A determination that the decision in *Ramos v. Louisiana* applies retroactively is warranted on the merits; of equal importance, it will provide relief to those most impacted by the operation of racism in our criminal legal system.

The **Institute for Racial Justice Research & Advocacy** at Albany Law School, was established to examine and dismantle racial prejudice and inequality in the law through research, advocacy and community education. The Institute seeks to educate the next generation of racial justice lawyers and advocates, engage the local and national community by sponsoring public roundtables and

discussions and offering workshops and symposia on matters of racial justice, and advocate for meaningful racial justice reform.

The **Center on Race, Law and Justice at Fordham Law School** engages domestic and global issues of race, law, and equity to identify, analyze, and create new solutions to the civil rights challenges.

The **Aoki Center for Critical Race and Nation Studies at UC Davis School of Law** (Martin Luther King, Jr. Hall) fosters multi-disciplinary scholarship and practice that critically examines the law through the lens of race, ethnicity, indigeneity, citizenship, and class. By integrating legal scholarship with the research of academics in other disciplines and by connecting critical race theory to the world of practice and policy, the Aoki Center seeks to deepen our understanding of issues of race discrimination that have a significant impact on our culture and society. Exposing and closing the gap between our country's avowal of fairness and the harsh reality of continuing discrimination is one of the primary challenges facing our legal system. In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court struck down nonunanimous convictions as a vestige of that discrimination. To now allow such prior racially tainted convictions to be shielded from review would represent a significant retreat from the important principles undergirding the *Ramos* decision.

SUMMARY OF ARGUMENT

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), this Court confronted the racism embodied in the nonunanimous jury rule in Louisiana and Oregon. Though the Court focused on how the nonunanimous

jury rule aimed to weaken the influence of Black jurors and other jurors of marginalized backgrounds, there was another dimension to the rule's racism. A close examination of the nonunanimous jury rule reveals that it originated as an orderly alternative to extrajudicial actions taken to marginalize and oppress Black people. In effect, it operated to eliminate the chance that any Black person would receive a fair trial. The rule functioned as intended even into recent times, with a disproportionately high number of Black people being convicted through nonunanimous verdicts.

The Court has spoken repeatedly, and with resounding force, about the threat that racial discrimination poses to the integrity of the judicial system. Allowing racial discrimination to infect legal proceedings injures not just the parties to a legal proceeding but the fair administration of justice in its entirety. Furthermore, racial discrimination weakens public confidence in the judicial system. Particularly at a time when racial discrimination in the criminal legal system has roused widespread public discontent, allowing collateral challenges to nonunanimous convictions is necessary to preserve the integrity of the judicial system and foster the fair administration of justice.

During the era in which the nonunanimous jury rule was enacted, enforcing racial equality in criminal legal proceedings was by no means a priority for the judiciary. However, the second half of the twentieth century saw a revolution in social and judicial understandings of the integral role of racial equality in administering justice. The *Ramos* decision is part of this watershed change to the bedrock of fair judicial

procedure that Justice Harlan discussed in *Mackey v. United States*, 401 U.S. 667 (1971), and that was later integrated into the *Teague* doctrine.[2] This Court should therefore allow collateral challenges to convictions obtained through nonunanimous jury verdicts.

ARGUMENT

I. THE NONUNANIMOUS JURY RULE WAS A TOOL OF RACIAL DISCRIMINATION USED AGAINST PEOPLE ON TRIAL.

This Court's decisions have clearly established that racism, which is "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Racism is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). The injury is far-reaching, "injur[ing] not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Rose*, 443 U. S. at 556). Addressing the concerns raised by racial discrimination in the administration of criminal law, even when the injury flows from a long-standing practice, is necessary to "ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning

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[2] *Amici* do not disagree with Petitioner's assertion that *Ramos* did not actually announce a new rule of criminal procedure. *See* Pet'r's Br. 12–22. To the extent that *Ramos* is interpreted as announcing a new rule, however, this brief provides additional support for that rule's retroactive application

democracy." *Pena-Rodriguez*, 137 S. Ct. at 868; *see also McGirt v. Oklahoma*, No. 18-9526, 2020 WL 3848063, at *21 (U.S. July 9, 2020) ("Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.").

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), this Court addressed one such example of racism in the criminal legal system. Examining the history of the nonunanimous jury rule, this Court emphasized how the rule originated as an effort to disempower Black jurors and other jurors belonging to marginalized groups. *Ramos*, 140 S. Ct. at 1394. But during its more than a century of life, the racially discriminatory character of the nonunanimous jury rule was not directed only against jurors. It was also directed against people on trial, whose fate depends upon the Court's decision here.

The instant case illustrates well the multidirectional nature of the nonunanimous jury rule's impact. On each count, the jury's single Black member voted to acquit Thedrick Edwards. Pet. for Cert. 6. Mr. Edwards, who is also Black, was convicted nonetheless. The nonunanimous jury rule not only rendered meaningless the vote of the juror who voted for acquittal, but also condemned Mr. Edwards to prison following a jury verdict that the Sixth Amendment forbids.

Were Mr. Edwards white, he may have fared better. Statistical data shows that the nonunanimous jury rule not only sent people to prison about whose guilt at least one juror harbored doubt, but did so in a

racially disparate way. In one dataset of Louisiana trials between 2011 and 2017, although Black people made up about 75 percent of people convicted overall, they made up 79 percent of people convicted by nonunanimous juries specifically.[3] Whereas convicted white people had a 33 percent chance of being convicted by a nonunanimous jury, convicted Black people had a 43 percent chance of being convicted nonunanimously.[4] "In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place." *Ramos*, 140 S. Ct. at 1417–18 (Kavanaugh, J., concurring).

The nonunanimous jury rule's early proponents were not surreptitious about their motives. Indeed, media accounts from the time of the rule's origins evince the racist sentiments that undergirded the now-condemned practice. In 1873, Louisiana's *Daily Picayune* lamented that when a Black person served on a jury in a case in which a Black person was on trial, that "juror becomes at once his earnest champion, and a hung jury is the usual result."[5] In 1893, the *Picayune* seized upon the lynching of three Black men awaiting trial—Robert Landry, Alfred

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[3] Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1638–39 (2018).

[4] *Id.*

[5] Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 375 (2012) (quoting *Future of the Freedman*, DAILY PICAYUNE, Aug. 31, 1873, at 5).

Jewell, and Jack Davis—to bolster its position.[6] Remarking that "this sort of lawlessness should be stopped" because "if any crimes are committed the courts are there to punish the criminals," the *Picayune* opined that in those rare cases where courts did fail to "mete out punishment to criminals," this was, "in a great majority of cases, due to the juries." Siding with those who "repeatedly urged that nine jurors should be competent to bring in a verdict, and so overthrow the power of a single person to disappoint or obstruct justice," the *Picayun*e noted that "[i]t is not to be wondered at that when such a jury sets free criminals whose guilt is established, peace-loving and law-abiding citizens rise up."[7]

The *Picayune* was not alone in this sentiment. That same year, Louisiana's *Weekly Messenger* bemoaned that when a "savage" Black person was on trial, "the decent members of their race shield them and protect them," resulting in acquittal and, in response, lynching. To prevent lynchings that would "bring the whole system into execration" while also ensuring the "adequate protection of white women," "the law itself must be amended to meet the occasion and to meet it promptly and fully."[8]

Calls for jury reform that would make convicting Black people easier could be heard across the South. Mississippi's *Daily Commercial Herald* reported in 1894 that "law-abiding" people faced "two great evils," one of which was "the Jury system, which is so poor a protection for life and property," and the other of which was "the dark and bloody resort to lynch law."

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[6] Frampton, *supra* note 4, at 1612–13.
[7] *Put a Stop to Bulldozing*, DAILY PICAYUNE, Feb. 1, 1893, at 4.
[8] *Lynch Law*, WKLY. MESSENGER, Oct. 7, 1893, at 2.

The paper argued that "if the jury system be so reformed that a majority may bring in a verdict, that lynching will be absolutely prevented."[9] The *Vicksburg Dispatch* took the same view, asserting "that lynching, as well as all other forms of lawlessness, could be reduced to the smallest limits" if nonunanimous jury verdicts were allowed.[10] North Carolina's *Semi-Weekly Messenger* agreed, attributing "the increase in lynchings" to a jury system in which "the one-man power is permitted to come in . . . and to turn out red-handed murderers and beastly rapists."[11] If "one negro on a jury . . . will tie the jury every time and prevent a verdict," then "[w]hy not have nine of the twelve agreed rather than all?"[12] If Black citizens were to continue serving on occasion as jurors, then "[t]the jury system must be radically changed."[13]

In Louisiana, that radical change came with the constitutional convention of 1898, convened with "the avowed purpose . . . to 'establish the supremacy of the white race.'" *Ramos*, 140 S. Ct. at 1394. The convention passed a plethora of racially discriminatory laws that included the nonunanimous jury rule, the adoption of which was "substantially motivated by racial ill will" in the words of historian

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[9] *Remedy for Lynching*, DAILY COM. HERALD, Sept. 11, 1894, at 2.

[10] Frampton, *supra* note 4, at 1614 n.118 (quoting *A Reform Needed*, VICKSBURG DISPATCH, Feb. 9, 1898, at 2).

[11] *Id.* at 1613–14 (quoting *The Georgia Baptists on Lynchings and Crimes*, SEMI-WKLY. MESSENGER, Apr. 14, 1899, at 2).

[12] *Id.* at 1614 (quoting *Criticised as to the Jury System*, SEMI-WKLY. MESSENGER, Aug. 4, 1899, at 4).

[13] *A Most Important Matter for the South*, SEMI-WKLY. MESSENGER, Jan. 7, 1898, at 4.

Lawrence Powell.[14] The law was crafted "[w]ith a careful eye on racial demographics . . . in order to ensure that African-American juror service would be meaningless." *Id.* (internal quotation marks omitted). As the convention's delegates surely recognized, "silenc[ing] the voices and negat[ing] the votes of black jurors" would be particularly impactful "in cases with black defendants." *Id.* at 1418 (Kavanaugh, J., concurring). After all, "securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial," *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring), and "only a unanimous jury so selected can serve to minimize the potential bigotry of those who might convict on inadequate evidence." *Johnson v. Louisiana*, 406 U.S. 356, 398 (1972) (Stewart, J., dissenting). The convention closed with an exultant proclamation by Judiciary Committee Chairman Thomas Semmes, formerly a Confederate Senator, that the convention had "establish[ed] the supremacy of the white race in this State to the extent to which could be legally and constitutionally done."[15]

Louisiana's efforts did not go unnoticed outside the state. Oregon followed Louisiana's example by enacting its own nonunanimous jury rule in 1934 "to

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[14] Andrew Cohen, *Will the Supreme Court Address Louisiana's Flawed Jury System?*, ATLANTIC (Apr. 23, 2014), https://www.theatlantic.com/national/archive/2014/04/Louisiana/360726/.

[15] LOUISIANA CONSTITUTIONAL CONVENTION, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUESDAY, FEBRUARY 8, 1898, at 375 (H. J. Hearsey, Convention Printer 1898).

dampen the influence of racial, ethnic, and religious minorities on Oregon juries" at a time "of racial tension when the state had seen an explosion of organized racial hatred and the rise of the KKK." *State v. Williams*, No. 15CR58698, at *16 (Or. Cir. Ct. Dec. 15, 2016), https://www.aclu-or.org/sites/default/files/williams_opinion_12152016.pdf. The state's *Morning Oregonian* pointed to "the epidemic of lynchings" as reason to support a rule that would make convicting people of color easier[16]—just "one manifestation of the extensive 19th- and early 20th-century history of racist and anti-Semitic sentiment in that State." *Ramos*, 140 S. Ct. at 1417 n.7 (2020) (Kavanaugh, J., concurring).

That racial animus, later echoed in Oregon, animated the enactment of the nonunanimous jury rule in Louisiana is clear. Delegates took advantage of the "well known" fact "that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). Neither state ever "truly grappled with the laws' sordid history in reenacting them," and Louisiana's "only effort to contend with the law's discriminatory purpose and effects came recently, when the law was repealed altogether." *Ramos*, 140 S. Ct. at 1410 (2020) (Sotomayor, J., concurring).

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[16] Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 5 (2016) (quoting *Jury Reforms Up to Voters*, MORNING OREGONIAN, Dec. 11, 1933, at 6).

The rule functioned into modern times as its drafters and proponents intended, marginalizing Black representation on juries[17] and increasing the likelihood that Black people on trial would be convicted by nonunanimous juries of crimes leading to their imprisonment.[18] In disproportionately sending Black people to prison, the rule was one of the many practices in Louisiana that have collectively resulted in a stark disproportionality: the proportion of Black people in prison is more than double that of their share of the overall state population.[19] As Sheriff Harry Lee of Louisiana's Jefferson Parish revealingly remarked in 2006, "We know the crime is in the black community. Why should I waste time in the white community?"[20]

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[17] *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010) (finding in Louisiana's Jefferson Parish that "in 80% of criminal trials, there is no effective black representation on the jury because only the votes of white jurors are necessary to convict, even though Jefferson Parish is 23% black").

[18] *See* Nancy J. King et. al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 1009 n.8 (2005) (surveying literature on the "jury trial penalty," a phenomenon in which people convicted through a jury trial face harsher sentencing and a greater likelihood of incarceration than similarly situated people convicted through a guilty plea or a bench trial).

[19] ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 16, tbl.a (2016).

[20] John Burnett, *Larger-Than-Life Sheriff Rules Louisiana Parish*, NPR (Nov. 28, 2006), https://www.npr.org/templates/story/story.php?storyId=6549329/.

II. PROHIBITING COLLATERAL CHALLENGES TO NONUNANIMOUS CONVICTIONS WOULD FRUSTRATE THIS COURT'S COMMITMENT TO ROOTING OUT RACIAL DISCRIMINATION REPUGNANT TO THE FAIR ADMINISTRATION OF JUSTICE.

Allowing collateral challenges to nonunanimous convictions would be a simple task and one that would advance this Court's "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Batson v. Kentucky*, 476 U.S. 79, 85 (1991). First, the relative ease of implementing the prohibition on nonunanimous convictions in cases on collateral review flows from the limited inquiry necessary to identify cases where the nonunanimous rule resulted in a conviction. In contrast to other cases this Court has considered, there would be no need for courts to undertake an elaborate process to determine the validity of a collateral challenge involving the nonunanimous jury rule. *See Allen v. Hardy*, 478 U.S. 255, 260–61 (1986) (discussing these challenges in the context of the *Batson* rule). Courts would only need to ask the easily answered question of whether or not a petitioner was convicted by a nonunanimous jury. Any burden on Louisiana and Oregon should they choose to retry people convicted by nonunanimous juries "cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Ramos*, 140 S. Ct. at 1408.

But more important than expedience is the integrity of the criminal legal system. In light of the profoundly racist character of the nonunanimous jury rule, preserving this integrity requires that the Court

allow collateral challenges to nonunanimous convictions. To prohibit these challenges would be condemn to prison—in many cases, for the rest of their lives—people who would not have been convicted but for a rule created as an orderly alternative to the lynching of Black people. In a legal system in which "[t]he jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice,"'" *Pena-Rodriguez*, 137 S. Ct. at 868 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)), convictions under the nonunanimous jury rule cannot be immune to challenge. Doing so would "damage[e] 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" *Pena-Rodriguez*, 137 S. Ct. at 868 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

Prohibiting collateral challenges to nonunanimous convictions would be particularly disturbing when considering that the nonunanimous jury rule may well have facilitated undetected *Batson* violations by allowing prosecutors to effectively negate the influence of jurors of color without striking every single one. *See, e.g.*, *State v. Collier*, 553 So. 2d 815, 819–20 (La. 1989) ("Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have . . . purposefully discriminated by limiting the number of blacks on the jury to two."); *State v. Cheatteam*, 986 So. 2d 738, 745 (La. App. 2008) ("[I]t appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes."). With Black citizens already underrepresented in jury pools, a result of policies with a racially disparate impact such

as bans on jurors with past felony convictions,[21] convictions obtained under these circumstances cannot be allowed to stand unchallenged.

As this Court has recognized, "discrimination on account of race in the administration of justice strikes at . . . fundamental values of our society and our legal system." *Rose*, 443 U.S. at 564. And "[w]here discrimination that is 'at war with our basic concepts of a democratic society and a representative government' infects the legal system, the strong interest in making available federal habeas corpus relief outweighs the costs associated with such relief." *Id.* (citation omitted). Rejecting the retroactive application of *Ramos* would be starkly at odds with this Court's recognition of "the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system in particular." *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring) (quoting *Pena-Rodriguez*, 137 S. Ct. at 867).

Immunizing nonunanimous jury convictions against collateral challenges would also threaten public confidence in the integrity of these convictions and the criminal legal system as a whole. In the judicial process, "there is a sound basis to treat racial

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[21] *See* OFF. OF THE STATE CT. ADM'R, REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM 3 (1994) (finding that "[t]oo few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries"); Smith & Sarma, *supra* note 5, at 367 (discussing the underrepresentation of Black citizens on Louisiana juries); *see also* Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 772–77 (2011) (discussing more generally racial disparities in jury representation).

bias with added precaution," for doing so—"including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Pena-Rodriguez*, 137 S. Ct. at 869. The threat to public confidence would be especially great in this case because the racially discriminatory practice at issue is neither secretive nor attributable to the actions of a single prosecutor, *see, e.g.*, *Batson*, 476 U.S. 79. Rather, people convicted by nonunanimous juries were convicted though a legal rule openly operating for all to see, "one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans." *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring). The nonunanimous jury rule embodied an institutionally designed form of racism in which racial discrimination did not flow from an individual state-affiliated actor—a person who might face sanctions, disbarment, or other consequences—but from the state itself.

Americans have mobilized en masse to protest racial discrimination in the criminal legal system. This Court should vindicate those widespread calls for racial justice by allowing collateral challenges to convictions only made possible by a rule "that is thoroughly racist in its origins and has continuing racially discriminatory effects." *Id.* at 1419.

III. THE NEW RULE FITS WITHIN THE *TEAGUE* DOCTRINE'S EXCEPTION FOR WATERSHED CHANGES.

This Court's strong denunciations of racially discriminatory practices that influence judicial proceedings illustrate why people convicted by

nonunanimous juries should be allowed to challenge those convictions on collateral review. Under this court's *Teague* doctrine, new constitutional rules of criminal procedure should be applied retroactively when those new procedures reflect a "watershed" change in basic conceptions of "ordered liberty." *Teague v. Lane*, 489 U.S. 288, 311 (1989). There are situations in which "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring)).

The elimination of old practices grounded in racial animus reflect just such a bedrock change in social and judicial understandings of fairness and justice. When Louisiana and Oregon enacted their nonunanimous jury rules, racially discriminatory laws were commonplace across the country. Courts rarely struck down such laws as violations of constitutional provisions that are now the cornerstones of civil rights law. *See, e.g.*, *Gong Lum v. Rice*, 275 U.S. 78 (1927); *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U.S. 151 (1914); *Cumming v. Bd. of Educ.*, 175 U.S. 528 (1899); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

The second half of the twentieth century, however, saw a revolution in judicial understanding of what the Constitution requires with regard to racial equality. Buttressed by a mass social movement that reshaped racial norms across society, courts began enforcing racial equality in a wide array

of settings and contexts. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Gayle v. Browder*, 352 U.S. 903 (1956); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). These contexts included the administration of criminal law, and recognition of "the risk that the factor of race may enter the criminal justice process" led this Court to "engag[e] in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey*, 481 U.S. at 309. This Court's decisions came to

> reflect a realization of the myriad of opportunities for racial considerations to influence criminal proceedings: in the exercise of peremptory challenges; in the selection of the grand jury; in the selection of the petit jury; in the exercise of prosecutorial discretion; in the conduct of argument; and in the conscious or unconscious bias of jurors.

Id. at 333 (Brennan, J., dissenting) (citations omitted).

This Court's evolved understanding of the integral role that racial equality plays in judicial proceedings, and the importance of enforcing and vindicating a commitment to racial equality, has long rendered the nonunanimous jury rule a relic of a very different era with a very different—and often abhorrent—understanding of justice. Neither Louisiana nor Oregon can reasonably claim reliance on convictions in the modern era that were obtained only through an anomalous rule—that both states made the free, voluntary decision to preserve—

flagrantly steeped in open racial animus. As a change to criminal procedure that is part and parcel of a bedrock, watershed change in social and judicial understanding of the role of racial equality in the administration of justice, the *Ramos* decision should be applied retroactively to cases on collateral review.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's submission, the Court should reverse the judgment below.

Respectfully Submitted,

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