No. 19-5807

IN THE
Supreme Court of the United States

THEDRICK EDWARDS, *Petitioner,*
v.
DARREL VANNOY, *Warden.*

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

BRIEF OF AMICI CURIAE THE PROMISE OF JUSTICE INITIATIVE, THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE ORLEANS PUBLIC DEFENDERS

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INTERESTS OF *AMICI CURIAE*[1]

The Promise of Justice Initiative (PJI) is a non-profit law office dedicated to upholding the promises of our constitution, to protect liberty and ensure dignity. PJI addresses issues concerning fairness in the criminal justice system, and has filed briefs in state courts and this Court on the original role of juries, in fulfilling the promises of our Constitution. Counsel at PJI began raising challenges to Louisiana's non-unanimous verdict scheme in 2004. After the argument in *Ramos*, PJI launched a project to ensure that every individual currently in prison based on a non-unanimous verdict could challenge that conviction. Forty law firms and more than 150 individual lawyers have engaged with PJI to provide pro bono assistance for that project.

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes protecting individual rights guaranteed by the Louisiana and United States constitutions. LACDL has been raising constitutional concerns over Louisiana's use of non-unanimous verdicts for over a decade. LACDL

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[1] Pursuant to Supreme Court Rule 37, *Amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief. Petitioner and Respondent consented to the filing of this amicus.

has argued that non-unanimous verdicts silenced minority jurors, reduced the state's burden of proof, and increased the risk of wrongful convictions, particularly for Black defendants. Members of the LACDL represent some of the individuals currently incarcerated in Louisiana as a result of non-unanimous verdicts and, if given the opportunity, LACDL will represent many on remand.

The Orleans Public Defenders (OPD) is the indigent defender organization for the Parish of Orleans. OPD's mission is to provide client-centered representation, reform the system, and partner with the community. OPD believes that fundamental fairness requires reversal of convictions by non-unanimous juries, and that the credibility of the justice system depends upon upholding the constitution. OPD started raising objections to non-unanimous verdicts in 2008, arguing that the scheme was contrary to the Sixth Amendment and was rooted in historical racism. Orleans Parish currently has more individuals in prison based on Louisiana's non-unanimous verdict scheme than any other parish in Louisiana. As the agency that would be responsible for a plurality of the cases that would be reversed if Petitioner prevails, OPD is eager for the opportunity to provide representation to those clients.

Amici were instrumental in engaging the Louisiana electorate and educating citizens on the meaning of the right to trial by jury in the 2018 Constitutional Amendment, and are committed to fulfilling the constitutional promise of the right to trial by jury.

INTRODUCTION

Petitioner, Thedrick Edwards, is one of roughly sixteen hundred people incarcerated in Louisiana based on a final non-unanimous verdict.

Procedural Background

Since the founding of our Country, and for hundreds of years before, the right to trial by jury was understood to guarantee the unanimous suffrage of twelve jurors. Louisiana amended the state Constitution to permit conviction by a non-unanimous jury during the 1898 Constitutional Convention, the avowed purpose of which was to "establish the supremacy of the white race." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020). The goal was to undermine Black citizens' participation on juries, and facilitate the conviction of Black defendants.

In 1972, as a "strange turn" in an "otherwise simple story," the Court issued a "badly fractured set of opinions" that "always stood on shaky ground" upholding the use of non-unanimous verdicts in state courts. *Id.* at 1397, 1398. It has been clear for decades that *Apodaca v. Oregon*[2] and *Johnson v. Louisiana*[3] were indefensible. Justice Powell's version of partial incorporation never garnered another vote. And the plurality's functional approach to constitutional rights was rejected in a series of cases from

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[2] *Apodaca v. Oregon*, 406 U.S. 404 (1972)

[3] *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Apprendi v. New Jersey,[4] to *Blakely v. Washington*,[5] *Crawford v. Washington,*[6] and *McDonald v. City of Chicago*.[7] Yet, until 2018, Louisiana resisted giving full meaning to the right to trial by jury.

In *Ramos v. Louisiana*,[8] this Court rejected the notion that the Fourteenth Amendment applies to the states a 'watered down, subjective version' of the Bill of Rights, and upheld the longstanding, oft-cited, bedrock principle, involving 400 years of cases, that the Sixth Amendment requires unanimity.

Questions concerning retroactivity arose during *Ramos*. Justice Kavanaugh concurred with the majority opinion and found *Apodaca* "egregiously wrong;" nevertheless he wrote that the rule "should not apply retroactively on habeas corpus review." *Ramos*, 140 S. Ct. at 1419–20 (Kavanaugh, J., concurring). But as Justice Alito noted in dissent, "the majority's depiction of the unanimity requirement as a hallowed right that Louisiana and Oregon flouted for ignominious reasons certainly provides fuel for the argument that the rule announced today meets the test [for retroactive application]." *Id.* at 1438 (Alito, J., dissenting).

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[4] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[5] *Blakely v. Washington*, 542 U.S. 296 (2004).

[6] *Crawford v. Washington*, 541 U.S. 36 (2004).

[7] *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

[8] *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

Weeks after issuing the *Ramos* decision, this Court granted certiorari in *Edwards v. Vannoy*, supplying the question: Whether this Court's decision in *Ramos v. Louisiana*, 590 U.S. __ (2020), applies retroactively to cases on federal collateral review.

This grant pretermits a state assessment of whether retroactive application is required under the federal constitution, or separately whether it is required under the state constitution. Last month, Chief Justice Johnson dissented from the denial of writs when the Louisiana Supreme Court was asked to address whether to provide retroactive application of *Ramos*, and explained that "the majority of this court has voted to defer until the Supreme Court mandates that we act..." *State v. Gipson*, 2019-01815 (La. 06/03/20) (Johnson, C.J., dissenting). State courts across Louisiana are waiting for this Court to rule before determining whether to provide retroactive relief based on *Ramos*.

Methodology for Identifying Non-Unanimous Cases

Amici have undertaken to identify all of the individuals convicted by non-unanimous verdicts in order to ensure those with claims can timely raise them pursuant to Article 930.8 of the Louisiana Code of Criminal Procedure.

We began with the data-set used in the Pulitzer Prize winning series by *The Advocate*. *See* Advocate Staff Report, *Tilting the scales*, *The Advocate* (Apr. 1, 2018), https://www.nola.com/article_25663280-c298-53ef-8182-9a8de046619c.html; *see also* Jeff Adelson, *Download data used in The Advocate's exhaustive research in 'Tilting the scales' series*, *The*

Advocate (Apr. 1, 2008), https://www.nola.com/article_25663280-c298-53ef-8182-9a8de046619c.html. We checked every single case, removing duplicates, the deceased and those released from prison. We continued our investigation in district courts and appellate courts throughout Louisiana, seeking non-unanimous jury verdicts outside the time range analyzed by *The Advocate*.

We searched through online court records, court of appeals records, records held at the Louisiana State University law library, and reviewed and requested copies of court records in parishes across the state. Additionally, we conducted outreach and education potentially reaching more than 15,000 people incarcerated in Louisiana Department of Public Safety and Corrections. We engaged in direct or broadcasted communication with more than 6,610 people in Louisiana prisons. We were included in partner organization surveys and newsletters reaching more than 1,000 incarcerated people and more than 10,000 of their families and loved ones. We did outreach to hundreds of defense attorneys across the state, and hosted multiple community forums with family members of people with non-unanimous jury verdicts.

After the *Ramos* opinion issued, *amici* LACDL engaged with the criminal defense bar to educate lawyers on the need to timely file pursuant to La. C. Cr. P. Art. 930.8, and offered continuing legal education with PJI to lawyers engaged in the practice. Simultaneously, *amici* distributed questionnaires and information to community organizations, family members of people incarcerated, inmate counsel and

individuals in prison. *Amici* held meetings in prisons across Louisiana, engaging with inmate counsel and entire groups of incarcerated people.

Combining our own research from publicly available sources with outreach we received from people in prison, we have identified 1,677 individuals with non-unanimous convictions: that includes all of the people represented by the private bar, everyone currently on direct appeal[9] and every individual in any of the prisons requesting representation.

While there may be a handful of additional individuals not yet identified, we believe we have successfully identified every individual who wants to litigate the constitutionality of their non-unanimous conviction.

As part of our project, more than 40 law firms and supporting organizations have offered pro bono assistance to individuals convicted by non-unanimous verdicts. *See* Appendix B. These firms and organizations have provided more than 150 lawyers.

Under Louisiana law, anyone seeking post-conviction relief must file in state court within one year of the decision in *Ramos v. Louisiana* (April 20,

[9] 76 of these individuals have cases that are not final, because they are either on direct appeal or pending certiorari in this Court. Relief in these cases is governed by *Griffiths v. Kentucky*, 479 U.S. 314 (1987).

2020), and additionally establish the retroactive application of *Ramos*. *See* La. C. Cr. P. Art. 930.8. It may be that there are other individuals convicted by a non-unanimous verdict in custody in Louisiana, but the State would be hard-pressed to complain about the cost of re-trying individuals who have not sought post-conviction relief.

SUMMARY OF ARGUMENT

Sixteen hundred individuals remain in custody based upon a final non-unanimous conviction. The continued punishment of these individuals "pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016). As the Court explained: "There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees." *Id.*

Moving forward, the costs of applying the principles of *Ramos* to those individuals currently in custody are far less than the benefits received from ensuring the full protection of the Constitution. Retroactive application of *Ramos* would likely result in no more than one additional trial per assistant district attorney. But it would enhance confidence in the fairness and reliability of the proceedings infinitely.

Amici recognize that questions of retroactivity often implicate a state's weighty interest in finality. But here, the balance must simultaneously consider

whether preserving in perpetuity a rule borne of racism and in contradiction to our constitutional principles is the balance that justice requires.

Ultimately, for those that remain incarcerated, the opinion in *Ramos v. Louisiana*, laid out a substantive rule that deprives the State of Louisiana the moral and legal authority to continue detention.

ARGUMENT

I. APPLYING *RAMOS* TO FINAL CONVICTIONS WILL NOT OVERLY BURDEN LOUISIANA'S JUSTICE SYSTEM

The retroactive application of *Ramos* will not overly burden Louisiana's justice system.

In reality, this Court's ruling in favor of Petitioner would likely require reversal of approximately sixteen hundred convictions. That means, retroactive application of *Ramos* will increase the number of criminal cases in Louisiana by less than 2%. The majority of these cases will either be resolved with a plea agreement or dismissed. Even assuming a rate of re-trials that is ten times the current-trial rate, the net effect of retroactive application will be one additional jury trial per year per assistant district attorney, spread over two years.

The number of retrials is far less than the number adumbrated by the State in *Ramos*. *See* Oral Argument, *Ramos v. Louisiana*, 18-5924, at 33, lines 20–23 (Ms. Murrill: We have 32,000 people that are currently serving time for serious crimes. And each of these convictions would be subject to challenge if *Apodaca* is reversed); *see also* Brief of Respondent,

Ramos v. Louisiana, 18-5924 at 49 ("Thousands of final convictions in Louisiana and Oregon could be upset if such a new rule were later declared retroactive.").

While there are some 1,677 individual under respondent's control in Louisiana based on non-unanimous convictions, 76 will receive a new trial as a result of *Griffiths v. Kentucky*. Complaints over the impact of complying with this Court's decision in *Ramos* ring hollow as even after the voters passed the constitutional amendment, prosecutors opposed instructions encouraging unanimity and continued to seek non-unanimous verdicts for offenses prior to January 1, 2019.[10] Indeed, even after this Court granted certiorari in *Ramos v. Louisiana*, 18-5924 (*cert. granted* Mar. 18, 2019), prosecutors sought non-unanimous convictions.[11]

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[10] Matt Sledge, *Duo convicted of murder in Mardi Gras 2018 shooting in Lower 9th Ward; jury's vote was 10-2,* The Times-Picayune (Oct. 25, 2019), https://www.nola.com/news/courts/article_37839c92-f74c-11e9-b6aa-4b5c35e078e6.html; Matt Sledge, *Jury convicts man in New Orleans killing of woman left under high-rise bridge*, The Times-Picayune (Oct. 30, 2019), https://www.nola.com/news/courts/article_47774ad4-fb27-11e9-891d-3f065d0077d5.html.

[11] Joe Gyan Jr., *Baton Rouge woman convicted of murder by split jury granted new trial*, *The AdvocateThe Advocate* (June 22, 2020), https://www.theadvocate.com/baton_rouge/news/courts/article_828cc35a-b4a5-11ea-b0fd-c3bf7e34b155.html ("Crockett, 29, was convicted by an 11-1 vote three days before the U.S. Supreme Court heard

A. Granting Relief in *Edwards* Will Affect 1,601 Cases

Granting relief in *Edwards* will likely affect 1,601 cases. Of these, *amici* have proof for 955 individuals; the remaining 646 are individuals who assert that they may have a claim of non-unanimous conviction, but at this time we do not have clear proof either because the Clerk of Courts has refused to provide access to polling slips and other data that would identify whether the individual had a non-unanimous conviction or the courts are in the process of providing such documentation.[12]

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arguments last fall in a New Orleans case over the legality of split-jury criminal verdicts in state court."); Heather Nolan, *Rapper Widner 'Flow' Degruy Sentenced to Life in Prison for Double Murder*, The Times-Picayune/The New Orleans Advocate (May 14, 2019), https://www.nola.com/news/crime_police/article_7f7524bc-a1bf-5b2a-8035-4f594fb0f646.html.

[12] *Cf State v. Young*, 2019-01818 (La. 06/12/20) (Hughes, J., concurring) ("Should this court or the United States Supreme Court decide to apply the Ramos case retroactively, applicant may file at that time."); *id.* (Johnson, C.J., concurring) ("Mr. Young has been in prison for 41 years. He requests the jury polling slips from his 1980 trial to ascertain whether the jury verdict was unanimous. … But he cannot file a post-conviction relief application arguing that he is entitled to the benefit of Ramos if he cannot show that he was convicted by non-unani-

B. Of The 1,601 Reversals, Only 1,302 Will Likely Require New Proceedings

To the extent Respondent's claims involve concern over the cost of new proceedings, these concerns are overblown. For roughly three hundred cases, the length of sentence may be reduced or collateral consequences may be removed, but there is little room to complain about the cost of re-trials. As such, these cases should not be counted in the calculus of the cost of retroactivity.

1. *In 37 instances, the defendant will likely be released from prison in the next five years regardless or is currently on parole.*

Thirty-seven individuals have almost completed their sentence. These individuals were primarily convicted since 2000 and sentenced to 20 years or less. As such, thirty-seven of the 1,601 individuals whose cases will be reversed have served the majority of their sentence and will be likely be parole eligible or will complete their sentence during the pendency of pretrial proceedings.[13]

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mous jury verdict. And he cannot show that he was convicted by a non-unanimous jury verdict without the clerk providing him with the jury polling slips.").

[13] See La. R.S. § 15:574.4 (providing for parole eligibility after the defendant served percentage of sentence).

2. *In 219 instances, the defendant is serving a sentence for a habitual offender conviction, the last of which was non-unanimous.*

In the vast majority of these habitual offender[14] cases, there will likely be no re-trial because, as a result of recent prospective ameliorative changes in legislation, the defendant has already served the maximum sentence.[15] As such, Louisiana may complain about the reduction in sentence for those serving sentences under newly amended habitual offender laws – but not of the cost of retrials from this set of cases.[16]

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[14] *Amici* notes that the use of a non-unanimous conviction to enhance a sentence based upon prior convictions raises concerns. *But see Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

[15] *See* 2017 La. Acts 282; *State v. Lyles*, 19-00203 (La. 10/22/19); 286 So.3d 407 (acknowledging that the Legislature had made retroactive the more lenient sentencing provisions of the habitual offender law passed in 2017, thus significantly curtailing, if not removing altogether, the ability of the state to enhance convictions for minor offenses both retroactively and prospectively).

[16] As the Louisiana Legislature has amended the statutory provision for these habitual offender proceedings to limit punishment to no more than twenty-years for future cases, complaints about the effect of *Ramos* on this class of individuals appear overblown.

3. *In at least 43 instances, the defendant is simultaneously serving a lengthy sentence for a unanimous conviction.*

Concerns over the impact of retroactive application of *Ramos* are also overstated because in many instances -- at least forty-three cases that we have identified -- the defendant was convicted of more than one crime and one conviction was by unanimous verdict, for which the defendant was sentenced to thirty-years or more. The Louisiana courts have made clear that *Ramos* does not undo convictions by a unanimous verdict even when a defendant had a simultaneous non-unanimous verdict, and that question is not before this Court today. *State v. Thomas*, 2019-01819 (La. 06/22/20) ("*Ramos* applies to any non-unanimous verdicts in these proceedings. …The matter is remanded to the court of appeal for further proceedings and to conduct a new error patent review in light of *Ramos v. Louisiana*. The remand order does not pertain to defendant's conviction for attempted manslaughter, which was by unanimous verdict."); *State v. Laurant*, 2019-0292 (La. App. 4 Cir. 7/1/20) ("For the foregoing reasons, we vacate defendant's conviction and [twenty year] sentence on the non-unanimous attempted manslaughter verdict and remand for a new trial. Defendant's conviction by a unanimous jury verdict for illegal possession of a firearm by a convicted felon

and respective [twenty year] sentence shall not be disturbed.").[17]

C. Granting Relief in *Edwards* Will Not Overburden the Louisiana Courts

Granting thirteen hundred new prosecutions will not overburden the courts in Louisiana.[18] There were 143,401 criminal cases filed in the district courts in Louisiana in 2019. Supreme Court of Louisiana, *2019 Annual Report of the Judicial Council of the Supreme Court*, Statistical Data at 25 (2019), https://www.lasc.org/press_room/annual_reports/reports/2019_AR.pdf. This does not include another 85,000 criminal filings in city and parish courts which would not be eligible for a jury trial. As such,

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[17] *State v. Laurant,* 2019-0292 (La. App. 4 Cir. 07/31/19) ("The defendant was sentenced to serve twenty years for attempted manslaughter and twenty years for being a felon in possession of a firearm, to be served consecutively.").

[18] Indeed, there is an argument that *not* granting relief to these individuals will overburden the courts with these cases, as each individual will then file applications for post-conviction relief in each of the cases, forcing the state courts to adjudicate the claims in post-conviction and then again as part of retrial. As *amici* appreciates it, the decision to grant certiorari in *Edwards* before the state and federal courts in Oregon and Louisiana, and the federal Fifth and Ninth Circuits ruled, was intended to reduce those costs.

the number of final *Ramos*-cases represents one percent of the cases that the Louisiana courts handle every year. And for various reasons, a substantial portion of this one percent would not actually result in new trial.

1. *The vast majority of cases that are reversed plea.*

Less than one percent of cases proceed to trial in Louisiana. The vast majority will plea. With the 143,401 cases initiated, there were only 445 criminal jury trials in Louisiana in 2019. Given the high plea rate in Louisiana, there are strong reasons to believe that a significant majority of the *Ramos*-reversals will not lead to a retrial. Even assuming a re-trial rate of 10 times the ordinary trial rate in Louisiana, the impact on the system will not be overwhelming.

Research also confirms that only about a third of cases that produce hung juries are ever retried. Over half are disposed of by plea agreements, dismissals, or other dispositions. *See* Paula L. Hannaford-Agor, J.D., Valerie P. Hans, Ph.D., Nicole L. Mott, Ph.D., G. Thomas Munsterman, M.S.E., National Institute of Justice, *Are Hung Juries a Problem?*, National Center for State Courts, (2002) (citing Planning & Management Consulting Corporation, *Empirical Study Of Frequency Of Occurrence Cases Effects And Amount Of Time Consumed By Hung Juries*, 4-30 to 4-37 (1975)). The research explains that retrial "pro-

vides an opportunity for the prosecution and defendant to reassess the strength of their respective cases and, in many cases, agree on an alternative to retrial (dismissal or plea agreement)." *Id.*

2. *There are sufficient prosecutors to handle reversals.*

The Louisiana Code of Criminal Procedure provides a statutory minimum of assistant district attorneys per district. La. R.S. § 16:51. There are 574 statutorily perfected assistant district attorneys in Louisiana.[19] However, given the funding of additional prosecutors supported with federal funds and from fines and fees, the actual number of assistant

[19] This does not include forty-two elected District Attorneys and the same number of First Assistants who are not typically tasked with trying cases. Nor does it include other assistant district attorneys paid for by the parish. *See* La. R.S. § 16:53 ("In addition to the number of assistant district attorneys provided for each judicial district and for the parish of Orleans in R.S. 16:51 the district attorney of each judicial district and of the parish of Orleans may appoint additional assistant district attorneys. The salary of such additional assistant district attorneys, with the approval of the governing authorities affected, shall be paid by the parish or parishes composing the judicial district or by the parish of Orleans.").

District Attorneys is closer to 700 assistant district attorneys.[20]

Even assuming the statutory minimum number of assistant district attorneys, there are on average 2.5 non-unanimous convictions per assistant district attorney. But as laid out in Appendix A, in eighteen of the forty-two Judicial Districts, there are one or fewer non-unanimous convictions per Assistant District Attorneys; in thirty-one of forty-two Judicial districts the number of cases will be two or less per Assistant District Attorney; in only four jurisdictions are there more than three cases per Assistant District Attorney.[21] Therefore, the average, across all districts is essentially two cases per assistant district attorney. Complaints about the cost to the system are overblown.

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[20] *See* Travers Mackel, *Little to no state funding for 700 assistant district attorneys across Louisiana,* WDSU6 (Jan. 31, 2018), https://www.wdsu.com/article/little-to-no-state-funding-for-700-assistant-district-attorneys-across-louisiana/15931071. Although cuts were proposed, full funding was ultimately restored.

[21] The broad outlier in this regard is Caddo Parish, in the First Judicial District, that has essentially one and a half times as many non-unanimous verdicts per Assistant District Attorney as any other district. As discussed below, there are any number of reasons for this geographic outlier – including but not limited to the threatened use of habitual offender proceedings in the district.

3. *The Burden to the Defense System Will Be Managed*

It is true that Louisiana's indigent defense system is significantly underfunded. *See Boyer v. Louisiana*, 569 U.S. 238, 249 (2013) (Sotomayor, J., with Ginsburg, J., Breyer, J., Kagan, J., dissenting) ("Boyer's case appears to be illustrative of larger, systemic problems in Louisiana. The Louisiana Supreme Court has suggested on multiple occasions that the State's failure to provide funding for indigent defense contributes to extended pretrial detentions … More broadly, the public defender system seems to be significantly understaffed.").

According to the Louisiana Public Defender Board, 508 public defense lawyers[22] have been involved in over 235,772 cases in calendar year 2019. However, *amici*, many of whose members will be shouldering the work on remand, have already secured the assistance of pro bono attorneys to assist in this important endeavor. See Appendix B. And regardless, whatever deficiencies exist are part of much broader structural funding challenges, based upon years of Louisiana's intransigence in complying with *Gideon v. Wainwright*, 372 U.S. 335 (1963),

[22] According to LPDB there are 811 different assistant public defenders, some of whom are part time or who worked part of the year, who have provided what constituted the equivalent of 508 full time employees.

and should not be double-counted as a reason not to uphold the promise of a unanimous verdict upheld by *Ramos*.

II. THE CASES HIGHLIGHT THE INJUSTICE OF LOUISIANA'S SYSTEM

The State of Louisiana seeks to incarcerate individuals convicted by an unconstitutional system that was designed to silence the voices of minority jurors and facilitate the convictions of Black citizens. *Amici* will not recount the circumstances of all 1,600 individuals convicted by non-unanimous verdicts, but highlight the following cases that are emblematic.

A. Significant Risks of Wrongful or Over Conviction.

As detailed in the Brief for Innocence Project New Orleans and The Innocence Project as Amici Curiae Supporting Petitioner, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the non-unanimity rule has increased the risk of wrongful conviction in Louisiana. *Amici* here are concerned that the found cases of innocence reveals only the tip of the iceberg of wrongful convictions. For some period now, this Court, too, has been confronted with a wide array of cases with factual bases for conviction that undermine our confidence in the outcome but where the legal questions do not meet this Court's Rule 10 considerations for granting certiorari.

Rhonda Jordan was convicted by a non-unanimous jury of manslaughter. She was in her home with her children, when Isaac Shelmire Jr. came to her house, drunk and on drugs; she asked him to leave and an argument ensued. Ultimate she was able to push Shelmire out of the house, but he began 'forcefully kicking the front door.' Ms. Jordan went out the back door, and around the front to get him to leave but a fight ensued. Shelmire was swinging at her in rage at her when Jordan swung at him with a pocket knife. He then went to get a sledgehammer, but died as a result of a single stab wound. *State v. Jordan*, 2015 La. App. Unpub. LEXIS 99 * | 2014 1083 (La.App. 1 Cir. 03/06/15).

Nelson Davis has spent over forty years in prison based upon a non-unanimous conviction where the evidence against him involved the testimony of an alleged co-conspirator and an identification. The Louisiana Supreme Court recognized the identification procedure was "suggestive" because "defendant was the only person out of the fifteen persons depicted in the photographs who could possibly have been the third subject" and noted that the witness testified at an earlier trial that a different person had committed the murder. *State v. Davis*, 385 So. 2d 193, 198-99 (La. 1980) (rejecting due process claim that "the state allowed Williams to testify that defendant shot him without disclosing that Williams

testified at the earlier trial of David Joseph Sylvester, the man who paid for the murders, that Clarence Davis shot him.").

Louie Schexnayder has been in custody for over twenty-five years, where his first trial resulted in a mistrial and his second resulted in a non-unanimous conviction. This Court has reviewed the disquieting procedural circumstances of Mr. Schexnayder's case. The facts are as concerning – as the case involves a single eye-witness identification of a person and a car, where the car was destroyed by the state prior to trial. *State v. Schexnayder*, 96-98 (La. App. 5 Cir. 11/26/96); 685 So. 2d 357.

Sam Mack was convicted by a non-unanimous jury and sentenced to life without parole as a principal to second degree murder, where the Court of Appeal found the evidence insufficient to support a conviction, but the Louisiana Supreme Court reversed and re-instated the conviction because the "web of cell phone calls" "buttresses …its theory that defendant had "concerned" himself in Westbrook's murder." *State v. Mack*, 13-1311 (La. 05/07/14); 144 So. 3d 983.[23]

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[23] One of the counsel for *amici* represents the co-defendant of Samuel Mack, Ortiz Jackson, who was also convicted by a non-unanimous verdict based upon dubious or incomplete evidence. *Amici* highlights the cases without

Landon Quinn's first trial ended in a hung jury, and his second ended in a ten-two verdict. The sole issue at trial was identification, with no DNA, physical evidence or confession. In state post-conviction, the district court reversed the conviction based upon ineffective assistance of counsel where trial counsel failed to present evidence of misidentification. Ultimately, the Louisiana Supreme Court reversed the grant of a new trial, upholding the finding of deficient performance, but suggesting the deficiency would not have led to a different result. *State v. Quinn*, 2016-1285 (La. 03/13/18); 248 So. 3d 1276.

While each of these cases may not individually warrant this Court's review and correction, the patter of these cases – and dozens more, if space permitted – shows how non-unanimous verdicts erode confidence in the accuracy of convictions in Louisiana.

B. The Non-Unanimous Rule Continues to Perpetuate a Racially Discriminatory Practice

Not only does Louisiana's non-unanimous rule have a sordid racist past – its current existence continues to perpetuate a racially discriminatory present. *The Advocate*'s Pulitzer Prize winning series did the first widespread analysis of 3,000 trials over

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regard to the positive evidence of the defendants' innocence, but even under the light most favorable to the government.

a six-year period, identifying 993 convictions rendered by a 12-person jury – 40% of which were non-unanimous. *The Advocate* explained that two-thirds of the state prisoners and three-quarters of those serving life without parole were Black. Their analysis revealed that Black defendants were almost 25% more likely to receive a non-unanimous verdict than white defendants.

Likewise, we have identified the race of defendants in 642 cases. Our analysis of the race of defendants reveals five times as many Black people convicted by a non-unanimous verdict than white people. In 525 instances the defendant was Black, and in 104 instances the defendant was white. This is a disturbing reminder that the non-unanimous rule is serving the insidious goal it was intended to advance from its inception: the continued oppression of Black people. *See United States v. Louisiana*, 225 F. Supp. 353, 374 (E.D. La. 1963) (describing the Constitutional Convention of 1898 where the President of the Convention explained: "We have not been free; we have not drafted the exact Constitution we should like to have drafted; otherwise we should have inscribed in it, if I know the popular sentiment of the State, Universal White Manhood Suffrage, and the exclusion from the suffrage of every man with a trade of African blood in his veins. … What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote,

and doesn't it stop the negro from voting, and isn't that what we came here for?").

This impact of race is particularly pernicious with respect to vulnerable defendants. Our analysis reveals that 90% percent of the children who have been convicted by non-unanimous juries in Louisiana are Black. Specifically, we have identified 94 children convicted by non-unanimous juries whose cases are final. Eighty-two of them are Black.

C. Louisiana's Heavy Use of Severe Sentences

Louisiana leads the nation for life without the possibility of parole sentences. *See* Lea Skene, *Louisiana's life without parole sentencing the nation's highest — and some say that should change*, *The Advocate* (Dec. 07, 2019)[24]. As of December 31, 2019, 4,662 people in Louisiana prisons were serving such sentences. *See* John Bel Edwards and James M. Le Blanc, *Louisiana Corrections: Briefing Book, January 2020 Update*, (Jan. 2020), at pg. 19.[25]

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[24]https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html

[25]https://s32082.pcdn.co/wp-content/uploads/2020/03/0Z-Full-Jan-2020-BB-3.13.2020.pdf; *see also* TCR Staff, *Louisiana Leads Nation in Life Without Parole Terms*, (Dec. 12, 2019), https://thecrimereport.org/2019/12/12/louisiana-leads-nation-in-life-without-parole-terms.

Not only is that statistic staggering, but Louisiana has a further distinction that no other state in the United States bears: many of those life sentences followed convictions that were not even unanimous. Our data reveals that 911 of the individuals in custody based upon final non-unanimous convictions are serving a life sentence or 99 years. In Louisiana, almost one in five people serving life without the possibility of parole sentences, including the Petitioner in this case, received a life sentence as a result of a non-unanimous jury verdict. Unlike Oregon, Louisiana is the only state that permits imposition of a mandatory life sentence based on a non-unanimous verdict. Further, our analysis of the children convicted by non-unanimous verdicts reveals that 52 of them are serving life or de facto life sentences; 47 of them are Black. Some are as young as fifteen years old. *See State v. Demery*, 28,396 (La. App. 2 Cir. 08/21/96); 679 So. 2d 518, 520 ("The defendant, a 15-year-old, was tried by a 12-person jury. He claimed self-defense as a justification for the shooting. After hearing all the evidence, the jury by a 10-2 vote found him guilty of second degree murder.").

In this context, any assessment of the value of finality must be balanced against the lives of these incarcerated individuals, and the lives of their children, partners and parents all who continue to bear the burden of a Jim Crow law from the 19th century, well into the 21st century.

D.The Non-Unanimous Regime Undermines Confidence in Results

The failure to require a unanimous jury is a structural error, but there is significant evidence that requiring a unanimous jury would have had a measurable impact on the verdict. Repeatedly, *Amici* finds cases in which the non-unanimous rule almost entirely foreclosed deliberation. While length of time of deliberation is not always recorded, we have found at least twenty cases where deliberation time was less than thirty minutes. Three juries deliberated for less than fifteen minutes. These short "deliberation" times suggest that even though some jurors doubted the defendant's guilt, the non-unanimous regime quickly overruled the unconvinced jurors and prematurely terminated deliberation.

On the other hand, there appear to be a series of cases where deliberations would have clearly produced hung verdicts in any other jurisdiction – but where deliberation was truncated by a non-unanimous verdict. *See State v. Foster*, 09-837 (La. App. 5 Cir. 6/29/10); 44 So. 3d 733, 737–38 (where jury returned a note "What happens if we can't come to an agreement; 8/4 vote," and then after additional deliberation provided another note "advising the court that it was deadlocked" but returned a verdict after the court instructed them to keep deliberating "if there was a possibility to 'get ten to do anything'");

State v. Miller, 10-718 (La. App. 5 Cir. 12/28/11); 83 So. 3d 178, 201–02 ("When the jury was polled, it was learned that the ten of twelve verdict included juror Jacob's handwritten note that her verdict was "yes," but "under duress to get out of here."); *State v. Simmons*, 414 So. 2d 705, 707 (La. 1982) (rejecting challenge to non-unanimous verdict in case where "the minutes reflect that the jury retired to deliberate at 4:20 p. m. on April 30, 1981. At 5:00 p. m. and 10:30 p. m., additional instructions were requested. At 11:45 p. m. they returned with the guilty verdict.").

Our investigation indicates that the non-unanimous regime got it exactly wrong for many defendants. The constitutionally required safeguard of a unanimous jury is precisely the sort of protection that is "central to an accurate determination of innocence or guilt," weighing heavily in favor of retroactivity despite the state's interest in finality. *Teague v. Lane*, 489 U.S. 288, 313 (1989). Moreover, the non-unanimous regime results in deliberations that are sometimes too short, sometimes too long – but always lacking the legitimacy of a unanimous verdict that would be just right.

III. NON-UNANIMOUS JURIES VITIATE THE INTEGRITY OF THE JUSTICE SYSTEM

Teague involved more than the interest in comity between state and federal sovereigns, but "also relied on the interest in finality." *Danforth v. Minnesota*, 552 U.S. 264, 300 (2008) (Roberts, CJ dissenting). But finality is a double edge sword; when the interest in finality enshrines in perpetuity a law based on race, it undermines rather than enhances the administration of justice. Moreover, continued incarceration based upon a racist law deprives citizens of a substantive constitutional right. The full application of substantive rules does not implicate a state's interest in ensuring the finality of convictions and sentences. *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016).

A. The Racist Origins of Louisiana's Law Invalidates the Constitutionality Of Incarceration Predicated Upon It.

As this Court has explained "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell,* 443 U.S. 545, 556 (1979); *Buck v. Davis,* 137 S. Ct. 759 (2017). "Discrimination not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Rose*, 443 U.S. at 556 (citing *Smith v. Texas*, 331 U.S. 128, 130 (1940)).

Louisiana's history of resisting the Fourteenth Amendment has been lengthy. *Pierre v. Louisiana*, 306 U.S. 354 (1939) (reversed petitioner's conviction and death sentence after the State systematically excluded Black people from the jury on the basis of race); *Alexander v. Louisiana*, 405 U.S. 625 (1972) (reversed rape conviction by all-white jury finding proof of invidious discrimination); *Garner v. Louisiana*, 368 U.S. 157 (1961) (held disturbing the peace convictions for peaceful sit-ins at segregated lunch counters violated due process); *Louisiana v. United States*, 380 U.S. 145 (1965) (held constitutional interpretation test required to vote in 21 parishes violated Fourteenth Amendment); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (reversed trespass convictions based on enforcing segregation); *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (reversed murder conviction by all-white jury on the basis that Black people were systematically excluded from grand juries in Orleans Parish); *Snyder v. Louisiana*, 552 U.S. 472 (2008) (reversed murder conviction after prosecutors eliminated all prospective Black jurors through peremptory strikes).

Nor have we always fully protected the principles underlying the Fourteenth Amendment in cases arising from Louisiana. *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable. . ."); *Murray v. Louisiana*, 163 U.S. 101 (1896) (exclusion of Black people from the jury in petitioner's trial failed to amount to deprivation "of any right or im-

munity secured to him under the laws or Constitution of the United States"); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (Stewart J., Brennan J, Marshall, J. dissenting) ("[T]oday's judgment approves the elimination of the one rule that can ensure that such participation will be meaningful — the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class"); *Dubuclet v. Louisiana*, 103 U.S. 550 (1880) (Depriving "petitioner of the office of treasurer of the State of Louisiana, by reason of the denial of the aforesaid citizens the right to vote on account of race, color, and previous condition of servitude . . . does not show a case "arising under the Constitution or laws of the United States."); *United States v. Cruikshank*, 92 U.S. 542 (1876) (reversing conspiracy charges for those who participated in the Colfax massacre and holding the First and Second Amendment did not apply to State governments or individuals).

But the failure to keep past promises is no justification for declining to honor constitutional obligations today. *See e.g. McGirt v. Oklahoma*, 591 U.S. __ (2020) ("many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking."); *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) ("[J]uries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to

punish. … And the "truth of every accusation" that was brought against a person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." … the Constitution's guarantees cannot mean less today than they did the day they were adopted.").

As this Court recognizes, the influence of race "poisons public confidence" in the judicial process. It thus injures 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 (2017) (internal citations omitted); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 631 (1991) ("Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality….[and] causes injury to the excused juror."). One of the goals of our jury system is "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). Selection procedures that silence the voices of African–American jurors undermine public confidence.

As this Court has explained, a sentence imposed "pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude

otherwise would undercut the Constitution's substantive guarantees." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016). For those 1,601 individuals who remain in custody in Louisiana today, their custody literally depends upon the laws that originated with Louisiana's grandfather clause.[26]

B. Reversal of Non-Unanimous Convictions Is Necessary to Restore Confidence in the Justice System

"Our criminal justice system makes two promises to its citizens: a fundamentally fair trial and an accurate result. If either of those two promises are not met, the criminal justice system itself falls into disrepute and will eventually be disregarded." *Ex parte Thompson*, 153 S.W.3d 416, 421 (Tex. Crim. App. 2005) (Cochran, J., concurring).

For more than 120 years, the state of Louisiana deprived its citizens of both those promises, denying thousands their right to a trial by jury, eroding public confidence in the integrity of law and incarcerating those whose guilt had not been found by a unanimous jury. As the American public considers its

[26] Thomas Aiello, Jim Crow's Last Stand, Non-Unanimous Criminal Jury Verdicts in Louisiana, Louisiana State University Press, Baton Rouge, Louisiana, 2015.

history,[27] courts must reckon with the failure to enforce constitutional rights.[28]

As concern over the administration of justice sparked protests across the country, Louisiana Supreme Court Chief Justice Bernette Johnson issued her own call for justice in the state. "Like all of you, I firmly believe in the rule of law. But its legitimacy is in peril when African American citizens see evidence every day of a criminal legal system that appears to value Black lives less than it values White lives." Chief Justice Bernette Joshua Johnson, *Louisiana Supreme Court Chief Justice Bernette Joshua Johnson issues call for justice for all in Louisiana* (June 8, 2020).

Justices from at least twenty-three state high courts have issued similar statements, acknowledging the judicial system's responsibility to repair racial injustice in order to give faith and confidence to the justice system.[29]

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[27] Mitch Landrieu, *In the Shadow of Statutes: A White Southerner Confronts History* (Penguin Books 2019).

[28] Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (Holt Paperbacks 2009).

[29] National Center for State Courts, *State Court Statements on Racial Justice*, https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice. *See e.g.* Illinois Supreme Court, *Supreme Court releases statement on racial justice, next steps for judicial branch*, (June 22, 2020) ("People of color have no less expectation

This Court now has the opportunity to set right the racial injustice inflicted by non-unanimous juries. While the Court disavowed the practice in *Ramos*, most of those convicted by non-unanimous verdicts remain unable to get relief, serving sentences at hard labor for crimes where at least one juror found them not guilty, but are unable to present their cause because their convictions have come "final" under an unconstitutional regime. As Chief Justice Johnson recently observed :

> The cost of giving new trials to all defendants convicted by non-unanimous juries pales in comparison to the long-term societal cost of perpetuating—by our own inaction—a deeply-ingrained distrust of law enforcement, criminal justice, and Louisiana's government institutions.

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of fairness, equity and freedom from racial discrimination than others, yet they are continually confronted with racial injustices that the Courts have the ability to nullify and set right."; Washington Supreme Court, *Letter to Members of the Judiciary and the Legal Community* (June 4, 2020) ("Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed… We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of Black Americans is not merely incorrect and harmful; it is shameful and deadly.").

State v. Gipson, 2019-01815 (La. 06/03/20) (Johnson, C.J., dissenting). Chief Justice Johnson's dissent is as true in this Court as it is in that one.

CONCLUSION

For the reasons set forth herein, *Amici* respectfully suggest that the Court hold that the decision in *Ramos v. Louisiana* apply fully to those individuals incarcerated based upon a non-unanimous verdict.

Respectfully submitted,

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APPENDIX A

Jurisdiction	Number of Assistant District Attorneys	Number of Ramos cases
First JDC	27	166
2nd JDC	10	8
3rd JDC	9	13
4th JDC	26	59
5th JDC	6	7
6th JDC	7	7
7th JDC	5	3
8th JDC	4	0
9th JDC	15	21
10th JDC	5	8
11th JDC	4	2
12th JDC	7	8
13th JDC	5	6
14th JDC	23	55

15th JDC	19	40
16th JDC	21	24
17th JDC	13	12
18th JDC	10	13
19th JDC	48	134
20th JDC	5	11
21st JDC	18	26
22nd JDC	30	120
23rd JDC	19	28
24th JDC	52	219
25th	5	3
26th JDC	12	30
27th JDC	11	10
28th JDC	3	0
29th JDC	9	10
30th JDC	6	5
31st JDC	4	0
32nd JDC	19	36

33rd JDC	4	4
34th JDC	8	6
35th JDC	4	2
36th JDC	4	4
37th JDC	2	4
38th JDC	2	1
39th JDC	2	2
40th JDC	9	13
41st JDC (Orleans)	83	324
42nd JDC	4	4

APPENDIX B

Below are some of the law firms, companies and organizations who have agreed to co-counsel with the Promise of Justice Initiative in representing clients with non-unanimous jury verdicts, listed alphabetically.

Akerman LLP

Akin Gump Strauss Hauer & Feld LLP

Baker McKenzie LLP

Boies Schiller Flexner LLP

Buckley LLP

Center for Constitutional Rights

Davis Polk & Wardwell LLP

Davis Wright Tremaine LLP

Dorsey & Whitney LLP

Dykema Gossett PLLC

Eversheds Sutherland LLP

Faegre Drinker Biddle & Reath LLP

Fredrikson & Byron, P.A.

Haynes and Boone, LLP

Hogan Lovells US LLP

Jenner & Block LLP

Liskow & Lewis LLP

Morrison & Foerster LLP

Orrick Herrington & Sutcliffe LLP

Perkins Coie LLP

Schwabe, Williamson & Wyatt PC

Squire Patton Boggs LLP

Tulane Law School's Women's Prison Project