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 FOR FORMER JUDGES, PROSECUTORS AND PUBLIC OFFICIALS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Whether this Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), applies retroactively to cases on federal collateral review.

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INTEREST OF *AMICI CURIAE*[1]

Amici formerly served as jurists, prosecutors, or senior government officials in the criminal justice system. Amici have participated in the judicial system from multiple vantage points and have a variety of perspectives on the proper administration of justice, but they are united in their collective belief that conviction by a unanimous jury is an essential prerequisite to a fair criminal system.

Although amici have a profound appreciation for the importance of finality interests, they are firm in their view that jury unanimity is a right so deeply rooted in the American tradition, and so critically important to a trial's fundamental fairness and accuracy, that it must supersede finality interests. Based on their decades of experience, amici are convinced that this quintessential feature of the American jury system ranks among the most fundamental procedural rights under our Constitution, promoting accurate verdicts, fairness, and community acceptance of the criminal process. Retroactive application of the unanimity rule to convictions on collateral review is thus warranted. Any person who was convicted despite dissenting voices on the jury should be able to assert the indispensable right to a unanimous verdict.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

A full list of amici is included as Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Petitioner Thedrick Edwards, an African-American man, was tried for non-capital crimes, one juror (the lone African American on the jury) voted to acquit. Under Louisiana's non-unanimous jury scheme, however, that juror's vote was meaningless. Despite the juror's conclusion that the prosecution had not proved Edwards guilty beyond a reasonable doubt, Edwards was convicted and sentenced to life in prison. That conviction—which in federal court or 48 states would have been invalid—violates the Sixth Amendment and bedrock standards for a fair and accurate trial. This Court should hold that *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), applies retroactively to cases on collateral review and vacate Edwards' non-unanimous conviction.

To balance the important interest in the finality of criminal judgments against "the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law," *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016), this Court adopted a retroactivity framework in *Teague v. Lane*, 489 U.S. 288 (1989), that reflected Justice Harlan's view of retroactivity. Under *Teague*, "a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the rule was announced." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016).

But the *Teague* bar has never been absolute. The Court has consistently recognized that *Teague* does not apply when the case in question does not

announce a "new rule." *Chaidez v. United States*, 568 U.S. 342, 347 (2013). *Teague*, like its antecedents, was designed to address new, previously unrecognized rules of criminal procedure; it was never intended to preclude retroactive application of decisions "grounded upon fundamental principles whose content does not change dramatically from year to year." *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting). And, under *Teague*, even new rules of criminal procedure will apply retroactively on collateral review if they qualify as "watershed." The watershed exception recognizes that finality must yield to retroactive application of rules that are "central to an accurate determination of innocence or guilt" and an "absolute prerequisite to fundamental fairness." *Teague*, 489 U.S. at 313-14 (plurality opinion). Although the balance struck in *Teague* means that few decisions of this Court will apply retroactively, "few" has never meant "zero."

Last Term's decision in *Ramos* is within the select set deserving of retroactive application. By holding that the right to a unanimous jury verdict applies to all state criminal defendants, *Ramos* restored the original understanding of the Sixth Amendment and eliminated a lingering remnant of the Jim Crow era. In doing so, the Court did not "break[] new ground" in the sense *Teague* contemplates. *Chaidez*, 568 U.S. at 347. Instead, it applied "seemingly straightforward principles" of law the Court had articulated "repeatedly and over many years." *Ramos*, 140 S. Ct. at 1395-96. *Teague* does not, and was never intended to, apply in this unusual circumstance. *Ramos* therefore falls outside the *Teague* bar because it does not qualify as a "new" rule.

But even if *Ramos*'s rule were "new" in the literal sense, it should nonetheless apply retroactively. *Teague* recognizes that some procedural protections are too important to allow convictions obtained in contravention of their guarantees to stand. Jury unanimity is one of those protections because it implicates the fundamental fairness and accuracy of the criminal proceeding. *Welch*, 136 S. Ct. at 1264. Edwards' conviction, obtained by a nonunanimous verdict, should be vacated.

ARGUMENT

I. *RAMOS* DID NOT ANNOUNCE A NEW RULE.

A rule is "new," for *Teague* purposes, if it "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (quoting *Teague*, 489 U.S. at 301 (plurality opinion) (emphasis removed)). *Ramos* falls outside that paradigm. The decision was the necessary outgrowth of two longstanding legal principles: that the Sixth Amendment guarantees the right to a unanimous jury verdict and that the Sixth Amendment applies with full force against the States through the Fourteenth Amendment. Both jurisprudential strands were settled long before Edwards's conviction became final in 2010. The only reason Edwards's conviction was permitted in the first place was because of an anachronism in this Court's jurisprudence: the deeply divided decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which rested on a single Justice's view of the law that "was …

foreclosed by precedent" the day it was decided, *Ramos*, 140 S. Ct. at 1398. *Ramos*'s repudiation of *Apodaca* and restoration of the historic and unquestioned unanimity right cannot be characterized as a "new" rule under *Teague*.

A. *Ramos* Reaffirmed The Original Understanding Of The Sixth Amendment Jury Right And Applied Settled Principles Of Incorporation.

Ramos's jurisprudential bases carry a unique historical pedigree.

1. "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. Unanimity was so vital that, according to a 1367 English case, "A 'verdict, taken from eleven, was no verdict' at all." *Id.* (quoting Anonymous Case, 41 Lib. Assisarum 11 (1367)).

The understanding that the jury trial right entails a guarantee of unanimity traveled over to "the young American States," which "appeared to regard unanimity as an essential feature of the jury trial." *Ramos*, 140 S. Ct. 1396. At the time of ratification, accordingly, "[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.* Were any more evidence needed, "[i]nfluential, postadoption treatises," including Nathan Dane's 1824 *Digest of American Laws* and Justice Story's 1833 *Commentaries on the Constitution*, "confirm" the historical understanding. *Id.*; *see also id.* at 1397 n. 22 (citing cases). In short, the historical evidence is "unmistakable"—be it "the

common law, state practices in the founding era, or opinions and treatises written soon afterwards"— "[a] jury must reach a unanimous verdict in order to convict." *Id.* at 1395.

The Framers firmly embedded that jurisprudential foundation in the Constitution. As the Court observed in *Ramos*, it had "commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over 120 years," in cases as old as *Thompson v. Utah*, 170 U.S. 343, 351 (1898) ("Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."), and as new as *United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality opinion). *Ramos*, 140 S. Ct. at 1397. Even "*Apodaca* itself [saw] a majority of Justices … recognize[] that the Sixth Amendment demands unanimity." *Id.* at 1398.

2. The Fourteenth Amendment component to *Ramos*—that the Sixth Amendment jury trial right applies in full (unanimity requirement included) to the States—is likewise well entrenched. The "Court has long explained … that incorporated provisions of the Bill of Rights"—including the Sixth Amendment right to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968)—"bear the same content when asserted against States as they do when asserted against the federal government." *Ramos*, 140 S. Ct. at 1397. By 1964 (eight years before *Apodaca*), this Court had "rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guaranties of the Bill of Rights." *Malloy v. Hogan*, 378 U.S. 1, 10-

11 (1964) (internal quotation marks omitted); *see also, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact laws [infringing on the Free Exercise Clause]."). And that rejection "has been restated many times since, too, including as recently as last year." *Ramos*, 140 S. Ct. at 1398 (citing *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

3. These two lines of precedent give *Ramos* a syllogistic quality. Because: (1) the Sixth Amendment jury trial right includes the right to a unanimous verdict; (2) that right is incorporated against the States; and (3) rights incorporated against the States apply in equal measure to the federal and state governments, *Ramos* did little more than "apply … settled rule[s] of [Sixth and Fourteenth] Amendment law," *Riggs v. California*, 119 S. Ct. 890, 892 (1999) (Stevens, J., respecting denial of certiorari). As such, *Ramos* did not "fashion a new rule, [and Edwards's] claim may be asserted in federal court" on collateral review. *Id.*

B. *Apodaca* Does Not Render *Ramos* A New Rule.

That *Ramos* reached a result opposite to *Apodaca* does not change the *Teague* analysis. *Apodaca* "always stood on shaky ground," as both rationales

that could support it—i.e., that the Sixth Amendment jury right did not include a unanimity right, or that the Sixth Amendment jury right applied in a lesser form against the States—had been rejected before, after, and even in *Apodaca* itself. *See Ramos*, 140 S. Ct. at 1398-99 (plurality opinion); *infra* at 24. *Apodaca* was a "universe of one," *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring as to all but Part IV-A): no case from this Court has ever relied on *Apodaca* in reaching a decision, let alone endorsed its opaque reasoning.

1. *Apodaca*'s bottom-line result was an amalgam of two rationales, neither of which garnered a majority in *Apodaca*—or in any other case. The first, invoked by four Justices, was that the Sixth Amendment's guarantee of a jury trial did not include the right to a unanimous verdict. *See* 406 U.S. at 406 (plurality opinion). That rationale could not supply binding reasoning, because it was rejected not only by the five other Justices in that very case, supra at 4-5, but by subsequent majorities of this Court as well, *see, e.g.*, *Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element").

The second rationale—that the Sixth Amendment's right to a jury trial applies differently against the States than against the federal government—is equally infirm. Although Justice Powell relied on this rationale to provide "the essential fifth vote to uphold Mr. Apodaca's conviction," *Ramos*, 140 S. Ct. at 1398; *see Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring), he charted that course alone, *see*

McDonald v. City of Chicago, 561 U.S. 742, 766 n.14 (2010) (plurality opinion) ("In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States."). Justice Powell's idiosyncratic view on incorporation therefore could not have supplied binding reasoning for future cases because all understood that his view "was … foreclosed by precedent" the day *Apodaca* was decided. *Ramos*, 140 S. Ct. at 1398.

Even if *Apodaca* could be said to have articulated a rule of law, as opposed to have reached a result, it was quickly, repeatedly, and emphatically repudiated by subsequent decisions of this Court. Multiple decisions over the years reaffirmed that the Sixth Amendment requires a unanimous verdict to convict. *See, e.g.*, *Richardson*, 526 U.S. at 817; *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). And subsequent cases soundly rejected any suggestion that *Apodaca* reflected a shift towards Justice Powell's view of the incorporation doctrine. As early as 1985, for example, the Court reaffirmed "that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States." *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985). And in June 2010—shortly before Edwards's conviction became final—a plurality of this Court, holding that the Second Amendment is fully incorporated against the States, dismissed *Apodaca* as nothing more than an anomaly "result[ing from] an unusual division among the Justices." *McDonald*, 561 U.S. at 766 n.14 (plurality opinion). By the time Edwards's conviction became final, *Apodaca*'s already shaky foundations had crumbled.

2. This dual erosion of *Apodaca*'s rationale underscores how poorly *Ramos* fits within *Teague*'s understanding of what it means to announce a "new" rule of criminal procedure. *Teague*'s general prohibition on the retroactivity of new procedural rules is designed to ensure that "finality [will not be] undermined by [the Court] changing a rule once thought correct but now understood to be deficient on its own terms." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring). But every potential rationale justifying the supposed constitutionality of a non-unanimous verdict was *already* "understood to be deficient on its own terms" well before *Ramos* confirmed the impropriety of such verdicts. *See Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring as to all but Part IV-A) (noting that *Apodaca* was "uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision").

This distinguishes *Ramos* from other cases this Court has held announced new rules because they overturned precedent. For instance, in *Whorton v. Bockting*, 549 U.S. 406 (2007), the Court held that its Confrontation Clause opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), was a new rule because it overturned *Ohio v. Roberts*, 448 U.S. 56 (1980). Unlike *Apodaca*, *Roberts* was a unanimous opinion that the Court repeatedly reaffirmed before charting a different course in *Crawford*. *See, e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 135-39 (1999); *White v. Illinois*, 502 U.S. 346, 357 (1992); *Idaho v. Wright*, 497 U.S. 805, 815 (1990); *Lee v. Illinois*, 476 U.S. 530, 543-44 (1986).

Rather than resembling *Crawford*, *Ramos* resembles *Gideon v. Wainwright*, 372 U.S. 335 (1963), which the Court has acknowledged is the paradigmatic rule that justifies retroactive application. *See Whorton*, 549 U.S. at 419. As discussed *infra* at 22-23, *Gideon* overturned *Betts v. Brady*, 316 U.S. 455 (1942), a decision that—like *Apodaca*—was "an anachronism when handed down" and "departed from the sound wisdom upon which [prior precedent] rested." *Gideon*, 372 U.S. at 345. Cases like *Gideon* and *Ramos* that overrule acknowledged anomalies on which no one could "rely with confidence" are not the sort of rules that *Teague* feared would cause unwarranted interference with finality. *Desist*, 394 U.S. at 264-65 (Harlan, J., dissenting). Thus, *Ramos*'s centuries-old understanding of the unanimity requirement is not a "new" rule and should apply retroactively to cases on collateral review.

II. THE UNANIMITY REQUIREMENT, IF NEW, IS A WATERSHED RULE OF CRIMINAL PROCEDURE.

If the Court nevertheless concludes that *Ramos* announced a "new" rule of criminal procedure, it should hold that the unanimity rule applies retroactively under *Teague*'s exception for "watershed" rules implicating the fundamental fairness and accuracy of criminal proceedings. 489 U.S. at 311-12. To qualify as watershed, "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001)

(internal quotation marks omitted) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)). Like the right-to-counsel guarantee that *Gideon* announced, the unanimity right that *Ramos* secured satisfies both requirements; it is among the "small core of rules" "implicit in the concept of ordered liberty," that apply retroactively to cases on collateral review. *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997).

A. A Unanimous Verdict Is Necessary To Prevent An Impermissibly Large Risk Of An Inaccurate Conviction.

1. Many rules of criminal procedure may improve a trial's accuracy, but the unanimity requirement is uniquely "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313 (plurality opinion). "The basic purpose of a trial," this Court has explained, "is the determination of truth, and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases." *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (plurality opinion) (internal quotation marks and citation omitted) (quoting *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966)). Therefore, "[a]ny practice that threatens the jury's ability to properly perform that function poses a similar threat to the truth-determining process itself." *Id.* Unanimity guards against inaccurate verdicts by requiring jurors to address and answer any objections before rendering a verdict, forcing deliberations to wrestle with competing understandings of the facts. Unanimity also ensures that, to the maximum extent possible, the verdict reflects the judgment of the citizenry, embodying the diverse views represented on the jury. Together, those functions reinforce the

requirement that a prosecutor must prove guilt beyond a reasonable doubt. And the historical origin of nonunanimity rules—to exclude minority views and thereby foster inaccurate verdicts—underscores the vital accuracy-promoting function of the unanimity requirement.

a. *Effective deliberation.* The presence of the jury ensures "the participation of the community in determinations of guilt." *Ballew v. Georgia*, 435 U.S. 223, 229 (1978). The unanimity requirement is a vital component of that participation because it guarantees that jurors engage in "real and full deliberation," *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring in the judgment), through "a comparison of views" and "arguments among the jurors themselves." *Allen v. United States*, 164 U.S. 492, 501 (1896). Deliberations that must come to grips with competing views and seek to persuade minority perspectives prevent "swift judgments" and produce more accurate verdicts. *See* ABA, *Principles for Juries and Jury Trials*, Principle 4.B Commentary (2005) (explaining that "implicit" in the "historical preference for unanimous juries" is the understanding "that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussion—ones that address and persuade every juror"); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1273 (2000) (citing empirical research indicating that nonunanimity rules "steer[] jurors toward swift judgments" that are "less accurate"); Reid Hastie et al., *Inside the Jury* 60 tbl. 4.1 (1983) (finding that twelve-person juries required to reach unanimous verdicts deliberated for almost twice as

long as those required to reach an eight-member majority). When "[a] single juror's change of mind is all it takes" to provoke discussion and debate, verdicts are substantially more accurate. *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012).

b. *A representative verdict.* The unanimity rule also ensures that a verdict represents the views of the entire jury, which likewise guards against biased or inaccurate verdicts. It is "a means of assuring" that the defendant's guilt is judged by "an *impartial*" jury rather than one "disproportionally ill disposed toward one or all classes of defendants." *Holland v. Illinois*, 493 U.S. 474, 480 (1990). While all jurors must be impartial, when a jury can render a verdict while ignoring minority views, a real risk exists that majority prejudices and biases will silence minority voices. *See Johnson*, 406 U.S. at 398 (Stewart, J., dissenting) ("[O]nly a unanimous jury … can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear."). Jury unanimity is therefore "central" to accurate fact-finding: majority voters may not silence minority voices and convict or acquit based simply on prejudice, bias, or bigotry.

Indeed, bias and bigotry were what led Louisiana and Oregon to enact their non-unanimous jury rules in the first place. As this Court recounted in *Ramos*, Louisiana and Oregon "adopted their peculiar rules" for "racially discriminatory reasons." 140 S. Ct. at 1401 (emphasis omitted). Louisiana adopted its nonunanimous verdict rule at a constitutional convention designed to "establish the supremacy of the white race" and "sculpted" the rule's contours "to ensure that African-American juror service would be

meaningless." *Id.* at 1394 (internal quotation marks omitted). And Oregon adopted its nonunanimous jury rule "to dilute the influence of racial, ethnic, and religious minorities on Oregon juries." *Id.* (internal quotation marks omitted). These rules achieved their intended effect on the outcome of jury trials. *See id.* at 1419 (Kavanaugh, J., concurring in part) (noting that these systems were "thoroughly racist in [their] origins" and continue to produce "racially discriminatory effects"). There is a long history of juries that are not representative of their communities producing "stark and unapologetic … race-motivated outcomes." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017); *see also Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) ("[N]on-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors."). The racist origins and effects of nonunanimity rules further confirm that unanimity is crucial to ensure accurate verdicts.

c. *Enforcing the burden of proof.* The absence of unanimity necessarily creates "an impermissibly large risk" of an inaccurate conviction, *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004), because it allows the State to brand the defendant "guilty" even though at least one juror—whose views are ordinarily accorded equal weight to every other's—has concluded that the prosecution did *not* meet its burden of proof. *See Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring as to all but Part IV-A) (explaining that the unanimity requirement reinforces "the right to put the State to its burden" by making the government convince each juror of the defendant's guilt beyond a reasonable doubt). The

requirement that the prosecution prove guilt beyond a reasonable doubt is "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970). It is "vital" to "the American scheme of criminal procedure," *id.*, because it is the "substantive constitutional standard" by which guilt or innocence is determined, *Jackson v. Virginia*, 443 U.S. 307, 317 (1979).[2]

The Court has recognized as "self-evident" that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). By forcing deliberations to seek consensus and overcome doubts of all jurors, unanimity gives the reasonable-doubt standard practical force and effect. It is a "longstanding tenet[] of common-law criminal jurisprudence" that "the truth of every accusation against a defendant should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting 4 W. Blackstone, Commentaries on the Laws of England

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[2] This Court has never squarely opined on whether *Cage v. Louisiana*, 498 U.S. 39 (1990), which held unconstitutional a jury instruction that creates a reasonable likelihood of conviction without proof beyond a reasonable doubt, is a retroactive rule under *Teague*. *See Tyler*, 533 U.S. at 665-66 (holding that the Court has not yet "made" *Cage* retroactive); *but see id.* at 670-71 (Breyer, J., dissenting) (arguing that *Cage* is retroactive under the logic of *Teague*).

343 (1769)). Absent unanimity, a haunting question will remain about why some jurors were convinced of guilt when another, equally competent juror was not. The jury trial thus achieves its truth-seeking purpose through the twin requirements of unanimity and burden of proof.

2. Unlike other rules that have failed *Teague*'s test, the unanimity rule is not merely "directed toward the enhancement of reliability and accuracy in some sense." *Whorton*, 549 U.S. at 418 (quoting *Sawyer*, 497 U.S. at 243). Rather, it eliminates the "intolerably high" risk of an inaccurate conviction that applies whenever the jury cannot agree that the burden of proof has been satisfied. *Id.* at 419.

This is borne out by empirical evidence. For example, one study used a series of mock juries to examine whether unanimity rules affected verdict outcomes. Taylor-Thompson, *supra*, at 1273. Juries were shown a reenactment of a murder trial that legal experts agreed did not satisfy the requirements of first-degree murder. *Id.* Although many individual jurors initially indicated a preference for that verdict in pre-deliberation questionnaires, not one jury that deliberated under a unanimous verdict requirement convicted the defendant of first-degree murder, whereas twelve percent of nonunanimous juries did. *Id.* Likewise, another study established that in approximately ten percent of cases in which juries must reach a unanimous verdict, the initial majority will change its vote. Without a unanimity requirement, then, "the jury may well have returned an arguably erroneous verdict." *Id.* at 1274. The shared conclusion of these studies—that absence of a unanimity requirement creates an impermissibly

large risk of an unreliable verdict—is unsurprising, given the unanimity rule's powerful role in forcing deliberation and consensus.

Ramos thus resembles *Gideon*, which similarly sharply reduced the unacceptable risk of an inaccurate conviction that attaches when a defendant who wishes to be represented by counsel is denied representation. *Whorton*, 549 U.S. at 419. By contrast, the unanimity rule is quite unlike other rules this Court has concluded failed to satisfy *Teague*'s accuracy requirement because they applied in narrow circumstances or merely removed a "theoretical[]" or "remote possibility" of arbitrary punishment. *Beard v. Banks*, 542 U.S. 406, 419-20 (2004).[3] For example, this Court declined to make *Crawford* retroactive because it was "unclear" how a Confrontation Clause error affects the overall accuracy of the trial. *Whorton*, 549 U.S. at 420. The *Crawford* rule, the Court noted, was "limited in scope" and had a mixed effect on the admissibility of reliable evidence. *Id.* at 419-20. No such ambiguity exists

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[3] *See, e.g.*, *Beard*, 542 U.S. at 419-20 (discussing rule against capital sentencing schemes that required juries to disregard non-unanimous mitigating factors); *O'Dell*, 521 U.S. at 167 (discussing rule establishing capital defendant's right to inform jury of parole ineligibility to rebut allegation of future dangerousness); *Gilmore v. Taylor*, 508 U.S. 333, 344-45 (1993) (discussing rule requiring express instruction about proper mental state for murder conviction); *Sawyer*, 497 U.S. at 241-45 (discussing rule against prosecutor's statements diminishing the jury's sense of responsibility for capital sentencing).

here. The *Ramos* rule applies in all criminal trials for serious offenses; pervades the entire trial because it forces the parties to speak to all segments of the community, not just a narrow subset; and plays a critical role in the deliberative process that drives jurors towards accurate verdicts.

Likewise, the unanimity rule differs from the requirement that juries find the requisite aggravating factors in a capital sentencing scheme, which this Court declined to hold retroactive in *Summerlin*. As the Court explained, whether a jury is an objectively more accurate factfinder than a judge is open to legitimate debate. *Summerlin*, 542 U.S. at 356. But in the case of a verdict rendered by the court or a unanimous jury, *each* factfinder has been convinced beyond a reasonable doubt of the defendant's guilt. Not so with a nonunanimous jury, where by definition at least one factfinder retains reasonable doubt about the conviction. The accuracy concerns in allowing verdicts to be rendered by nonunanimous juries thus far exceed those implicated by permitting a judge to render a verdict.

The same goes for the Court's pre-*Teague* decision in *DeStefano v. Woods*, 392 U.S. 631 (1968) (per curiam). In *DeStefano*, the Court declined to give retroactive effect to *Duncan*, which incorporated the jury trial right against the States. *See id.* at 634-35. But in doing so, the Court applied a test that turns on factors that *Teague* does not separately consider. Instead of focusing on the rule's importance to accuracy and fundamental fairness, as *Teague* instructs, *DeStefano* primarily addressed reliance interests and the practical effects on the administration of justice should the rule be held

retroactive. *Id.* *Teague* rejected this approach, derived from *Linkletter v. Walker*, 381 U.S. 618 (1965), and instead adopted a test that accounts for the importance of finality by applying new rules retroactively only when they are of utmost substantive importance to the trial's fairness and accuracy. *See* 489 U.S. at 302-10. To the extent reliance interests carry any independent relevance, however, many "well-known state and federal limitations on postconviction review in criminal proceedings" will temper the effect of a ruling in favor of Edwards. *See McGirt v. Oklahoma*, __ S. Ct. __, 2020 WL 3848063, at *19 (U.S. July 9, 2020). And to the extent *DeStefano* analyzed accuracy at all, *see Summerlin*, 542 U.S. at 358 & n.6, it is distinguishable for the same reasons as *Summerlin*.

The more appropriate pre-*Teague* comparator is *Brown v. Louisiana*, 447 U.S. 323 (1980). *Brown* analyzed the retroactivity of *Burch v. Louisiana*, 441 U.S. 130 (1979), which had invalidated Louisiana's nonunanimous jury rule for petty criminal cases. Applying the same test as *DeStefano*, the Court held *Burch* retroactive.[4] The Court noted that a nonunanimous verdict, which demonstrates the prosecution's "inability to convince all the jurors of the accused's guilt," raised serious concerns "about the reliability and accuracy of the jury's verdict." 447

[4] Although styled as a "retroactivity" decision, *Brown* addressed whether to apply *Burch* to a conviction that was still on direct appeal. *See* 447 U.S. at 327. Nonetheless, *Brown* analyzed the same factors derived from *Linkletter* that governed retroactivity before *Teague*.

U.S. at 333 (plurality opinion). And the Court drew an explicit contrast to decisions by smaller, yet unanimous, juries, explaining that a nonunanimous jury rule "is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict." *Id.* at 333 n.12. The same reliability and accuracy concerns apply to *Ramos*'s unanimity rule as well.

B. The Unanimity Requirement Is Essential To The Fundamental Fairness Of A Criminal Proceeding.

Ramos's unanimity rule likewise "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 421 (quoting *Sawyer*, 497 U.S. at 242). Like the right to counsel established in *Gideon*, *Ramos* restored the proper understanding of a basic constitutional right by incorporating it against the States. And the enduring role of jury unanimity in promoting community confidence in the fairness and integrity of the criminal proceeding further confirms that it is a "bedrock" procedural protection "rightly demand[ed] of the adjudicatory process." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part).

1. The Court has repeatedly pointed to *Gideon* as the paradigm of a rule that altered our understanding of a fair trial's basic features. By extending to the States the Sixth Amendment's guarantee of appointed counsel for indigent felony defendants, *Gideon* made a "profound and 'sweeping' change" to the law. *Whorton*, 549 U.S. at 421 (internal quotation

marks omitted) (quoting *Beard*, 542 U.S. at 418). Three notable features capture *Gideon*'s effect on the legal landscape.

First, before *Gideon*, it was already understood that the right to counsel guaranteed by the Sixth Amendment included the right to the appointment of counsel for the indigent. *See Johnson v. Zerbst*, 304 U.S. 458 (1938). *Gideon* worked no change to that understanding; it instead extended that right to state defendants after concluding that the procedural protection qualified as "fundamental and essential to a fair trial." *Gideon*, 372 U.S. at 342.

Second, the centrality of the right to counsel was reinforced by its widespread adoption by the States before *Gideon*. *See* Brief of State Governments as Amici Curiae, *Gideon*, 1962 WL 115122, at *2 (Nov. 23, 1962) ("Today thirty-five states require counsel in non-capital cases, which is a strong indication of the fundamental nature of that right in the modern view."). And the right already applied in all capital cases, regardless of forum. *See Hamilton v. Alabama*, 368 U.S. 52 (1961). The fact that few States deemed it acceptable to convict a defendant forced to proceed *pro se* attested to the indispensable character of the right to appointed counsel to a fair trial.

Third, as noted *supra* at 11, *Gideon* overruled *Betts v. Brady*, 316 U.S. 455 (1942), in which the Court had previously concluded that the right to appointed counsel was *not* a "fundamental" right incorporated against the States via the Fourteenth Amendment. *See Gideon*, 372 U.S. at 342-43. *Betts*, the Court concluded in *Gideon*, constituted an "abrupt break" with an earlier line of cases recognizing the

right to counsel as fundamental. *Id.* at 343-44. Twenty-two States submitted an amicus brief arguing that the Court's earlier failure to incorporate the right was "an anachronism when handed down and that it should be overruled." *Id.* at 345 (quoting Brief of State Governments as Amici Curiae, *Gideon*, 1962 WL 115122, at *24).

Thus, *Gideon* altered the legal landscape by (1) analyzing an important procedural protection that already existed for all federal and most state criminal defendants, (2) extending that right to eliminate an aberrant rule followed by a small group of outlier States, and (3) thereby "returning" to earlier precedent to "restore" a "constitutional principle[] established to achieve a fair system of justice." *Id.* at 344.

Ramos altered the legal landscape in precisely the same way as *Gideon*.

First, just like the right to appointed counsel, the right to a unanimous jury was understood to be a core feature of the Constitution long before *Ramos*. *Ramos*'s clarification that States infringe upon that right by employing nonunanimous jury systems therefore extended an institution already "fundamental to the American scheme of justice" to the States, *Ramos*, 140 S. Ct. at 1397 (quoting *Duncan*, 391 U.S. at 148-50), just as *Gideon* did. The very reason the Court concluded that the jury-trial right applies in state courts is *because* it "is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Duncan*, 391 U.S. at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

Second, and unsurprisingly given its fundamental character, the unanimity right already applied to all federal and nearly all state criminal defendants before *Ramos* incorporated it. *See supra* at 5-7.

Third, just as *Gideon* overruled a mistaken decision to "restore constitutional principles" embedded in "old precedents," *Gideon*, 372 U.S. at 344, *Ramos* did the same: it restored our understanding of the fundamental nature of jury unanimity by rejecting a prior ruling that was an "outlier on the day it was decided." *Ramos*, 140 S. Ct. at 1408; *see also id.* at 1409 (Sotomayor, J., concurring as to all but Part IV-A) (noting that *Apodaca* "was on shaky ground from the start"). To the extent *Ramos* announced a "new" rule at all, it altered our understanding of the essential elements of a fair trial in much the same way that *Gideon* did.

2. Beyond its similarity to *Gideon* in *how* it altered the law, *Ramos* is equally central to achieving fairness. Both historically and in the modern era, jury unanimity gives the public confidence that our criminal justice system works.

The very reason for making the jury the factfinder in criminal proceedings is to "guard against a spirit of oppression and tyranny on the part of rulers" by placing a group of the defendant's peers in between the state and the right to exact punishment. *Apprendi*, 530 U.S. at 477 (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)). Unanimity is a critical component of that design. *See Am. Publ'g Co. v. Fisher*, 166 U.S. 464, 468 (1897) (unanimity was one of the "essential features of trial by jury at the

common law"). That is not only because unanimity increases accuracy inside the jury box, *see supra* at 12-21, but also because it gives legitimacy to the criminal justice system as a whole. Unanimity is essential to maintaining public faith in how the system works. *See* Brief for American Bar Association as Amicus Curiae, *Ramos*, 140 S. Ct. 1390, 2019 WL 2549746, at *21 (June 18, 2019) ("Citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer."); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 L. & Hum. Behav. 333, 337, 338 tbl.1 (1988). By ensuring that the verdict represents the reasoned judgment of the entire jury, the rule strengthens community acceptance of the outcome.

That legitimacy is especially critical in the context of this Court's ongoing efforts "to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987). The jury is "a criminal defendant's fundamental 'protection … against race or color prejudice,'" *id.* at 310, and the requirement of unanimity is essential to that purpose. As recounted *supra* at 14-15, Louisiana's nonunanimous jury rule was specifically designed to silence African-American jurors and secure racially motivated verdicts. "In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to

the integrity of the jury trial." *Pena-Rodriguez*, 137 S. Ct. at 867. "[B]latant racial prejudice is antithetical to the functioning of the jury system," even independent of its effect on the verdict's accuracy. *Id.* at 871. Thus, "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), not just to improve the accuracy of criminal proceedings, but to restore public confidence in the justice system more generally.

Ramos secures the Fourteenth Amendment's promise by eliminating a vestige of racial prejudice from that era that cast an indelible stain on the criminal justice system. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there," "mars the integrity of the judicial system[,] and prevents the idea of democratic government from becoming a reality."); *see also Powers v. Ohio*, 499 U.S. 400, 404-07 (1991) (recounting the Court's efforts to eliminate racial prejudice from the jury system to further the jury's role in "preserv[ing] the democratic element of the law" and "ensur[ing] continued acceptance of the laws by all of the people"). Because of the persistence of race discrimination in the jury system over many decades, *see Flowers v. Mississippi*, 139 S. Ct. 2228, 2238-41 (2019), it is of the utmost importance to apply *Ramos*'s protections to convictions rendered in the years when that essential safeguard was missing.

In sum, because *Ramos* works a fundamental change to a structural protection that is emblematic

of American justice, it merits retroactive application. All defendants—those convicted before *Ramos* as well as those tried after—are entitled to enjoy this quintessential safeguard. Amici urge the Court to hold that the right to a unanimous jury applies retroactively on collateral review.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

APPENDIX A
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