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 AMICUS CURIAE JONRE TAYLOR IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

JonRe Taylor is a Black citizen of Louisiana. Her father's family has lived in Louisiana for as long as anyone can remember. She graduated from Robert E. Lee High School in Baton Rouge in 2001 and received a Bachelor of Arts in Political Science and Government from Southern University and A&M College in 2007. She received an M.B.A. from Colorado Technical University in 2015.

Soon after her college graduation, Ms. Taylor was summoned to appear for jury duty in the Nineteenth Judicial District Court in Baton Rouge. She was selected, sworn, and served as the twelfth juror in Case No. 07-06-0032, *State of Louisiana v. Thedrick Edwards*. The jury comprised 11 white jurors and Ms. Taylor.

Following a four-day trial, the jury unanimously voted "not guilty" on one count of attempted armed robbery, voted 10-2 to convict Edwards with respect to four counts of armed robbery, and voted 11-1 to convict him on the remaining four counts (aggravated rape, armed robbery, and two counts of aggravated kidnapping). R. 1099-1108. Ms. Taylor was the only juror to vote "not guilty" with respect to all nine charges. *Id.*

Ms. Taylor's experience during deliberations as a young Black woman—during which the other jurors

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[1] Pursuant to this Court's Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Notice was provided timely, and Petitioner and Respondent filed blanket consent to the submission of amicus briefs.

were free to "simply ignore the views of their fellow panel member[] of a different race or class," *Johnson v. Louisiana*, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting)—left her profoundly disillusioned. Prior to serving as a juror, Ms. Taylor considered attending law school. But the experience of casting an "empty vote" that could be, and was, nullified by the votes of ten white jurors engendered cynicism. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1320 (2000). This is hardly a surprise: relegating Black jurors like Ms. Taylor to a form of second-class citizenship, to the detriment of Black defendants, "was the whole point of adopting the non-unanimous jury requirement in the first place." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part).

Ms. Taylor writes to underscore the ways in which, from a juror's vantage, non-unanimity undermines both the accuracy and fundamental fairness of criminal trials. *See Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (explaining "[w]atershed rules of criminal procedure that implicat[e] the fundamental fairness and accuracy of the criminal proceeding" apply retroactively) (internal quotations omitted). Over the past thirteen years, Ms. Taylor has thought frequently of the victims in this case, particularly the two college students who were sexually assaulted. (As Ms. Taylor disclosed during voir dire, she herself has been the victim of a forcible rape. R. 1339.) But Ms. Taylor has also spent the past thirteen years troubled by the possibility that the wrong teenager was condemned to life imprisonment at Angola. Five other teenagers initially were indicted in connection with the crime spree—including several

who, unlike Edwards, were found with guns and the proceeds of the multiple robberies. R. 24, 805-09. In any other jurisdiction (save Oregon), the extent to which Ms. Taylor's fellow jurors judged Edwards based on his relationship with his friends, rather than based on solid proof of individualized wrongdoing, would have been further debated and scrutinized. But because this trial took place in Louisiana, the other jurors—six older white men and five older white women—were free to disregard Ms. Taylor's views and return a verdict without her.

Ultimately, Ms. Taylor simply wants her vote as a juror to be counted. By granting relief, this Court can finally restore what was denied to Ms. Taylor by the State of Louisiana thirteen years ago: the right to have her participation as a juror recognized as "meaningful" in the eyes of the law. *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting) (noting non-unanimity "eliminat[es] the one rule that can ensure that such participation [by historically excluded groups] will be meaningful."); *accord Ramos*, 140 S. Ct. at 1493 (observing adoption of non-unanimity rendered Black jury service "meaningless") (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

When Louisiana abandoned the traditional requirement of unanimity, it did so to strip from Black jurors like Ms. Taylor the ability to meaningfully constrain state power. The "empty votes" Ms. Taylor cast in this case—and, relatedly, the fact that non-unanimity permitted a verdict to be returned that represented the views solely of white jurors—expose the accuracy and fairness harms wrought by Louisiana's unconstitutional experiment with non-unanimity.

Ms. Taylor's experience as a juror is best understood in historical context. For over 120 years, Louisiana lawmakers recognized that non-unanimity substantially increased the risk of erroneous convictions; that risk was tolerated, in large part, because the harm was borne predominantly by minority defendants. The other consistent feature of non-unanimity is that it has served to limit the influence of Louisiana's minority jurors; non-unanimity has worked in tandem with other forms of racial exclusion in jury selection to reduce the impact of Black jury service since its inception.

In weighing the retroactive application of *Ramos*, this Court should consider the myriad ways that the rule of unanimity intersects with other constitutional rules developed to ensure democratic participation in the administration of criminal justice. By granting relief, this Court can ensure that Ms. Taylor's rights—and those of other Louisianans who have served as jurors—are finally vindicated.

ARGUMENT

I. MS. TAYLOR'S EXPERIENCE IN THIS CASE ILLUSTRATES THE RISK OF ERROR AND UNFAIRNESS POSED BY NON-UNANIMOUS VERDICTS

A. Unanimity Substantially Reduces the Risk of Erroneous Convictions

For the past thirteen years, Ms. Taylor has been plagued by the same serious doubts that that she—and, on four counts, another juror—harbored at trial. Prosecutors persuasively established that the defendant was part of a group of high school friends, two of whom almost certainly committed a series of heinous crimes one weekend in May 2006. But Ms. Taylor was unconvinced Edwards, rather than another member of the clique, was criminally responsible for the charged offenses.

1. *Initial Offenses & Arrests*

Edwards was accused of committing a series of crimes that occurred near the LSU campus. According to the State, Edwards committed (1) the kidnapping and robbery of Ryan Eaton; the robbery of Grace Wilson, R.M. and L.R.; and the rape of L.R. (all as part of one extended incident over several hours on the evening of May 13, 2006); (2) the attempted robbery of Dylan Levine (the following night); and (3) the kidnapping and robbery of Marc Verret (also the following night). R. 564-82. The State alleged that Edwards did all of the above alongside Joshua Johnson, who was tried separately (and was accused of raping R.M.). *Id.*

Investigators made a break in the case at 3:50 a.m. on May 15, 2006, when a Baton Rouge police officer pulled over a car containing six teenagers: Excell Wright, Eric Walker, Horace Wells, and three unnamed individuals. R. 805. There were $20 bills scattered across the floorboard and in the pockets of the front passenger, Wright, who had an outstanding arrest warrant for "felony carnal knowledge." *Id.* Officers also spotted an iPod that they determined was stolen from Verret, R. 807-08, two guns stuffed in the engine block of the car, R. 809, and a bandana, *id.* Video footage showed Wright wearing the bandana on his head earlier that night. R. 859, 861. Jurors also heard evidence that photographs taken on May 14, 2006 depicted Walker and Wells posing with guns and money. R. 1016. Wright, Walker, and Wells immediately became suspects in a series of recent robberies in the area. R. 808. Walker also told interrogators that he, Wright, and Wells had "spent the [entire] night" together at a hotel room on May 13, when the crimes against Eaton, Wilson, R.M. and L.R. occurred; detectives were skeptical. R. 864.

Edwards was not in the car. R. 808.

After the arrest of Wright, Walker, and Wells, law enforcement pulled video footage from a local bowling alley, R. 858-60, where the entire 12th Grade class of Scotlandville High School had gathered for a graduation party earlier that evening. R. 819. Officers noticed Wright, Walker, and Wells socializing with Edwards and several other friends. R. 861-62. Edwards was wearing a blue shirt similar to one stolen from Eaton the previous night. R. 859, 1060. Edwards, Johnson, Jacquin James, and at least one

other 14-year-old became suspects, as well. R. 572, 834, 926.

2. *Lack of Physical Evidence*

Throughout the trial, Ms. Taylor was troubled by the lack of physical evidence tying Edwards to any of the crimes.

None of the voluminous DNA or fingerprint evidence in the case matched samples taken from Edwards. Sexual assault examiners used, in their words, "the Cadillac of rape kits" when investigating the attack on L.R. and R.M. (allegedly raped by Johnson at the same time as the attack on L.R.), R. 705, collecting samples "from head to toe," R. 716. Investigators recovered a hair from the underwear of one of the victims. R. 897. Investigators also "collect[ed] many, many swabs" from Eaton's vehicle, R. 739, 893, 940-41, and from the two guns found in the car with Wright, Walker, and Wells, R. 881. Investigators also searched for latent fingerprints on the inside and outside of Eaton's vehicle, R. 741, recovering at least one partial fingerprint from the passenger side door. *Id*. None of this evidence established any link with Edwards.

Law enforcement also executed a search warrant at Edwards's house around 1:00 a.m. on May 16, 2006. R. 732, 965. Officers searched for clothing that matched the outfits worn by the assailants on May 13 and May 14, weapons, or any property taken from the victims of the various robberies. *Id.*; *see also* R. 964. The house was thoroughly searched, R. 965, but nothing connecting Edwards to the crime spree was found. R. 733, 912.

3. *The State's Case*

The State's case was built chiefly on three pieces of evidence: (1) an eyewitness identification of Edwards by one of the six victims, Eaton; (2) a subsequently recanted confession by Edwards; and (3) the testimony of Jacquin James. Ms. Taylor thought that each of piece of evidence was flawed in significant ways.

Eaton selected Edwards's picture from a six-person photographic lineup, identifying him as one of the two people who committed the kidnapping, robbery, and rapes of May 13. R. 615. But there was good reason to doubt this identification, apart from the ordinary concerns about cross-racial identifications. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984). First, although Eaton identified Edwards as one of his attackers, he was certain that L.R. was raped by someone else. R. 960. Second, Eaton said he was similarly positive of the identity of the other assailant who committed the May 13 crimes alongside Edwards, but the photograph he selected from the lineup was a "filler" (not the other suspect, Johnson, whose photograph appeared in the array). R. 617. Third, Eaton revealed that he had seen photographs of at least one suspect on the local news; "I saw it when I was at the police station, actually, it came on TV," possibly right before the identification procedure. R. 621. And fourth, the lineup was administered by the lead detective on the case, who was presumably familiar with the suspects' identities. R. 614. *But see* Rodriguez & Berry, *Eyewitness Science and the Call for Double-Blind Lineup Administration*, 2013 J. of Criminology 1

(2013) (underscoring importance of administering lineups with personnel who are ignorant of suspect's identity). All of these factors undercut the probative value of Eaton's identification.

The second key piece of evidence against Edwards was a videotaped confession, which Edwards recanted under oath at trial. R. 1017-20. As the State admitted, what the videotape depicts was actually Edwards's *third* interrogation, but it was the first interrogation that investigators opted to record. R. 733-34 (acknowledging initial interrogation between 1 a.m. and 2 a.m.); R. 945-47, 966 (acknowledging second 75-minte interrogation beginning at 11 a.m). At trial, Edwards explained that, during the first two unrecorded interrogations, he repeatedly denied involvement in the crimes, but he was threatened, cajoled, and physically intimidated into changing his story. R. 1017-21. He testified that he "confessed" during the third interrogation after being coached in the second interrogation, during which detectives supplied him with the details of the crimes. *Id.*; *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1053–54 (2010) (examining 38 false confessions in DNA exoneration cases and noting suspects almost always "offered surprisingly rich, detailed, and accurate information" that was likely disclosed by police); Saul M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Human Behavior 3, 10 (2010) (recommending all custodial interviews be videotaped "in their entirety" because "investigators sometimes suggest and incorporate crime details into a suspect's confessions . . .

[and consequently] many false confessions appear highly credible to the secondhand observer").

Ms. Taylor had ample reason to believe Edwards's explanation for the video. During the recording, one of the two interrogators, Det. Fairbanks, inadvertently supplied erroneous information about the model and color of the victim's car, and Edwards appeared to incorporate this information into his account (suggesting Edwards lacked independent knowledge of the events). R. 954, 970-71. Fairbanks testified that neither he nor his partner, Sgt. Attuso, "even entertained the idea of going out to start a video tape" during the second interrogation, for fear of breaking the flow of Edwards' self-incrimination. R. 968. Yet Attuso was captured on video leaving the room in the midst of the third interrogation, R. 969, undermining the State's explanation for why no video of the critical second interrogation existed. Fairbanks did other things that called his professionalism into question, too: Edwards testified that he asked for an attorney, R. 1021, and Fairbanks admitted on cross-examination that he advised the teenager "it was senseless to hire an attorney[.]" R. 972. And the State's account of the second interrogation would have been significantly stronger if Attuso—who played "bad cop" to Fairbanks's "good cop" throughout the encounter, R. 1030—had corroborated his partner's testimony and denied roughing up Edwards in the hours before the recording commenced. For reasons unexplained to jurors, the State elected not to call Attuso.

Finally, the State offered the testimony of one of the five other indicted teenagers, Jacquin James. R.

817-42. Prosecutors did not ask James a single question concerning the crimes of May 13—or his whereabouts (or the whereabouts of Walker, Wright, and Wells) that night. R. 817-35. Instead, James's trial testimony focused just on the two later incidents: the attempted robbery of Levine and the kidnapping and robbery of Verret that occurred on May 14. R. 817-35. James testified that he was with Edwards, Walker, Wright, and Johnson on the evening of May 14. R. 824. He claimed that he witnessed Edwards commit the attempted robbery of Levine, though he didn't notice any gun at the time. R. 823. (The jury unanimously acquitted Edwards on this charge. R. 1104-05.) James also claimed he drove Edwards and Johnson to another location, where they encountered Verret, for the purpose of stealing a car. R. 825. But James acknowledged that he had previously lied to police, R. 834, and that his testimony was motivated by a desire to "get the slack off of [him]," R. 836.

4. *Edwards's Testimony and Corroborating Evidence*

Ms. Taylor found credible Edwards's testimony that he was at home on the evening of May 13 with friends and family, R. 1009-11, and that he was involved only tangentially in the robberies of May 14 (which, he admitted, were committed by his friends), R. 1012-17.

On the evening of May 13, Edwards testified that he was home playing video games with his little brother and his little brother's friend, R. 1010-11; he didn't go out because there was a "Senior Breakfast" (which he attended with friends) early the next

morning at the school, R. 1011. Two witnesses corroborated this story. A friend, Rodney Walker, testified that he reached Edwards between 11:30 p.m. and 12:00 a.m. on his home phone number. R. 992. And Edwards's mother testified that Edwards was definitely at home between 8:00 p.m. and "about between 1:00 and 2:00" when she went to bed. R. 997-98. She acknowledged on cross-examination that Edwards could have snuck out after that, R. 1000, but Eaton testified his ordeal began when he was kidnapped by two masked men shortly after 11:30 p.m., R. 589.

As for the evening of May 14, Edwards acknowledged that he met up with his friends (including Johnson, James, Walker, Wells, Wright, and others) at the bowling alley, R. at 1011-13. The friends decided to drive around town. *Id.* While stopped at a red light, James jumped out of the car and unsuccessfully attempted to rob a pizza delivery man (Levine). R. 1012. Soon they arrived at an apartment complex where James told Johnson "this would be a good place" to steal a car. R. 1013. At James's urging, Edwards exited the car to help Johnson, but then "got nervous" and backed out. R. 1013-14. He reconnected with his friends later in the evening, but played no direct role in the kidnapping and robbery of Verret. R. 1015-17.

5. *Conclusion*

Individuals in a particular group tend to "see those in other groups as a more homogenous mass (outgroup homogeneity) and in a more negative manner (outgroup derogation)." Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the*

Peremptory Challenge, 85 B.U. L. Rev. 155, 196 (2005); *see also id.* at 193-207 (discussing additional psychological research on group biases). It is hardly surprising, in other words, that a group of eleven older white jurors might view a Black teenager—particularly one who socializes with unsavory friends of the same race—in a less differentiated fashion than would a younger Black juror like Ms. Taylor. Ordinarily, we rely on "thoughtful, rational dialogue [that constitutes] the foundation of . . . the jury system" to mediate these competing perspectives, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017). Non-unanimity obviated the need for such "dialogue" here.

B. Unanimity Ensures that the Participation of Black Jurors Counts

Louisiana's unconstitutional abandonment of the unanimity requirement meant that Edwards could be convicted without the assent of a single non-white juror (despite being tried, in 2007, in a jurisdiction that was nearly half Black). *See* U.S. Bureau of the Census, American Community Survey (ACS) 5-Year Estimates (2010), Table DPO5, available at https://data.census.gov/cedsci. A closer examination of jury selection in this case helps illustrate the ways in which non-unanimity—coupled with other forms of racial exclusion in jury selection—continues to foreclose the "meaningful" participation of Black jurors like Ms. Taylor in the administration of Louisiana criminal justice. *See Johnson*, 406 U.S. at 397 (Stewart, J., dissenting); *Ramos*, 140 S. Ct. at 1493.

When Ms. Taylor entered the courtroom for Edwards's trial, she was one of forty potential jurors

from which the final panel of twelve was ultimately selected. R. 337-39. In this initial group, twenty-nine potential jurors were white and eleven were Black. *Id.* Black jurors thus made up 28% of the initial venire, despite constituting 45.0% of the East Baton Rouge population. *Id. See* Figure 1.

Then began the process of "qualifying" the jury. The State of Louisiana removed eight jurors using challenges for cause; five were Black. *See* Figure 2. Each of the Black jurors disclosed negative experiences with the legal system that might shape their view of the evidence. *See* R. 1203 (falsely accused of crime as teenager); R. 1263 (prosecutors not interested when stepson was molested); R. 1287 (brother died in prison while serving lengthy robbery sentence); R. 1284 (two incarcerated children; concerns about life sentences); R. 1326 (police officer "shot [father] and he shot him back"). When white jurors disclosed family members' run-ins with the law, prosecutors asked leading questions to confirm that they would not be biased against the State; they did the opposite with similarly situated Black jurors. *Compare* R. 1333 ("You think the system worked out fairly for your daddy? . . . And you don't think it's going to play any role in your decision?") (white juror) *with* R. 1288-89 ("What I'm hearing and what you're tell me, is you're angry with the justice system right now because of what happened? . . . What I hear you telling me is that based upon your life experience, based on what your brother has been through, it's going to be very difficult for you not to hold that against the State in this case?") (Black juror).

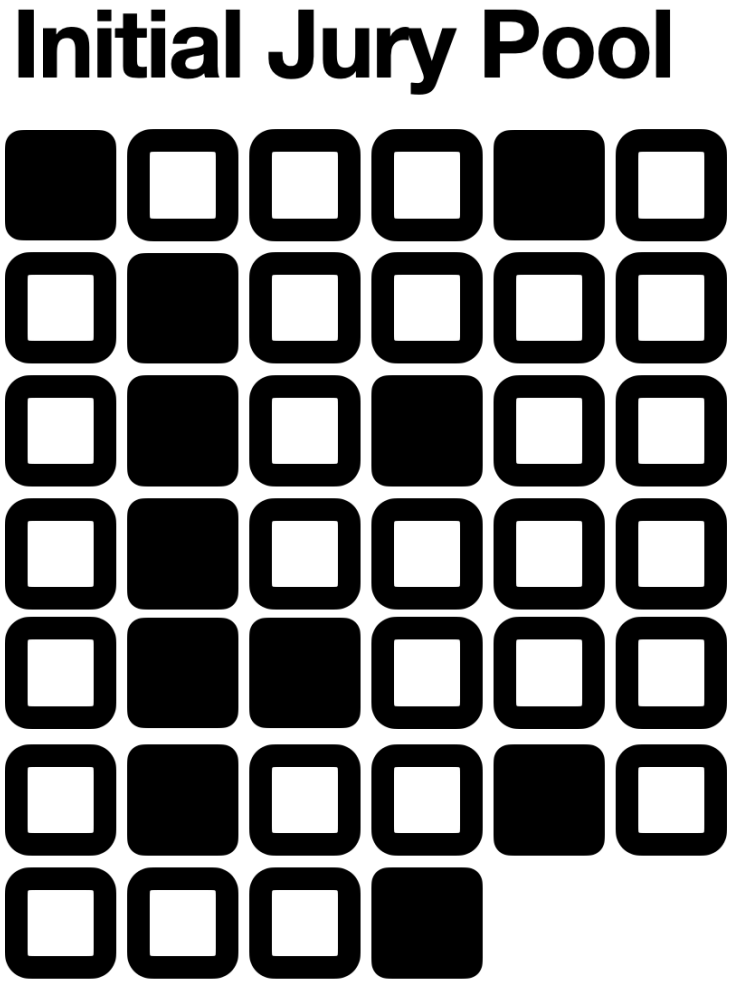

Figure 1 – Initial Jury Pool (R. 338-40).

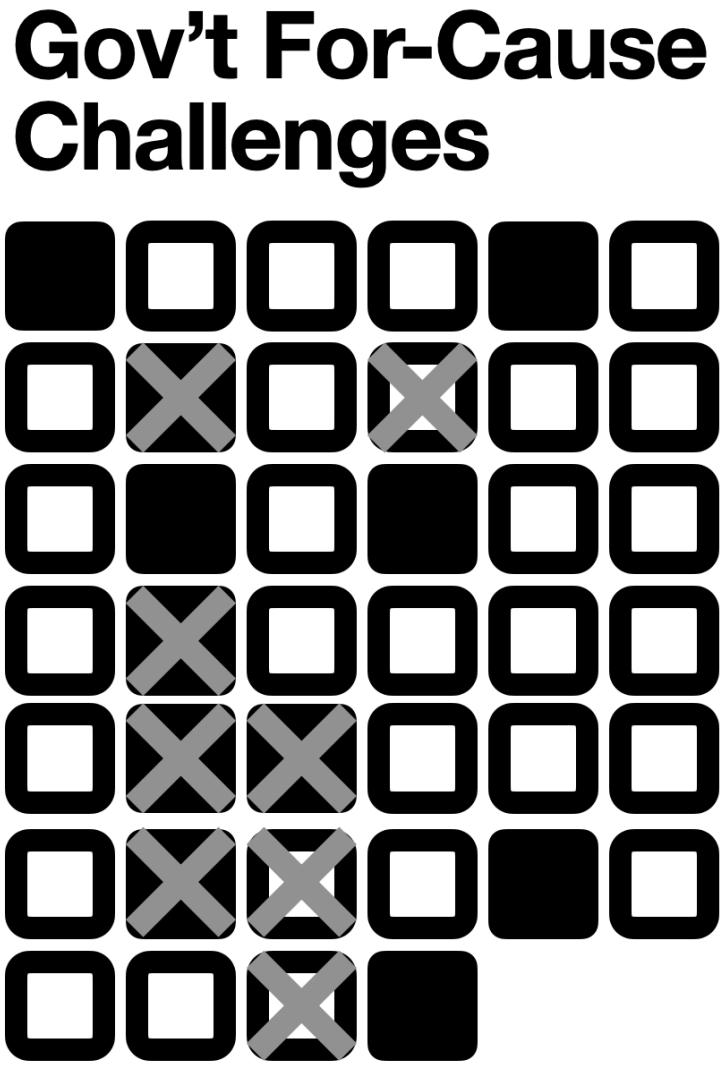

Figure 2 – Gov't For-Cause Challenges (R. 338-40).

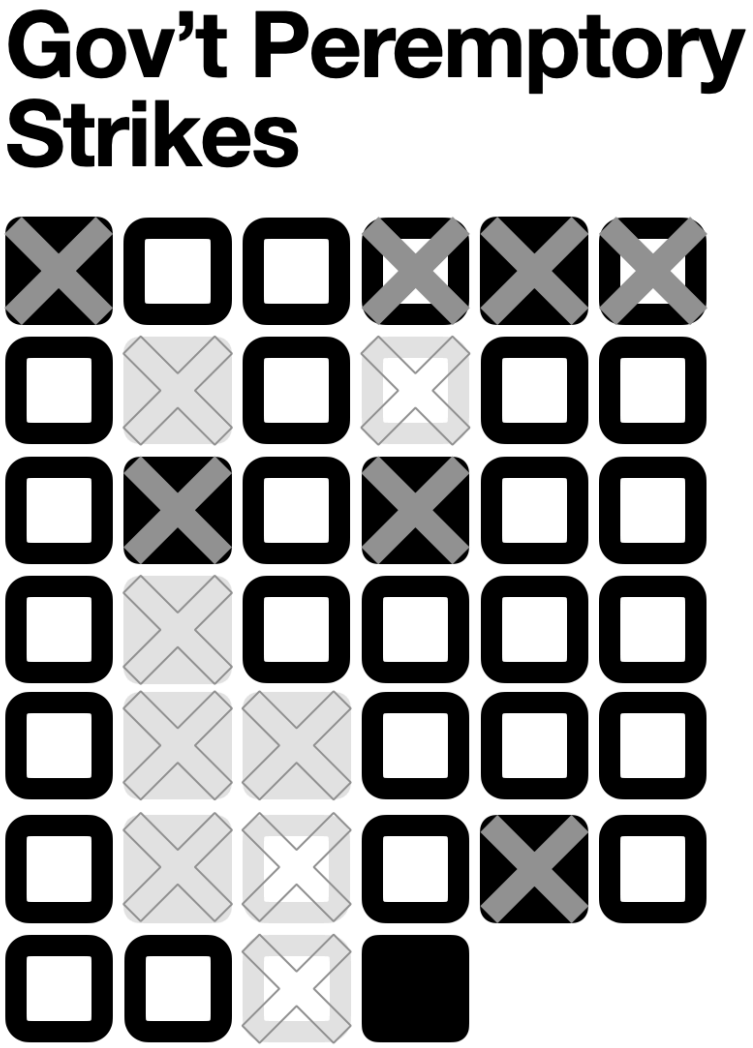

Figure 3 – Gov't Peremptory Strikes (R. 338-40).

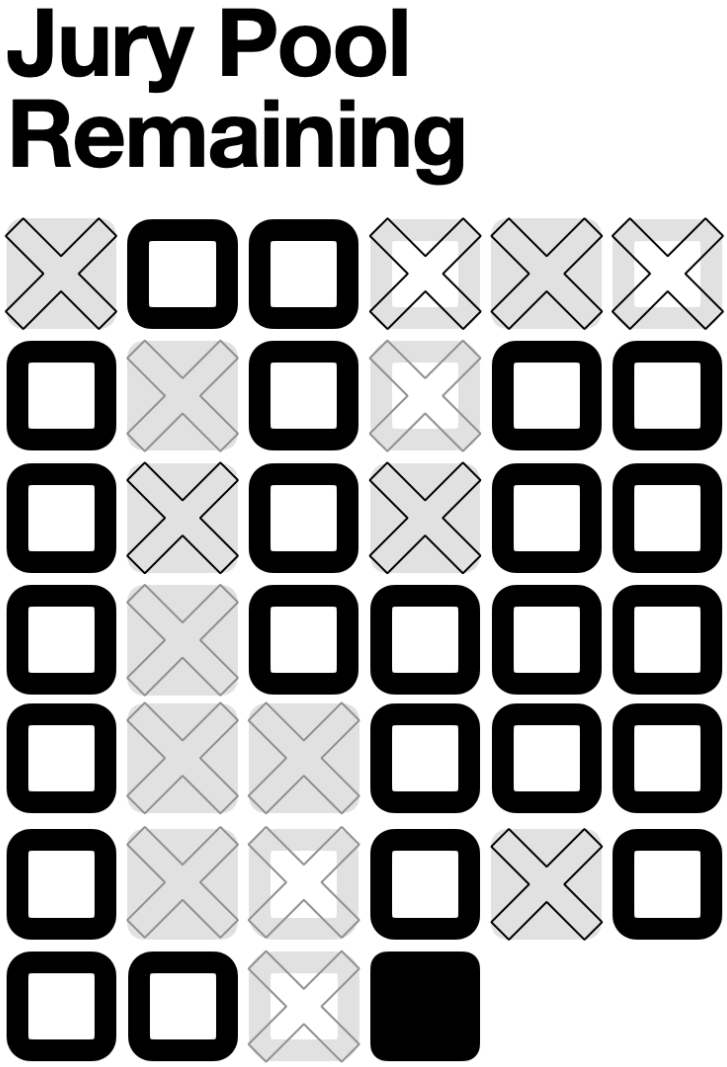

Figure 4 – Jury Pool Remaining (R. 338-40).

Only six Black potential jurors were "qualified" and remained in the venire before peremptory strikes. The State used five of seven peremptory strikes to eliminate Black jurors, leaving only one Black juror (Ms. Taylor). R. 338-40. *See* Figures 3 & 4. At the time the State accepted her as the twelfth and final juror, the parties knew that no more than one Black juror would be empaneled. R. 1383-84.

Ms. Taylor thus became the twelfth juror in this case. In a jurisdiction compliant with the Sixth Amendment, her presence would dictate that the assent of one non-white juror would be required to convict the defendant. But not in Louisiana or Oregon. *See* Figure 5. Because of Louisiana's non-unanimous verdict rule, the white jurors could reach a verdict of "guilty"—which, in this case, triggered a mandatory life-without-parole sentence—without Ms. Taylor's vote. *Cf.* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L.J. 1, 1 (1995) ("Few statements are more likely to evoke disturbing images of American criminal justice than this one: 'The defendant was tried by an all-white jury.'").

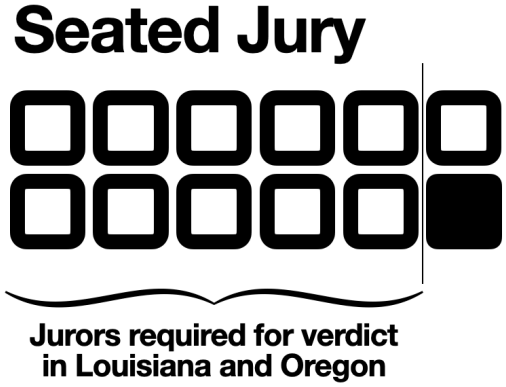

Figure 5 – Seated Jury (R 388-40).

II. LOUISIANA OFFICIALS HAVE ALWAYS RECOGNIZED (AND DISREGARDED) THE HARMS OF NON-UNANIMOUS VERDICTS

A. Unanimity Has Always Assured Greater Accuracy

In a regime where one or two jurors' belief in the defendant's innocence may be disregarded by their colleagues, the likelihood of an erroneous conviction is substantially higher. *See Brown v. Louisiana*, 447 U.S. 323, 333 (1980) ("The prosecution's demonstrated inability to convince all the jurors of the defendant's guilt certainly does nothing to allay our concern about the reliability of the jury's verdict."). Louisiana officials have known this to be true ever since non-unanimous verdicts were first adopted.

In 2018, when Louisiana legislators and voters finally amended the Louisiana Constitution to restore the rule of unanimity, accuracy concerns figured prominently in the debate. In the Louisiana Senate, the reforms nearly stalled, until State Senator Dan Claitor—a former prosecutor—disclosed a particularly pernicious way Louisiana's law undermined the accuracy of convictions. S*ee* Jessica Rosgaard & Wallis Watkins, *How Louisiana's Unanimous Jury Proposal Got on the Ballot*, WWNO.ORG, Oct. 23, 2018 (noting bill lacked required two-thirds support until "Senator Dan Claitor took to the podium"). The lawmaker confessed that he and other prosecutors, when handling "a particularly hard [low-level felony] case . . . [we] would upcharge them [to a more serious felony], because it was easier for me to convict them with ten out of twelve—I'm not

proud of that—then it is six out of six [as required for low-level felony verdicts]." S.B. 243, 2018 Reg. Sess., Debate on Final Passage (Apr. 4, 2018) (Statement of Sen. Claitor), http://senate.la.gov/video/videoarchive.asp?v=seate/2018/04/040418SCHAMB_0 at 01:08:28. He urged his fellow white colleagues to consider not just whether "10 of 12 in a jury is good enough for those people . . . good enough . . . for African-American[s] . . . good enough for Hispanics," but also whether it was "good enough for your children . . . your wife . . . your neighbor?" *Id.* at 1:17:00. The bill cleared the Senate, 27-10. *Id.* at 1:24:20.

Convention delegates were similarly focused on inaccurate convictions when Louisiana shifted from 9-3 verdicts to 10-2 verdicts at the Constitutional Convention of 1973. When introducing language imposing the more demanding standard to the Convention as a whole, Vice Chairman of the Convention Chris J. Roy held aloft a picture of Wilbur McDonald, a man recently exonerated after being convicted of rape and murder in Illinois. 7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184 (La. Constitutional Convention Records Comm'n 1977). Roy argued that adopting a more stringent 10-2 requirement was the bare minimum delegates should do to ensure accuracy:

> I've had enough of it, I've had to bring with me—let me show you a picture, this fellow [McDonald] here . . . Three years later after every benefit of doubt had been accorded to him the real culprit came up . . . and admitted his guilt. . . . . We ask you to consider what 'beyond reasonable doubt' means. If it means to you that it takes only seventy-five percent

> to send a man to Angola . . . if that's what you want to do, then do it. But let's not say that you weren't told. Let's not argue about ten out of twelve being too much to ask for.

Id. at 1184-1185.

Since the very beginning of non-unanimous verdicts, Louisiana officials have downplayed, or simply disregarded, the dangers of inaccurate outcomes; indeed, appeasing white citizens' desire for racial retribution (at the expense of accuracy) was the whole point. Louisiana's leading newspaper first endorsed non-unanimous verdicts in 1893 in the wake of the lynching of "three terrified negroes" by a mob in "a state of wild excitement." *See Triple Lynching*, Daily Picayune (New Orleans, La.), Jan. 22, 1893, at 1. The lynching victims were suspects in an attempted robbery and murder, but newspaper accounts noted that (1) a different armed suspect was initially erroneously detained, and (2) the evidence against one of the three men, thought to be the triggerman, was substantially stronger than the evidence against the other two. *Id.* Lynchings were regrettable, the *Picayune*'s editors solemnly opined, but the clamor for such extrajudicial violence might abate "if nine jurors should be competent to bring in a verdict, and so overthrow the power of a single person to disappoint . . . justice." *Put a Stop to Bulldozing*, Daily Picayune (New Orleans, La.), Feb. 1, 1893, at 4. Oregon newspapers made the same argument when non-unanimity was adopted there. *Jury Reforms Up to Voters*, Morning Oregonian (Portland, Or.), Dec. 11, 1933, at 6 (invoking "the epidemic of lynchings" across the country as reason for voters to support non-unanimity).

Not all Louisiana lawmakers were convinced. Even at the avowedly white supremacist Constitutional Convention of 1898, some dissenters warned that non-unanimity posed an unacceptably high risk to (white men's) liberty; twenty-seven delegates voted against the measure, with one explaining it "abrogates the right of trial by jury—the very bulwark of our liberties." Explanation of Votes (Mr. Sanders), in Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 355 (H. Hearsey ed. 1898). But this was a risk that the majority of delegates were willing to take. *Id.* at 379 (Address of Thomas J. Semmes, Chairman of the Committee on the Judiciary) (boasting reforms would eliminate "delays which have so often resulted in a man being hung by a mob").

The State of Louisiana will likely argue that even if unanimity reduces the likelihood of an inaccurate conviction, the marginal benefit of the rule is insufficiently profound to warrant retroactive application of *Ramos*. *Cf. Schriro*, 542 U.S. at 356. The argument remains, at its core, that ten out of twelve is "good enough." But, following State Sen. Claitor's queries, one wonders whether it would be "good enough" if Louisiana's prison population had been majority-white at any point since 1898. *See* Mark Carleton, Politics and Punishment: The History of the Louisiana State Penal System 88 (1984); Robert J. Smith and Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 365 (2012). Or if the majority of those jurors who cast "empty votes" for acquittal were white citizens, rather than Black citizens. *State v. Maxie*, No. 13-CR-

72522 (La. 11th Jud. Dist., Oct. 11, 2018 ("[T]he comparative disparities are statistically significant and startling[;] African-American jurors are casting empty votes 64 percent above the expected outcome[.]"). Ms. Taylor respectfully submits that non-unanimous verdicts have never been "good enough."

B. Unanimity Has Always Implicated Fundamental Fairness

Accuracy considerations aside, the rule of unanimity implicates the fundamental fairness of criminal proceedings by ensuring that the voice of jurors like Ms. Taylor count. This Court has highlighted the racist origins of Louisiana's non-unanimous verdict system, and the importance of that history in assessing the law's validity. *Ramos*, 140 S. Ct. at 1394-95; *id.* at 1408 (Sotomayor, concurring); *id.* at 1417-18 (Kavanaugh, J., concurring in part). But the particular ways in which the law has always targeted and impacted Black *jurors*, like Ms. Taylor, warrant special emphasis.

In both the North and the South, "[p]utting blacks on juries was a radical idea," at least until shortly before the Civil War. James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 910 (2004). As Congress debated the Thirteenth Amendment, however, Black Louisianans began publicly demanding (as they would for the next three decades) a critical component of full citizenship: the ability to serve as jurors on equal footing with white citizens. Cong. Globe, 38th Cong., 2d Sess. 289 (1865) (statement of Rep. Kelley) (quoting *Is There Any Justice for the Black?*, New Orleans Trib., Dec. 15, 1864). The "jury-box," no less than the

"ballot-box" and "cartridge-box," was essential to the freedman becoming a citizen. Frederick Douglas, Life and Times of Frederick Douglas 420 (1882).

Congress and the Court acted assertively, at least initially, to ensure the participation of Black jurors in state court proceedings. In 1875, Congress made it a federal crime for State officials to disqualify jurors "on account of race, color or previous condition of servitude." Civil Rights Act of 1875, ch. 114, 28 Stat. 335, 335-37. While this Court struck down other parts of the Act, *see Civil Rights Cases*, 109 U.S. 3 (1883), it upheld the jury discrimination provisions, *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex Parte Virginia*, 100 U.S. 339 (1880).

Guaranteeing meaningful Black jury service was critical for several overlapping reasons. An integrated jury affirmed the citizenship of those called to serve: Black newspapers would often publish the names of prominent community leaders empaneled as jurors. *See, e.g.*, *Personal Mention*, Weekly Pelican (New Orleans, La.), Apr. 4, 1887, at 1; *see also* Michael Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 39 (2004) (discussing Black jury service "as a form of officeholding"). It limited impunity for white purveyors of racial violence against Black victims. Forman, *supra*, at 936 (arguing Reconstruction Republicans "recognize[d] that the exclusion of blacks from juries made it impossible [for Black victims] to achieve justice in Southern courts"). And it protected Black defendants. In early cases like *Strauder*, the Court "understood that allowing the defendant an opportunity to secure representation of

the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.'" *Flowers v. Mississippi*, 139 S. Ct. 2228, 2281 (2019) (Thomas, J., dissenting); *accord Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring in the judgment) (noting the Court "reasonably surmised . . . that all-white juries might judge black defendants unfairly . . . without direct evidence [of racial discrimination] in any particular case.").

Black jury participation declined after Reconstruction, but, owing to the traditional requirement of unanimity, even limited Black participation posed a problem for many whites. *See, e.g.*, *Jury Trials*, Daily Com. Herald (Vicksburg, Miss.), Apr. 3, 1887 at 4 ("[T]he jury system, with juries chosen from both races and unanimous verdicts required, is a failure . . . ."); *Criticised as to the Jury System*, Semi-Weekly Messenger (Wilmington, N.C.), Aug. 4, 1899, at 4 ("You can put one negro on a jury in such a case and he will tie the jury every time and prevent a verdict. . . . Why not have nine of the twelve agreed rather than all?").

As this Court has recognized, Louisiana's abandonment of unanimity was designed to resolve this dilemma. Louisiana was a hotbed of agitation against "the Jim Crow jury" throughout the 1890s, and just as Louisiana's Constitutional Convention began in 1898, federal authorities began investigating (at the behest of Louisiana activists) the exclusion of Black jurors in Louisiana. *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1616-18 (2018); Resolution: Service on Juries in Louisiana, 31 Cong. Rec. 1019 (Jan. 26, 1898).

Such scrutiny made an outright ban on Black jury service impracticable, but adoption of non-unanimity accomplished the same thing: it "ensure[d] that African-American juror service would be meaningless." *Ramos*, 140 S. Ct. at 1394 (quoting *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018)).[2]

The process by which an all-white verdict was returned in this case—with Black citizens being disproportionately excluded at each stage of jury selection, and non-unanimity silencing the one Black participant remaining, *see infra* Part I.B.—has been a

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[2] One aspect of the Court's history in *Ramos* was inaccurate: it is simply untrue that "no mention was made of race" during the Louisiana Constitutional Convention of 1973 when the non-unanimous verdict provision was renewed. *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting) (citation and internal quotation marks omitted). To the contrary, during the very short debate, race figured prominently. As Vice Chairman of the Convention Chris J. Roy explained, the updated provision was an effort to ameliorate (but only partially) the discriminatory impact of the law:

> [I]f the rest of the United States can require unanimous verdicts . . . why can't we in Louisiana require at least five-sixths verdicts to convict? . . . [G]enerally ugly, poor, illiterate, and mostly minority groups are those people who are convicted by juries . . . . [J]uries just generally don't convict nice-looking . . . people like all you folks here in this convention.

7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184-85 (La. Constitutional Convention Records Comm'n 1977). But "[t]aking cognizance of discrimination and not curing it, cannot, as the State argues, cure the policy of its discrimination, either in intent or in impact . . . . The current scheme [adopted in 1973] continues to perpetuate the discrimination intended and adopted in 1898." *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018).

feature of Louisiana justice ever since. Throughout most of the twentieth century, Black citizens were simply left out of juror pools; reviewing courts blessed the massive underrepresentation of Black jurors on lists so long as state officials pointed to vague qualifications—e.g., "sound judgment and fair character"—to account for large racial disparities in jury pools and venires. *Gibson v. Mississippi*, 162 U.S. 565, 588 (1896); *accord State v. Pierre*, 3 So.2d 895 (La. 1941); *State v. Gill*, 172 So. 412 (La. 1937). The Court's fair-cross-section jurisprudence has limited such overt exclusionary practices. *See Taylor v. Louisiana*, 419 U.S. 522 (1975). But fair-cross-section challenges remain notoriously difficult to prove, Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing it with Equal Protection*, 64 Hastings L. Rev. 141 (2012), and Black jurors remain substantially underrepresented in Louisiana venires today, Gordon Russell, *Tilting the scales: In Louisiana, is it truly a 'jury of one's peers' when race matters?*, The Advocate (New Orleans, La.), Apr. 1, 2018. In East Baton Rouge Parish, a recent Pulitzer Prize-winning investigation found that Black jurors made up fewer than one-third of those actually summoned for jury duty between 2011-2016, despite the fact that Black citizens made up nearly half of the local population. *Id.* (Court official presented with the data acknowledged they had noticed the gap and would "try harder" to achieve parity. *Id.*[3]).

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[3] East Baton Rouge Parish juries lack diversity in other ways, too. *See* Alan Blinder, *Glitch Kept Thousands of Young People Off Jury Rolls in Louisiana*, N.Y. Times, Apr. 11, 2019, at A24 ("Since 2011, more than 150,000 people—including

The challenge-for-cause process exacerbates these disparities, which defendants are powerless to contest through fair-cross-section claims. *Holland v. Illinois*, 493 U.S. 474, 481 (1990). As in decades past, Louisiana prosecutors remain far more likely to remove Black potential jurors than white potential jurors for lacking the required objectivity—formerly "sound judgment and fair character"—to serve. Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the Jury*, 118 Mich. L. Rev. 785 (2020); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 Ind. L. Rev. 113 (2016).

Finally, even when a substantial number of Black jurors remain in a particular "qualified" venire, Louisiana grants each party twelve peremptory strikes for serious felony cases. La. C. Cr. P. art. 799. *Batson* and its progeny notwithstanding, Louisiana prosecutors strike Black potential jurors at alarmingly disproportionate rates. Alexandria Burris, *Black Jurors More Likely to be Struck from Caddo Parish Juries*, Shreveport Times, Aug. 17, 2015, at A1 ("[Q]ualified blacks were three times more likely to be struck from a jury than non-blacks when Caddo [Parish] prosecutors used discretionary 'peremptory' challenges."); Frampton, *Jim Crow Jury*, supra at 1623-32 (finding similar patterns statewide in Louisiana in nearly 1,000 jury trials). There is a broad scholarly consensus that *Batson* has not meaningfully curtailed racial bias in the exercise of peremp-

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thousands born after June 2, 1993—may have been inadvertently left off the jury rolls, potentially starving young defendants of jurors who were roughly their age.").

tory strikes, both in Louisiana and across the country. *Miller-El v. Dretke*, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring) (collecting studies).

The end result is a system that functioned—all the way until its abolition in 2018—precisely as it was originally designed: Black jurors like Ms. Taylor, when they did manage to serve, often found that their service is "meaningless." *Ramos*, 140 S. Ct. at 1493 (citation and internal quotation marks omitted); *see also State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018 (noting overrepresentation of Black jurors casting "empty votes"). The effective nullification of the lone Black juror's input in this case is a longstanding feature—not a bug—of Louisiana's non-unanimous verdict system.

III. MS. TAYLOR'S JURY SERVICE SHOULD NOT REMAIN MEANINGLESS

As a "vital right" protected by the common law since the fourteenth century, *Ramos*, 140 S. Ct. at 1395, the requirement of jury unanimity would implicate accuracy and fundamental fairness even in the absence of Louisiana's sordid history of Black juror disenfranchisement. But in light of that history, this Court should consider the ways in which the Sixth Amendment's unanimity requirement intersects with other constitutional provisions meant to ensure the meaningful participation of all citizens in criminal adjudication.

First, as both this case and broader research demonstrate, non-unanimity undercuts the Sixth Amendment's requirement that juries be drawn from a fair cross-section of the community. *See Tay-*

lor v. Louisiana, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). Such "[c]ommunity participation in the administration of the criminal law," the Court has explained, is both "consistent with our democratic heritage" and "critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S. at 530. Underlying the fair-cross-section requirement is the insight that jurors from "'distinctive' group[s] in the community" bring different perspectives and views into deliberations, *Duren*, 439 U.S. at 364; candor requires us to admit that "[t]he racial composition of a jury matters," *Flowers*, 139 S. Ct. at 2274 (Thomas, J., dissenting). As Ms. Taylor's experience illustrates, non-unanimity continues to accomplish precisely what it was designed to do: minimize the participation of individuals from particular communities. *Accord Johnson*, 406 U.S. at 398 (Stewart, J., dissenting) ("[C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines."). *But see id.* at 402-03 (Marshall, J., dissenting) (emphasizing such "fencing-out" is dangerous even where "[t]he juror whose dissenting voice is unheard [is] a spokesman, not for any minority viewpoint, but simply for himself[.]"

Second, non-unanimity has undermined what this Court has sought to accomplish over the past thirty-four years through *Batson* and its progeny:

> The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination

> against black defendants, victims, and jurors. In effect, the non-unanimous jury allows back-door and unreviewable peremptory strikes against up to 2 of the 12 jurors.

Ramos, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part); *accord State v. Collier*, 553 So.2d 815, 819-20 (La. 1999) (suggesting that, "[b]ecause only ten votes [are] needed to convict," biased Louisiana prosecutors might let one or two Black jurors remain on a jury to evade *Batson*). The Court has "fettered" peremptory strikes because procedural safeguards have "help[ed] to secure the rights of defendants, the excluded jurors, and the community and provide[d] both fairness and the appearance of fairness, fundamental values in the American criminal justice system." Brett M. Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 Yale L.J. 187, 207 (1989). In Louisiana and Oregon, non-unanimity has undermined these safeguards.

In previous cases, procedural rules intended to bolster the Sixth Amendment's fair-cross-section guarantee or the Fourteenth Amendment's promise of non-discriminatory jury selection—viewed in isolation—were held to insufficiently implicate fundamental fairness and accuracy to warrant retroactive application. *See Teague*, 489 U.S. at 314; *Allen v. Hardy*, 478 U.S. 255, 261 (1986). But the rule of unanimity is unique: in addition to being an "unmistakable" component of the Sixth Amendment's promise of a "trial by an impartial jury," *Ramos*, 140 S. Ct. at 1395, it gives substance to multiple other constitutional guarantees this Court has recognized as essential to a fair trial.

When Louisiana first became part of the United States in 1803, its inhabitants (including free people of color) were promised "all the rights, advantages and immunities of citizens of the United States." Treaty Between the United States of America and the French Republic, Art. III, Apr. 30, 1803, 8 Stat. 202. But insofar as citizenship encompasses the right to serve on a jury as an equal—to have one's voice as a juror constrain the power of the state, under rules free of the taint of racial bias—that promise has been repeatedly broken. The State of Louisiana broke that promise to its Black citizens in 1898 when it first adopted non-unanimous verdicts. As Louis Martinet, Louisiana's leading Black lawyer at the time, despondently protested then: "All the rights and privileges that make American citizenship desirable or worth anything"—including the right to sit on juries—are "being taken one by one from the colored American in the South." Letter from L.A. Martinet to the Hon. Attorney General (Feb. 8, 1898) (on file with National Archives, Records of the U.S. Senate, Record Group 46, Committee Papers, Senate Judiciary Committee, 55A-F15, Washington, D.C.). The State of Louisiana has been in breach of that promise ever since. As this Court considers whether to place its imprimatur on the continued (sometimes lifelong) imprisonment of individuals convicted by non-unanimous juries, it should also weigh the ways in which this unconstitutional system has eroded the faith and confidence in the justice system of all Louisianans—and, in particular, Black citizens like Ms. Taylor.

CONCLUSION

For the reasons set forth herein, Ms. Taylor respectfully suggests that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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