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 LAW PROFESSORS AND SOCIAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and social scientists whose research and teaching address the Sixth Amendment right to a unanimous jury verdict and the demonstrated benefits that right produces. They have a strong interest in ensuring that this Court understands the full extent of those benefits when determining whether the rule announced in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), requiring jury unanimity in state and federal criminal trials, applies retroactively to cases on federal collateral review. In particular, they have an interest in affirming the wisdom of the *Ramos* rule and demonstrating that the rule is necessary to avoid an impermissibly large risk of inaccurate convictions. As students of the jury, *amici* are also well aware that at the time of the Sixth Amendment's adoption, both the English and American legal systems recognized the requirement of a unanimous jury verdict as a bedrock element essential to the fairness of a criminal proceeding.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the critical question whether the rule this Court announced last Term in *Ramos v. Louisiana*, 140 S. Ct. 1390—which held that the Sixth

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Amendment, as incorporated by the Fourteenth Amendment, guarantees criminal defendants in both state and federal court the right to a unanimous jury verdict, *id.* at 1397—applies retroactively to cases on federal collateral review. Before this Court decided *Ramos*, a jury in Louisiana state court found Petitioner Thedrick Edwards, an African American man, guilty of several serious charges, all by votes of 10-2 or 11-1. Pet'r Br. 2, 5. The one African American member of Edwards' jury voted to acquit on all counts. *Id.* at 5 & n.1. At the time in Louisiana, however, these non-unanimous jury verdicts were sufficient to convict, and Edwards was sentenced to multiple consecutive terms, including life imprisonment without the possibility of probation, parole, or suspension of sentence. *Id.* at 6.

This Court should hold that *Ramos* applies retroactively to cases like this one on federal habeas review. Although "newly recognized rules of criminal procedure do not normally apply [o]n collateral review," *Ramos*, 140 S. Ct. at 1407 (citing *Teague v. Lane*, 489 U.S. 288, 311-12 (1989) (plurality opinion)), this Court has noted "the possibility of an exception for 'watershed rules' 'implicat[ing] the fundamental fairness [and accuracy] of the trial,'" *id.* (alterations in original) (quoting *Teague*, 489 U.S. at 311-12). The *Ramos* rule satisfies the standard this Court has articulated for this exception, as it is necessary to prevent an impermissibly high risk of an inaccurate conviction, and it altered this Court's understanding of a bedrock procedural element essential to fairness. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

Empirical evidence confirms that the *Ramos* unanimity rule is critical to ensuring the accuracy of criminal convictions. Research has shown that a unanimous jury requirement reduces the frequency of error

by strengthening deliberations and by fostering greater consideration of minority viewpoints. A unanimity requirement also increases juror confidence in the accuracy of their verdicts. *See infra* at 5-13. Thus, this Court's holding in *Ramos* that jury verdicts in state and federal criminal trials must be unanimous is necessary to prevent an impermissibly large risk of wrongful convictions.

Moreover, the right to a unanimous jury verdict in criminal cases is a bedrock procedural element that is essential to ensuring that criminal defendants receive a fair trial. Indeed, the Framers of the Bill of Rights viewed the right to trial by jury as sacrosanct, *cf. Ramos*, 140 S. Ct. at 1397 ("[T]he Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice.'" (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968))), and at the time of the Sixth Amendment's adoption, "the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict," *id.* at 1400; *see id.* at 1402 ("[T]he right to trial by jury *included* a right to a unanimous verdict."). Thus, when the Framers included the right to trial by jury in the Sixth Amendment, they did so with the understanding that jury unanimity was a fundamental component of that right.

This Court's splintered decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), however, meant that until last Term, criminal defendants in state court could be denied the right to a unanimous jury verdict. But this Court recognized in *Ramos* that a criminal defendant has the constitutional right to a unanimous jury verdict in both state and federal court. 140 S. Ct. at 1397. The *Ramos* rule therefore altered this Court's understanding of the bedrock elements essential to a fair criminal proceeding and should apply retroactively.

ARGUMENT

I. EMPIRICAL RESEARCH DEMONSTRATES THAT THE *RAMOS* RULE IS NECESSARY TO PREVENT AN IMPERMISSIBLY LARGE RISK OF AN INACCURATE CONVICTION.

This Court has explained that for a new rule of criminal procedure to apply retroactively on federal habeas review, the rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction." *Whorton*, 549 U.S. at 418 (internal quotation marks omitted) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004)). While "[i]t is . . . not enough . . . to say that [the] rule is aimed at improving the accuracy of trial, or that the rule is directed toward the enhancement of reliability and accuracy in some sense," *id.* (alterations in original) (internal quotation marks omitted) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990)), this Court has made clear that a new rule should apply retroactively if it "remedie[s] an impermissibly large risk of an inaccurate conviction," *id.* (internal quotation marks omitted) (quoting *Schriro*, 542 U.S. at 356).

The *Ramos* rule satisfies this demanding standard, as empirical studies have consistently demonstrated that requiring unanimous jury verdicts is necessary to ensure the accuracy of convictions. These studies confirm that requiring a unanimous verdict strengthens jury deliberations, markedly reducing the incidence of factual errors that lead to mistaken judgments. Moreover, research shows that unanimity requirements like the *Ramos* rule increase the attention paid to minority viewpoints and ensure that all jurors are heard in the process of reaching a verdict, thus avoiding a situation like the one in this case where a minority opinion is cast aside at the risk of a wrongful conviction. In addition, studies confirm that requiring

unanimity bolsters juror confidence in the accuracy of their verdicts.

A. A Unanimity Requirement Produces More Thorough Deliberations and Yields More Accurate Outcomes.

Empirical research has repeatedly shown that requiring unanimity fosters more thorough and considered jury deliberations, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) [hereinafter *Jury Decision Making*] (examining eleven empirical studies), and studies have "strong[ly] indicat[ed] that the quality of the deliberation process is in fact related to criminal jury trial outcomes," Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. Empirical Legal Stud. 273, 300 (2007); *see* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (collecting empirical studies). Thus, a unanimity requirement strengthens jury deliberations and increases the accuracy of jury verdicts.

Juries requiring unanimity tend to be "evidence-driven," delaying their first vote longer and discussing the evidence more thoroughly than non-unanimous juries. *See* Reid Hastie et al., *Inside the Jury* 115, 164-65 (1983); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1, 24-25 (2001) [hereinafter *The Power of Twelve*]. When unanimity is not required, by contrast, juries tend to end their deliberations soon after obtaining enough votes to reach a verdict. *Jury Decision Making*, *supra*, at 669. This is to be expected because non-unanimous juries are typically more "verdict-driven." *See* Hastie et al., *supra*, at 165; *The Power of Twelve*, *supra*, at 24-25. They are

more likely to take a formal ballot during the first ten minutes of deliberation and to continue voting with some frequency until enough jurors agree to reach a verdict. *See* Hastie et al., *supra*, at 115, 164-65. Accordingly, when juries are not required to reach unanimous verdicts, they tend to take less time to deliberate, *Jury Decision Making*, *supra*, at 669, and are less thorough in their deliberations, Hastie et al., *supra*, at 165.

A study of 50 real civil jury deliberations in Arizona confirmed these findings.[2] *See* Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 Nw. U. L. Rev. 201 (2006). On post-trial questionnaires, members of juries that reached a three-fourths majority verdict rated their deliberations as less thorough and their fellow jurors as less open-minded than did members of juries that reached unanimous verdicts. *Id.* at 225. These more negative perceptions from jurors whose deliberations did not end in unanimity held true not only for dissenters from the majority's decision, but also for members of the prevailing majority. *Id.*

To be sure, not all majority-rule juries speed through deliberations or give short shrift to minority viewpoints; some of the juries in the Arizona study pressed for unanimity even though it was not required. *Id.* at 212. But many did not. *See id.* at 212-13. The majority of juries in the Arizona study pointed out early in deliberations that they did not need to be unanimous to reach a verdict, *id.* at 214, and some jurors used the quorum requirement explicitly to

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[2] With respect to both the thoroughness of deliberations and the attention paid to minority viewpoints, researchers have found that the effect of a unanimity requirement is similar for civil and criminal juries. *The Power of Twelve*, *supra*, at 23-27.

suppress debate, *id.* at 215-16. In one particularly striking case, a member of a quorum-rule jury expressly discounted the views of a fellow juror, stating, "All right, no offense, but we are going to ignore you." *Id.* at 216.

Experimental studies have also found that juries deliberate longer and more thoroughly when unanimity is required. In one study, participants who had appeared for jury duty were shown a three-hour reenactment of an actual homicide trial. Hastie et al., *supra*, at 45-47. The jurors then deliberated under either a unanimous (twelve out of twelve), a five-sixths (ten out of twelve), or a two-thirds (eight out of twelve) decision rule. *Id.* at 50. The juries operating under a unanimous decision rule deliberated longer and discussed key facts to a greater extent than those not required to reach a unanimous verdict. *See id.* at 76-77, 97. Consistent with these measures, jurors operating under a unanimous decision rule rated their deliberations as more thorough than did jurors operating under non-unanimous decision rules. *Id.* at 77.

Other experimental studies have produced similar results. For example, an early study involving mock criminal juries found that twelve-person juries charged with reaching a unanimous verdict spent significantly more time deliberating than did their counterparts who were permitted to reach a two-thirds majority. James H. Davis et al., *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psychol. 1, 9, 12 (1975). Moreover, most juries in this study that were required to reach a two-thirds majority stopped deliberating either immediately or within ten minutes after obtaining the requisite number of votes. *Id.* at 12. Thus, deliberations are likely

to be significantly more thorough when unanimity is required.[3]

Critically, empirical studies have shown that a unanimity requirement not only produces more thorough deliberations, but also reduces the likelihood of an erroneous outcome. *See* Taylor-Thompson, *supra*, at 1272 ("A shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment."). One study found that juries required to reach a unanimous verdict in a simulated homicide trial were less likely to reach the legally inaccurate verdict of first-degree murder than those operating under a non-unanimous decision rule. Hastie et al., *supra*, at 62, 81; *see id.* at 81 ("[T]here was an elevated rate of [inaccurate] first-degree murder verdicts under the ten-out-of-twelve majority decision rule . . . ."); *id.* at 228 ("[I]t is significant that in the study the first degree murder verdict was rendered only by nonunanimous juries.").[4] Juries required to be unanimous were also more likely to correct erroneous

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[3] Unanimity requirements, as compared with majority requirements, have also been associated with a modest increase in the rate of hung juries, *see* Diamond et al., *supra*, at 207, which this Court has acknowledged may indicate that "a jury [required to reach unanimity is] doing exactly what . . . it should—deliberating carefully and safeguarding against overzealous prosecutions," *Ramos*, 140 S. Ct. at 1401.

[4] Experts who reviewed the study "all declared the second degree-murder verdict the most proper or correct verdict for the case." Hastie et al., *supra*, at 81; *see id.* at 62 ("[T]he first degree verdict for the stimulus case is virtually untenable in the eyes of legal experts. No experienced trial judge or attorney out of a sample of over twenty found the first degree verdict acceptable. Thus, a first-degree murder verdict is indicative of a failure of the deliberation process.").

assertions made during deliberations that could lead to a wrongful conviction. *Id.* at 88-89.

Unanimity requirements, therefore, have been shown to foster more robust jury deliberations and produce more accurate outcomes. *See* Diamond et al., *supra*, at 230 ("The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the judge agreed with the verdict favored by the holdouts in a number of these cases."). Accordingly, the *Ramos* unanimity rule is not merely "*aimed at* improving the accuracy of [a] trial," *Whorton*, 549 U.S. at 418 (emphasis added) (quoting *Sawyer*, 497 U.S. at 242). Instead, empirical evidence shows that the rule is necessary to prevent a large risk of an inaccurate conviction, and that without a unanimity requirement, "the likelihood of an accurate conviction is *seriously* diminished." *Id.* at 420 (quoting *Schriro*, 542 U.S. at 352).[5]

B. A Unanimity Requirement Increases Consideration of Minority Viewpoints, Thereby Increasing Verdict Accuracy.

Empirical studies have also shown that a unanimity requirement increases consideration of minority viewpoints, thus ensuring that such viewpoints are not cast aside at the risk of rendering an inaccurate verdict. As this Court has recognized, "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Ballew v. Georgia*,

[5] Perhaps the increased accuracy of unanimous jury verdicts is why at the time this Court issued its decision in *Ramos*, every State but Oregon, Or. Const. art. I, § 11, required unanimous verdicts in felony cases, and why even Louisiana (the other State that allowed non-unanimous verdicts in felony cases until shortly before *Ramos*) has long required unanimity in capital cases, La. Const. art. I, § 17(A).

435 U.S. 223, 237 (1978) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). To that end, this Court has taken great strides through the years to ensure that prospective jurors are not excluded from the jury room on the basis of race or sex. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 213 (2005); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994). Requiring unanimity ensures that jurors who share a majority viewpoint must still consider and respond to the views of jurors in the minority, thereby increasing the accuracy of verdicts. *See* Valerie P. Hans, *Deliberation and Dissent:* 12 Angry Men *Versus the Empirical Reality of Juries*, 82 Chi.-Kent L. Rev. 579, 587 (2007) ("In juries required to reach unanimity, jurors understandably pay more attention to those who hold minority views; furthermore, those attempting to argue a minority position participate more in the discussion and have more influence."); *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.) ("A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury.").

Absent a unanimity requirement, a jury may disregard and effectively silence the views of members of historically excluded groups—namely, racial and ethnic minorities and women. Thus, "[i]f—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules [in criminal cases] can operate to eliminate the voice of difference on the jury." Taylor-Thompson, *supra*, at 1264. Indeed, a 2018 study of 199 serious felony guilty verdicts by non-unanimous juries in Louisiana confirmed that Louisiana's non-unanimity rule effectively suppressed the views of racial minorities. Thomas Ward Frampton, *The Jim Crow*

Jury, 71 Vand. L. Rev. 1593, 1599 (2018). The study demonstrated that African American jurors are disproportionately in the minority urging acquittal. *Id.* at 1599. Thus, when unanimity is not required, "black jurors are more likely than white jurors to cast 'empty votes' (i.e., dissenting votes that are overridden by supermajority verdicts)." *Id.* at 1622. In fact, that was precisely what the sole African American member of Edwards' jury experienced when she voted to acquit on all counts, to no avail. Pet'r Br. 5 & n.1.

These results are perhaps unsurprising given the racially motivated origins of the Louisiana rule. *See Ramos*, 140 S. Ct. at 1394 ("With a careful eye on racial demographics, the convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'" (quoting *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018), App. 56-57)); *see also* Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana* (2015) (describing the history of the non-unanimous verdict in Louisiana). Accordingly, "[t]he absence of a unanimity requirement [has] continue[d] to systematically weaken the voice of nonwhite jurors in contemporary criminal adjudication, just as it was originally intended." Frampton, *supra*, at 1599.

The marginalization of members of racial minority groups in particular—even if unintended—can have significant consequences, as racial stereotypes and biases continue to influence jurors' judgments and their perceptions of a defendant's honesty and guilt. *See* Taylor-Thompson, *supra*, at 1290-95 (collecting studies); *cf. Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (holding that a state no-impeachment rule does not preclude a court from considering evidence of racial bias during jury deliberations "where a juror . . .

indicates he or she relied on racial stereotypes or animus to convict"). Indeed, African American defendants are more likely than white defendants to be convicted by non-unanimous verdicts. Frampton, *supra*, at 1622.

Further, allowing non-unanimous jury verdicts may diminish or eliminate the influence of women on juries. Research has shown that women tend to speak less frequently than men in jury deliberations. *See* Taylor-Thompson, *supra*, at 1299; Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 Yale L.J. 593, 594-98 (1987); Hastie et al., *supra*, at 141-42 (observing that male mock jurors made 40% more comments than their female counterparts). Men also tend to interrupt women in deliberations or ignore their comments, further reducing women's participation. Taylor-Thompson, *supra*, at 1299 (collecting studies). In addition, women tend to take longer than men to enter these discussions. *Id.* Thus, under a majority-rule system, where deliberations typically conclude more quickly, a jury may reach a verdict before women begin to meaningfully contribute. *Id.* at 1300. "Indeed, majority rule may make it less likely that women's voices will ever be heard." *Id.*

But it is not only women and racial minorities whose views are more likely to be ignored when the jury need not reach unanimity. *Any* person or group who expresses a minority position may find their views ignored when their votes are not needed to reach a verdict. And that suppression of minority viewpoints seriously diminishes the likelihood that all potentially relevant matters will be examined and that the jury will reach an accurate verdict.

C. A Unanimity Requirement Leads to Greater Confidence in the Accuracy of Verdicts.

Finally, several studies have shown that jurors who are required to reach unanimity report greater satisfaction and confidence in the accuracy of their verdicts. *See, e.g.*, *Jury Decision Making*, *supra*, at 669; *The Power of Twelve*, *supra*, at 26 & n.89. Individuals interviewed for one empirical study believed that twelve-person unanimous juries were "most accurate (63%), most thorough (62%), most likely to represent minorities (67%), most likely to listen to holdouts (36%), most likely to minimize bias (41%), and fairest (59%)," as compared with twelve-person majority, six-person unanimous, and six-person majority juries. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 Law & Hum. Behav. 333, 337 (1988). "The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict . . . ." *Lopez*, 581 F.2d at 1341 (Kennedy, J.).

II. THE *RAMOS* RULE ALTERED THIS COURT'S UNDERSTANDING OF THE BEDROCK ELEMENTS ESSENTIAL TO THE FAIRNESS OF A PROCEEDING.

For a new rule of criminal procedure to apply retroactively, it must also "alter [this Court's] understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418. This Court has explained that it is insufficient for the new rule to be "*based on* a 'bedrock' right." *Id.* at 420-21. Instead, the rule "must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding," *id.* at 421,

much like the right-to-counsel rule articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The *Ramos* rule easily satisfies this requirement. The rule, which guarantees that criminal defendants in both state and federal court enjoy the right to a unanimous jury verdict, *is itself* part and parcel of the Sixth Amendment right to trial by an impartial jury and is essential to a fair criminal proceeding. Indeed, this Court recognized in *Ramos* both that "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice,'" *Ramos*, 140 S. Ct. at 1397 (quoting *Duncan*, 391 U.S. at 149), and that at the time of the Sixth Amendment's adoption, "the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict," *id.* at 1400; *see id.* at 1402 ("[T]he right to trial by jury *included* a right to a unanimous verdict."). Thus, the *Ramos* rule requiring a unanimous jury verdict is itself "fundamental to the American scheme of justice," *id.* at 1397 (quoting *Duncan*, 391 U.S. at 149), and is a bedrock element that is critical to procedural fairness.

A. The Framers Understood That a Unanimous Jury Requirement Was an Essential Component of a Fair Jury Trial.

The Framers regarded unanimity as crucial to the Sixth Amendment right to trial by jury—a right that they deemed sacrosanct. Featured expressly in three of the first ten amendments to the Constitution, the jury is "a paradigmatic image underlying the original Bill of Rights." Akhil Reed Amar, *The Bill of Rights* 96 (1998); *see, e.g.*, U.S. Const. amends. V, VI, VII. To the Framers, the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." Amar, *The Bill of Rights*, *supra*, at 97.

The Founding generation's focus on the jury as a central feature of a system of ordered liberty was strongly rooted in English common law, where juries were required to be unanimous: "The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law." *Ramos*, 140 S. Ct. at 1395; *see id.* ("A verdict, taken from eleven, was no verdict at all." (internal quotation marks omitted) (quoting J. Thayer, *Evidence at the Common Law* 88-89 n.4 (1898))). Sir William Blackstone emphasized that "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 William Blackstone, *Commentaries* *379; *see* 4 *id.* at *343-44 (calling the jury a "sacred bulwark" of liberty). Blackstone's understanding was that trial by jury "is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the *unanimous consent* of twelve of his neighbours and equals." 2 *id.* at *379 (emphasis added). Blackstone later explained that it was important that a trial by jury include "the *unanimous suffrage* of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." 4 *id.* at *343 (emphasis added).

The Framers shared this view that jury unanimity was implicit in the fundamental right to trial by jury in criminal cases. In 1786, several years prior to ratification of the Constitution and the Sixth Amendment, John Adams reflected that "it is the *unanimity* of the jury that preserves the rights of mankind." Letter from John Adams to William Stephens Smith (Dec. 21, 1786), *in* 7 *The Adams Papers: Adams Family Correspondence, January 1786-February 1787* (Margaret A. Hogan et al. eds., 2005) (emphasis added). Later, as the States debated and ratified the Sixth Amendment,

Justice James Wilson expressed in his 1790-91 *Lectures on Law* that "[t]o the conviction of a crime, the undoubting and the *unanimous* sentiment of the twelve jurors is of indispensable necessity." 2 James Wilson, *The Works of the Honourable James Wilson* 350 (1804) (emphasis added).

State practice toward the end of the eighteenth century also demonstrates that unanimity had become an essential element of the right to trial by jury for criminal cases in the United States. As this Court recognized in *Ramos*, "consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial" at the time of the Sixth Amendment's adoption. 140 S. Ct. at 1396.

"It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791," *id.*, providing that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," U.S. Const. amend. VI. "By that time, unanimous verdicts had been required for about 400 years." *Ramos*, 140 S. Ct. at 1396. Thus, as this Court recognized in *Ramos*, "[i]f the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Id.*

The view that jury unanimity was an essential component of the right to trial by jury did not change after the Sixth Amendment's ratification. *See id.* ("Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity."). In 1803, St. George Tucker, author of the 1803 edition of *Blackstone's Commentaries*, stated his view that the Sixth Amendment secured "the trial by jury" as described in Blackstone's text, 5 St. George Tucker, *Blackstone's*

Commentaries 348-49 n.2 (1803), later commenting that "without [the jurors'] *unanimous verdict*, or consent, no person can be condemned of any crime," 1 *id.* at App. 34 (emphasis added). Likewise, in 1833, Justice Joseph Story embraced the unanimity requirement in his *Commentaries on the Constitution*, explaining that "[a] trial by jury is generally understood to mean . . . a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." 1 Joseph Story, *Commentaries on the Constitution of the United States* § 1779, at 559 n.2 (The Lawbook Exch., Ltd. 2008) (4th ed. 1873).

And in 1868, Thomas Cooley stated in an influential treatise that the "common-law incidents to a jury trial" that were "preserved by the constitution" included the requirement that "[t]he jury must unanimously concur in the verdict." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 319-20 (The Lawbook Exch., Ltd. 1999) (1868). Other prominent legal commentators of the time accepted this view as well. *See* 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 897, at 546 (2d ed. 1872) ("[I]n a case in which the constitution guarantees a jury trial," a statute allowing "a verdict upon anything short of the unanimous consent of the twelve jurors" is "void."); John Norton Pomeroy, *An Introduction to Municipal Law* § 135, at 78 (1864) ("[T]he jury [must] be unanimous in rendering their verdict. . . . The principle once adopted has continued as an essential part of the jury trial . . . ."); Joel Tiffany, *A Treatise on Government and Constitutional Law* § 548, at 367 (1867) ("And a

trial by jury is understood to mean—generally—a trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had.").

Thus, the Framers recognized that a unanimous jury requirement is critical to the constitutional right to a fair jury trial. The *Ramos* rule guaranteeing a unanimous jury verdict in criminal trials is therefore a bedrock procedural element that is essential to the fairness of a criminal proceeding. Indeed, this Court has recognized time and again "that the Sixth Amendment affords a right to 'a trial by jury as understood and applied at common law, . . . includ[ing] all the *essential elements* as they were recognized in this country and England when the Constitution was adopted'"—including the requirement "'that the verdict should be unanimous.'" *Ramos*, 140 S. Ct. at 1397 (alterations in original) (emphasis added) (quoting *Patton v. United States*, 281 U.S. 276, 288 (1930)).

B. This Court's Decision in Ramos *Altered Its Understanding of the Bedrock Right to Unanimity.*

"[D]espite these seemingly straightforward principles" and longstanding recognition of the importance of unanimity, *Ramos*, 140 S. Ct. at 1397, this Court's splintered decision in *Apodaca v. Oregon*, 406 U.S. 404, meant that until this Court decided *Ramos* last Term, criminal defendants in state court could be denied their fundamental right to a unanimous jury verdict. *Apodaca* was "the result of an unusual division among the Justices," *McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010); *accord Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019), and it stood for the proposition that the unanimity requirement applied in federal court but not in state court. *See Johnson v. Louisiana*, 406 U.S. 366, 373 (1972) (Powell, J., concurring). The general rule, of course, is 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.'" *McDonald*, 561 U.S. at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)); *see Timbs*, 139 S. Ct. at 687 ("[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."). This Court observed in *Ramos* that "no one has found a way to make sense," 140 S. Ct. at 1399, of the "unusual" exception, *id.* (quoting *McDonald*, 561 U.S. at 766 n.14), *Apodaca* created to that general rule.

In *Ramos*, this Court finally rectified the situation, holding that under the Sixth Amendment, as incorporated by the Fourteenth Amendment, criminal defendants in both state and federal court have the right to a unanimous jury verdict. *Id.* at 1397. In other words, the Court recognized that in state court as well as in federal court, the constitutional right to a jury trial—a right that "is 'fundamental to the American scheme of justice,'" *id.* (quoting *Duncan*, 391 U.S. at 149)—"*mean[s]* a trial in which the jury renders a unanimous verdict." *Id.* at 1400; *see id.* at 1397 ("There can be no question . . . that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."). This rule "itself constitute[s] a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 421. It should therefore apply retroactively to cases like this one on federal collateral review.

* * *

In sum, empirical evidence confirms the Framers' insight that unanimity is critical to the Sixth Amendment right to trial by jury and to the fairness and accuracy of a criminal proceeding. When this Court held

in *Ramos* that the Sixth Amendment right to a unanimous jury verdict applies to defendants in state court as well as in federal court, that holding altered this Court's understanding of the bedrock procedural elements essential to the fairness of a criminal proceeding. The *Ramos* rule should therefore apply retroactively.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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