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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 disclosure statement in the brief for petitioner remains accurate.

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INTRODUCTION

Louisiana's brief reinforces the uniqueness of *Ramos* and the reasons it should apply retroactively.

First, the State's contention that *Ramos* created a "new" rule rests on false premises. Louisiana misreads *Apodaca* and *Ramos*, ignores precedent other than *Apodaca* that logically dictated the result in *Ramos*, and overstates the implications of lower courts' reliance on *Apodaca*. Jury unanimity and the incorporation of the jury trial right are deeply rooted in American jurisprudence. *Apodaca* was an anomaly that allowed Louisiana to persist in an unconstitutional jury system, but that does not mean *Ramos* ineluctably broke new ground.

Second, if *Ramos* is a "new" rule, then it must be a watershed rule. Louisiana and its amici accept that *Ramos* restored a bedrock right, but dispute whether jury unanimity improves the accuracy of criminal trials. But as a matter of law, a conviction can only be legally accurate if Louisiana proves its case beyond the reasonable doubts of all jurors. Historical sources and empirical research confirm that jury unanimity improves accuracy. Louisiana's interests in finality do not change this analysis; applying *Ramos* retroactively will not overburden courts, and the racist roots of Louisiana's regime weaken any legitimate state interest in convictions by non-unanimous juries.

Finally, Louisiana reaches beyond the question presented to challenge Mr. Edwards's ultimate entitlement to habeas relief. If the Court addresses these arguments at all, it should reject them as misinterpretations of AEDPA.

ARGUMENT

I. *RAMOS* DID NOT ANNOUNCE A NEW RULE OF CONSTITUTIONAL CRIMINAL PROCEDURE.

Louisiana accepts that well-established lines of precedent dictated the result in *Ramos*, but insists "*Apodaca* was a precedent of this Court that state courts and lower federal courts were bound to follow from 1972 to 2020." Resp. Br. 23. That argument relies on three, linked premises: (1) *Apodaca* was controlling precedent that *Ramos* expressly overruled; (2) *Apodaca* is the only decision relevant to the *Teague* analysis; and (3) *Apodaca*'s binding effect on lower courts means that the rule in *Ramos* was neither "dictated by precedent" nor apparent to "all reasonable jurists" for *Teague*'s purposes. Louisiana's argument is viable only if all three proposition are correct; none is.

1. Louisiana contends *Apodaca* was controlling precedent, Resp. Br. 16–17, but several members of this Court rejected that argument in *Ramos*. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1401–02 (2020) (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.); *id.* at 1424–25 (Thomas, J., concurring) (*Apodaca* was not "bind[ing]" because it failed to consider the Privileges or Immunities Clause). That is because, like an unreasoned affirmance, *Apodaca* had no *ratio decidendi* even though its "judgment line resolved that case for the parties in that case." *Id.* at 1404 (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.); see also *Trans World Airlines*, *Inc.* v. *Hardison*, 432 U.S. 63, 73 n.8 (1977) ("Judgment entered by an equally divided Court is not 'entitled to precedential weight.'" (quoting *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972))).

Further, whatever *Apodaca* was, *Ramos* did not "expressly overrule[]" it and thereby create a "new rule." Resp. Br. 9, 14, 16; see *Graham* v. *Collins*, 506 U.S. 461, 467 (1993); *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (describing the "explicit overruling of an earlier holding"). In *Ramos*, only two Justices voted to overrule *Apodaca* (Sotomayor and Kavanaugh, JJ.); seven Justices did not. Louisiana nonetheless adds those two votes to those of three dissenting Justices who voted *not* to overrule *Apodaca* (Roberts, C.J., and Alito and Kagan, JJ.), but who believed the majority's decision would do so. Respondent cannot cobble together these separate opinions to argue that this Court "expressly overrul[ed]" its own precedent. That vote-counting method incorrectly assumes the dissenters "concurred in the judgment." *Marks* v. *United States*, 430 U.S. 188, 193 (1977). The *Ramos* plurality did not need to expressly overrule *Apodaca* because *Apodaca* lacked precedential force to begin with.

Ironically, Louisiana's approach to counting votes would still suggest that there was nothing in *Apodaca* to overrule. After all, five Justices in *Apodaca* agreed that "the Sixth Amendment requires a unanimous verdict in federal criminal jury trials," and eight Justices agreed the "Sixth Amendment is to be enforced against the States according to the same standards that protect the right against federal encroachment." *Johnson* v. *Louisiana*, 406 U.S. 356, 395 (1972) (Brennan J., dissenting).

2. Louisiana agrees *Teague* requires "survey[ing] the legal landscape," *Lambrix* v. *Singletory*, 520 U.S. 518, 527–28 (1997), yet advances a "new rule" argu-

ment based on *Apodaca* alone. Resp. Br. 9–10, 15.[1] But any such survey must include founding-era precepts and long-established precedent, *e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Malloy* v. *Hogan*, 378 U.S. 1 (1964), which logically dictated the result in *Ramos*.[2]

That precedent is essential to the retroactivity analysis. "[T]he ultimate decision whether [a rule] was dictated by precedent is based on an objective reading of the relevant *cases*"—plural. *Stringer* v. *Black*, 503 U.S. 222, 237 (1992) (emphasis added). The "relevant cases" extend beyond *Apodaca*, and include the Sixth and Fourteenth Amendment precedents that led to *Ramos*. This Court has characterized unanimity as an "ancient guarantee" synonymous with the jury trial right, *Ramos*, 140 S. Ct. at 1401, and the Sixth Amendment was incorporated against the States over half a century ago. Because *Ramos* neither "develop[ed] new law" nor broke "new ground," *Chaidez* v. *United States*, 568 U.S. 342, 354–55 (2013), it cannot be a new rule. Former Judges Br. 5–11; ACLU Br. 7–12.

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[1] Louisiana also ignores that jury unanimity was "an obligation of the State of Louisiana . . . since 1804." Louisiana Law Professors Br. 2. This guarantee has long been protected against abridgment under the Privileges or Immunities Clause, and, thus, nothing in *Ramos* created a "new obligation" for the State. *Id.* at 26; *see Ramos*, 140 S. Ct. at 1424 (Thomas, J., concurring).

[2] The United States incorrectly implies *Duncan* "left open" whether jury unanimity applied to the States. U.S. Br. 11. *Duncan* merely noted its holding would not require "*widespread* changes." 391 U.S. at 158 n.30 (emphasis added). The "open" question mentioned in *DeStefano* v. *Woods*, 392 U.S. 631 (1968) (per curiam), was whether the Sixth Amendment "includes a right not to be convicted except by a unanimous verdict." *Id.* at 632–33. *Ramos* explains why that was not a serious question. *Ramos*, 140 S. Ct. at 1395–97.

3. Unable to establish that *Apodaca* was precedent or that *Ramos* broke new ground, Louisiana emphasizes that lower courts felt "bound" by *Apodaca*. Resp. Br. 23; see also U.S. Br. 11 (noting Louisiana courts permitted jury trials "without requiring unanimity"). But the subjective views of Louisiana judges cannot stymie this Court's objective analysis. The question is whether the "result" in *Ramos* was "*dictated* by precedent existing at the time the defendant's conviction became final," given the "constitutional standards that prevailed at the time the original proceedings took place." *Teague* v. *Lane*, 489 U.S. 288, 301, 306 (1989) (internal quotations omitted); see also *Stringer*, 503 U.S. at 229 (holding that later decision followed "*a fortiori*" from this Court's precedents). The answer here is easy: the Sixth and Fourteenth Amendment standards *Ramos* applied undoubtedly "prevailed" when Mr. Edwards was convicted, and even when *Apodaca* was decided. See *Ramos*, 140 S. Ct. at 1405 (*Apodaca* "sits uneasily with 120 years of preceding case law"). Louisiana itself agrees that "*Ramos* was based on other bedrock rights," which were not "previously unrecognized," Resp. Br. 39, and yet the State chose to persist in a regime contrary to those bedrock rights.

Louisiana nonetheless argues that because lower courts felt bound by *Apodaca*, Mr. Edwards cannot establish that "all reasonable jurists" would have anticipated *Ramos*. But the hypothetical "reasonable jurists" standard developed as a corollary to—and does not supplant—the "dictated by precedent" standard. See *Chaidez*, 568 U.S. at 347–48; Pet. Br. 18. And even if lower courts felt bound, they could not have reasonably believed that *Apodaca* "repudiate[d] this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments." *Ramos*, 140

S. Ct. at 1404 (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.). Nor could they have reasonably expected this Court would endorse *Apodaca* upon a "survey [of] the legal landscape." *Lambrix*, 520 U.S. at 527. This Court has never read *Apodaca* as somehow abrogating its pre-existing precedents. *E.g.*, *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 n.1 (2019); *McDonald* v. *Chicago*, 561 U.S. 742, 766, 871 n.14 (2010); *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000) (explaining, in state criminal appeal, that jury trial right demands "*truth of every accusation*" be "confirmed by the unanimous suffrage of twelve," without even citing *Apodaca*).[3]

The United States argues that, though *Apodaca* was "'shaky ground' . . . it was 'ground' nonetheless." U.S. Br. 14. But it is telling that, in *Ramos*, not even Louisiana would argue that *Apodaca* carried "precedential force." Resp. Br. 23; see *Ramos*, 140 S. Ct. at 1403 (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.) ("[B]oth sides admit that Justice Powell's opinion cannot bind us.").

This Court's references to the *Apodaca* "exception," *McDonald*, 561 U.S. at 766 n.14, simply confirm that *Apodaca* did not comport with then-existing precedent. *McDonald*, for instance, explained that partial incorporation was "decisively" rejected in *Malloy*—eight years before *Apodaca*. *Id.* at 765. True, the

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[3] *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), did not call *Apodaca* binding precedent. Resp. Br. 18. It merely reiterated *Ramos*'s explanation, in response to the dissent, that the "threat of unsettling convictions cannot save a precedent of this Court." *McGirt*, 140 S. Ct. at 2480. And certiorari denials in cases seeking to clarify *Apodaca*, Resp. Br. 20, have "no legal significance whatever bearing on the merits." *Ramos*, 140 S. Ct. at 1404 n.56 (opinion of Gorsuch, J., joined by Ginsburg and Breyer, JJ.) (internal quotations omitted).

Court noted *Apodaca*'s anomalous result appeared to create a situation where the jury trial right was partially incorporated. *Id.* at 766 n.14. But that was attributed to "an unusual division among the Justices," and this Court reaffirmed that "*Apodaca* . . . does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *Id.* Lower courts, too, have noted *Apodaca*'s infirmity. U.S. Br. 12.[4]

Louisiana fights this result. It reads *Teague* as validating "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to *later* decisions." Resp. Br. 21. But *Teague* did not contemplate the idiosyncrasy of *Apodaca*, which was contrary to precedent when it was decided. *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring) (describing *Apodaca* as "a universe of one," and "uniquely irreconcilable" with precedent "before and after the decision"). Not even Louisiana argues that the constitutional rules *Ramos* applied were unknown when Mr. Edwards was convicted; at best, it argues *Apodaca* justified disregard for those rules in Louisiana. But that does not mean *Ramos* announced anything "new" under *Teague*. See *Wright* v. *West*, 505 U.S. 277, 304 (1992) (O'Connor J.,

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[4] *E.g.*, *United States* v. *Turrietta*, 696 F.3d 972, 983 n.14 (10th Cir. 2012) (describing *Apodaca* as a "limited" decision resulting from "a three-way division among the justices"); *Rauf* v. *State*, 145 A.3d 430, 480 n.300 (Del. 2016) (Strine, C.J., concurring) (describing *Apodaca* as an "odd case[]," the rationale of which "is not convincing"); *id.* at 484 (Holland, J., concurring) (explaining Justice Powell's opinion has "been called into question"); *Rice* v. *State*, 532 A.2d 1357, 1362 n.5 (Md. 1987) (calling *Apodaca* "an anomaly of legal reasoning").

concurring) ("[C]onflicting authority does not necessarily mean a rule is new.").

The United States asserts that applying *Ramos* retroactively would "frustrate[]" lower courts. U.S. Br. 16. But a habeas petitioner must receive the benefit of "law prevailing" at the time of his conviction, *Teague*, 489 U.S. at 306, and Louisiana cannot claim full incorporation was a newfangled doctrine that emerged only after Mr. Edwards's conviction. Jurists are "frustrated" when an aberrant case, like *Apodaca*, results in unconstitutional convictions that are "plainly unjust" and contrary to our most cherished rights. *Solem* v. *Stumes*, 465 U.S. 638, 653 n.4 (1984); see Tarpley Br. 17–19; Former Judges Br. 1.

II. IF *RAMOS* ANNOUNCED A NEW RULE, IT IS A UNIQUE WATERSHED RULE.

A. *Ramos* altered our understanding of a bedrock procedural element essential to the fairness of criminal proceedings.

Louisiana insists that jury unanimity does not deserve watershed status because those rights were not "previously unrecognized." Resp. Br. 38–39. That argument misconstrues the standard. The test for a watershed rule does not require a bedrock principle to be heretofore unknown; it is enough that the right was unrecognized for a time because it was obscured by a decision of this Court.

Gideon v. *Wainwright*, 372 U.S. 335 (1963), the paradigmatic watershed rule, illustrates the point. The right to counsel in *Gideon* did not come from whole cloth; instead, *Betts* v. *Brady*, 316 U.S. 455 (1942), had "departed from the sound wisdom" of preexisting authority. *Gideon*, 372 U.S. at 344–45 (describing *Betts* as "an anachronism when handed down"). Although many States afforded counsel to in-

digent defendants, some outlier states did not. Br. for the State Gov't *Amici Curiae* at *2, *Gideon* v. *Cochran*, No. 155, 1962 WL 115122 (U.S. Nov. 23, 1962). *Gideon* restored our understanding of that bedrock principle: the Court reaffirmed that the right to counsel, "[f]rom the very beginning," has been "fundamental and essential to fair trials," and then compelled outlier states to enforce that right. *Gideon*, 372 U.S. at 345.

Ramos altered our understanding of the unanimous-jury guarantee in the same way. The Court corrected *Apodaca*'s sharp turn from "120 years of preceding case law." *Ramos*, 140 S. Ct. at 1405 (describing *Apodaca* as "unmoored . . . from the start"). *Apodaca* notwithstanding, 48 States have treated jury unanimity as a bedrock element essential to the fairness of criminal proceedings, with just two outlier States (Louisiana and Oregon) deviating from the norm.[5] *Ramos* altered our understanding—in the relevant sense—by reaffirming that unanimity is an "essential" and "indispensable" feature of the jury trial right, which is "fundamental to the American scheme of justice," such that "[a] verdict, taken from eleven, was no verdict at all." *Id.* at 1395–97 (internal quotations omitted). And, like *Gideon*, *Ramos* also compelled outlier states to enforce a right they previously refused to recognize.

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[5] Puerto Rico has also allowed non-unanimous juries. Puerto Rico Br. 4–6 (citing P.R. Const. art. II, § 11). But the Sixth Amendment's jury trial right does not apply in Puerto Rico's courts. *Balzac* v. *Porto Rico*, 258 U.S. 298, 304–09 (1922).

B. Jury unanimity is necessary to prevent an impermissibly large risk of legally inaccurate convictions.

Louisiana does not address the parallels between *Ramos* and *Gideon*, except to say that *Ramos* is more like *Crawford* in its effect on accuracy. Resp. Br. 35. In Louisiana's view, jury unanimity does not have the "overall effect" of "improv[ing] the accuracy of fact-finding in criminal trials." *Id.* at 33 (quoting *Whorton* v. *Bockting*, 549 U.S. 406, 419 (2007)). Louisiana's crabbed view of "accuracy" is wrong, and disregards the presumptions of innocence and jury regularity that are pillars of criminal procedure.

1. Relying on *Bousley* v. *United States*, 523 U.S. 614, 620 (1998), Louisiana claims an inaccurate conviction means only "the conviction of someone who is *factually innocent*." Resp. Br. 33 (emphasis added). That is incorrect. *Bousley* emphasizes that one of the "principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a *procedure* which creates an impermissibly large risk that the innocent will be convicted.'" *Bousley*, 523 U.S. at 620 (emphasis added). The focus is the risk of wrongful conviction associated with a given "procedure," not the factual innocence or guilt of any individual. After all, the root of the word "accurate" means "careful," not "truthful." *Accurate*, Oxford English Dictionary (3d ed. 2011); *accord* NACDL Br. 13–15.

Again, *Gideon* illustrates the State's flawed approach. *Gideon* has been described as watershed not because the right to counsel is tied to "factual[] innocenc[e]," Resp. Br. 33, but because of "the relationship of that rule to the accuracy of the factfinding *process*." *Whorton* v. *Bockting*, 549 U.S. 406, 419 (2007) (emphasis added). The risk of an "unreliable verdict is intolerably high" when a defendant is deprived of

counsel, *id.*, because that assistance effectuates other constitutional guarantees and ensures that the prosecution goes through the "crucible," *United States* v. *Cronic*, 466 U.S. 648, 656 (1984). Indeed, this Court has repeatedly confirmed that *Gideon* would qualify as a watershed rule today, *Whorton*, 549 U.S. at 419, even though counsel may spare from conviction a factually guilty defendant. NACDL Br. 14 (*Gideon* "ensures that every defendant will receive all the protections intended to reduce the risk that an innocent person will be convicted, even if that means in a given case that a guilty person may go free").

Louisiana places great emphasis on *Whorton*, asserting that *Ramos* cannot be watershed just because it relied on "the original understanding of the Bill of Rights." Resp. Br. 12; *accord* U.S. Br. 6, 15. That misses the point. Despite its pedigree, *Crawford*'s confrontation right lacked "primacy" and "centrality" because it was an evidentiary device that potentially "decreased" accuracy. *Whorton*, 549 U.S. at 420–21. *Ramos* is not remotely similar. Pet. Br. 27–32; see also Former Judges Br. 18–19. In addition to its "ancient" origins, jury unanimity is an "essential" and "indispensable" feature of the factfinding process. *Ramos*, 140 S. Ct. at 1396, 1401; see also *Sullivan* v. *Louisiana*, 508 U.S. 275, 281–82 (1993) ("a criminal trial cannot reliably serve its function" without the jury guarantee). Moreover, unanimity secures "the right to put the State to its burden"—proof of guilt beyond a reasonable doubt. *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring); see also *Descamps* v. *United States*, 570 U.S. 254, 269 (2013) (factfinding must occur "unanimously and beyond a reasonable doubt").

Historical sources confirm that jury unanimity was intended to prevent impermissibly inaccurate ver-

dicts. ACLU Br. 14–18 (surveying literature). For example, in tracing the rule's English origins, one commentator observed that "only a unanimous verdict was considered trustworthy." Daniel D. Peck, *The Unanimous Jury Verdict: Its Valediction in Some Criminal Cases*, 4 Tex. Tech L. Rev. 185, 187 (1972). Scholarly works in the early Republic explained that the accused can be "effectually protected from the concealed and poisoned darts of private malice and malignity" only though unanimity. 2 James Wilson, *Works of the Honourable James Wilson* 351 (1804). Nineteenth century jurists were in accord. *E.g.*, *State* v. *Bybee*, 17 Kan. 462, 467 (1877) (the "unanimous conclusion of twelve different minds . . . is the certainty of fact sought in the law").[6]

The United States asserts that Mr. Edwards's position lacks "empirical support," U.S. Br. 21, but ignores the literature. Amici highlight numerous studies, unrebutted by Louisiana, finding that "juries deliberate longer and more thoroughly when unanimity is required." Social Scientists Br. 5–13; see also ACLU Br. 22–24; NACDL Br. 17; NAACP Br. 18–19; Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (collecting studies). The United States criticizes only one study because it attributed some results to "sampling variability." U.S. Br. 26 (quoting Reid Hastie et al., *Inside the Jury* 61, 63 (1983)). But even that nit-picking fails: the authors noted that, notwithstanding sample

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[6] Louisiana observes England no longer requires unanimous juries, calling it "odd" to have a different rule here. Resp. Br. 36–37. Our legal system has developed independently from England's for the last 244 years, and does not follow modern British law. *Roper* v. *Simmons*, 543 U.S. 551, 626–27 (2005) (Scalia, J., dissenting) (calling it "indefensible" to conform the right to a "jury trial in criminal cases" to modern British practice).

variance, it was statistically significant that *no* unanimous-rule juries reached the "legally untenable" verdict of first-degree murder, while many non-unanimous juries did. Reid Hastie et al., *Inside the Jury*, 61–62 (1983).

2. Louisiana argues that unanimity may "*diminish* the accuracy of a verdict" because a "holdout juror might 'continue[] to insist upon acquittal without having persuasive reasons in support of [her] position.'" Resp. Br. 34–35. That argument relies on reasoning that *Ramos* spurned. *Ramos*, 140 S. Ct. at 1401 (questioning "whether any particular hung jury is a waste, rather than an example of a jury doing exactly what . . . it should—deliberating carefully and safeguarding against overzealous prosecutions"); *id.* at 1418 (Kavanaugh, J., concurring) ("[N]on-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors."). It also flies in the face of the presumptions of jury regularity and innocence. *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987); *In re Winship*, 397 U.S. 358, 363 (1970).

Contrary to the government's assertion, the fact that at a first trial, the jury hung six votes to six does not mean that six jurors got it wrong if the defendant is convicted by a unanimous jury on retrial. U.S. Br. 23. Instead, it means that prosecutors failed to convince six jurors beyond a reasonable doubt and that they presented a better case at the second trial. The United States also wrongly suggests that, if unanimity were "necessary to avoid an inaccurate or unfair determination of guilt," the remedy would be "a directed verdict of acquittal." *Id.* But the source of this contention, *Johnson*, was the companion case to *Apodaca* and has been similarly discredited. See *Ramos*,

140 S. Ct. at 1397. Moreover, the notion that a "watershed" rule requires acquittal runs headlong into *Gideon*—the remedy for a *Gideon* violation is retrial, *not* "a directed verdict."

Louisiana's conjecture about holdout jurors also proves too much, Resp. Br. 34–35, as these arguments would apply with equal force in the capital context. Yet no one disputes that jury unanimity is necessary for ensuring accurate outcomes in capital cases. Cf. *Jones* v. *United States*, 527 U.S. 373, 382 (1999) ("[W]e have long been of the view that '[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'").

3. Louisiana looks to exoneration rates in a handful of other States (like Illinois, Texas, and New York) to show that non-unanimous juries are not measurably more inaccurate than unanimous juries. Resp. Br. 33–34. But those States are extreme outliers for exoneration rates, in part because of a documented history of prosecutorial abuse and police misconduct,[7] making them poor comparators. Louisiana may be content to be among the States with the highest exoneration rates, but it is disingenuous to suggest Louisiana can find justification for non-unanimous juries because of the company it keeps.

Within Louisiana, the evidence suggests that non-unanimous verdicts are significantly less reliable

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[7] *See, e.g.*, Noah Berlatsky, *When Chicago Tortured*, The Atlantic (Dec. 17, 2014), https://www.theatlantic.com/national/archive/2014/12/chicago-police-torture-jon-burge/383839/; Jon Schuppe, *How One Texas County Drove a Record Rise in Exonerations*, NBC News (Mar. 8, 2017), https://www.nbcnews.com/news/us-news/how-one-texas-county-drove-record-rise-exonerations-n730161.

than verdicts from unanimous juries. Louisiana concedes that fully *one quarter* of exonerations in the State involve non-unanimous juries, Resp. Br. 34, but misrepresents the data. Of the exoneration cases in which a non-unanimity rule was permitted at trial, almost *half* involved convictions obtained by a non-unanimous verdict. Innocence Project Br. 6–7. And according to a 2015 report by the National Registry of Exonerations, Louisiana was second in the *per capita* rate of wrongful convictions. *Id.* at 6.

4. Finally, Louisiana looks to Mr. Edwards's own trial for anecdotal "proof" that non-unanimous juries reach accurate results, characterizing Mr. Edwards's taped confession as "overwhelming evidence" of guilt. Resp. Br. 37–38. But false confessions are a pervasive problem. For example, in 2019, 16% of exonerations across the country involved a false confession.[8] And here the State's purportedly "overwhelming evidence" failed to convince at least one juror of guilt beyond a reasonable doubt. J.A. 17–39; Taylor Br. 5–13. In 48 other States (and now Louisiana), the view of a single juror that Mr. Edwards was *not* guilty would have prevented a conviction. If the State disagrees with the jury's assessment, it can retry the case.

C. Louisiana's minimal finality interests do not negate the watershed status of *Ramos*.

Louisiana contends that *Ramos* is not watershed because the State has significant reliance interests in preserving convictions obtained through unconstitutional and unjust jury practices, and that "racial is-

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[8] Nat'l Registry of Exonerations, Annual Report 3 (Mar. 31, 2020), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2019.pdf.

sues" should not be considered. Resp. Br. 42–46. Neither contention is correct.

1. Louisiana's reliance interests are minimal. Applying *Ramos* retroactively would potentially affect about 1,600 cases in Louisiana, for which fewer than 1,000 have proof of a non-unanimous verdict. Promise of Justice Br. 10–11. Not all defendants will challenge their convictions in federal habeas due to other procedural hurdles, or considerations like the time remaining on their sentences as compared to the time for a retrial. And for many defendants, the prospect of a plea deal will be far more attractive than retrial.

In that scenario, Louisiana's criminal justice system will not collapse. In truth, it will hardly be burdened: even if all 1,600 potential cases in Louisiana were reopened and resolved in a single year, that would increase the criminal cases disposed of in Louisiana—roughly 140,000 per year—by barely *one percent*.[9] Promise of Justice Br. 15–18. The criminal justice system has weathered retroactivity decisions of far greater magnitude. Oregon FPD Br. 13–15; DKT Liberty Project Br. 14–18.

Similarly, the United States expresses concern that retroactive application of *Ramos* "could . . . unsettle a significant number of federal sentences" that are "predicated on prior state convictions." U.S. Br. 1, 31. (citing, without further support, the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1)). That concern is unfounded. According to the U.S. Sentencing Commission, in the five judicial districts most

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[9] Louisiana complains that some retrials will be hard because files were lost to floods. Resp. Br. 41. Evidentiary degradation is an issue whenever there is a retroactive rule, and the precise cause—whether hurricane, fire, or computer failure—is irrelevant under *Teague*.

likely at play—the Eastern, Middle, and Western Districts of Louisiana, the District of Oregon, and the District of Puerto Rico—there have been a combined total of 164 ACCA sentences imposed over the last 15 years; or, roughly 11 per year.[10]

Even that number greatly overstates the actual impact. Dozens of "violent felony" predicate crimes in Louisiana, for instance, have long required a *unanimous* six-person jury, negating any impact from retroactivity. *E.g.*, La. Stat. Ann. § 14:34 (aggravated battery); *id.* § 14:37.4 (aggravated assault with a firearm); *id.* § 14:37.1 (drive-by shootings). And as amici point out, the vast majority of cases are resolved through pleas, Promise of Justice Br. 16, and most convictions obtained through trial came from a unanimous verdict, such that barely five percent of those incarcerated in Louisiana were convicted non-unanimously. *Id.* at 9–10 (1,677 out of 32,000 prisoners convicted non-unanimously). But even taking that percentage at face value,[11] applying it to the 164 AC-

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[10] *See* U.S. Sentencing Comm'n, *Commission Datafiles, Individual Offender Datafiles (2005–2019),* https://www.ussc.gov/research/datafiles/commission-datafiles; *see also* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties For Firearms Offenses In The Federal Criminal Justice System* (Mar. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf. While individuals with state-crime predicates from Oregon, Louisiana, or Puerto Rico could hypothetically receive federal ACCA sentences in different judicial districts, the number is so low that it could not perceptibly increase the government's burden.

[11] Because plenty of individuals in this subset are, like Mr. Edwards, sentenced to life imprisonment—and thus unlikely to later commit a firearms offense that would subject them to ACCA's mandatory minimums—five percent overstates the number.

CA sentences at issue over the last 15 years leaves roughly *eight sentences*, nationwide, that would potentially be affected. And even for those, the federal government will likely argue—as it routinely does—that vacatur of a predicate state crime should not disturb the ACCA sentence.[12] This minimal burden on the government is not nearly "significant" enough to let unconstitutional and unjust sentences stand. See *Ramos*, 140 S. Ct. at 1406 (noting that *United States* v. *Booker*, 543 U.S. 220 (2005), required vacating and remanding nearly 800 decisions).

2. The racist origins of non-unanimous juries also contravene any State interest in finality and repose. Louisiana first approved non-unanimous juries "as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans." *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring); *accord* NAACP Br. 14–20; Center on Race, Inequality, and the Law Br. 5–12.

Yet Louisiana now maintains that the original non-unanimity rule "had no apparent racial motivation," Resp. Br. 42 n.47; contra *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring) ("[T]he 1898 constitutional convention expressly sought to 'establish the supremacy of the white race.'"), and that the 1974 re-adoption of that rule erased any racial taint. Resp. Br. 42–43. True, in the 1970s, Louisiana purportedly

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[12] *See* Opp. at 16, *Casey* v. *United States*, 138 S. Ct. 2678 (2018) (Mem.) (No. 17-1251) (arguing default because a prisoner failed to raise on direct appeal a challenge to the ACCA's residual clause despite "Justice Scalia ha[ving] adopted the view that the residual clause was vague"); U.S. Br. at 11–12, *Tribue* v. *United States*, 929 F.3d 1326 (11th Cir. 2019) (No. 18-10579) (arguing government can substitute a different, previously unrelied-upon conviction to maintain an ACCA sentence on collateral review if a state-crime predicate is later vacated).

re-enacted its non-unanimous rule for "judicial efficiency." Resp. Br. 13. But that was of no moment in *Ramos*, and even less so here. Members of this Court have since recognized that "the original motivation for the laws mattered," notwithstanding subsequent re-ratification. *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring).

Louisiana's non-unanimity law was "thoroughly racist in its origins and has continuing racially discriminatory effects." *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring). The State has no legitimate interest in avoiding retroactivity, but for its desire to let Mr. Edwards and others like him languish in prison. *Id.* at 1408 (opinion of Gorsuch, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.); Promise of Justice Br. 20–23; Innocence Project Br. 1A–14A; Human Rights for Kids Br. 2–15; DKT Liberty Project Br. 11–12. But, as Members of this Court asked in *Ramos*, "where is the justice in that?"

III. AEDPA DOES NOT BAR RETROACTIVE APPLICATION OF *RAMOS*.

1. This Court's own question presented is limited to the following: whether *Ramos* "applies retroactively to cases on federal collateral review." It thus need only decide whether *Ramos* is retroactive under *Teague*, and not whether Mr. Edwards is entitled to habeas relief. See *San Remo Hotel, L.P.* v. *San Francisco*, 545 U.S. 323, 327 n.1 (2005).

The State admits that "*Teague* provides a 'threshold . . . analysis' that courts must conduct *before* 'performing any analysis required by AEDPA.'" Resp. Br. 46–47; see also *Horn* v. *Banks*, 536 U.S. 266, 272 (2002) (per curiam) (explaining that "[t]he AEDPA and *Teague* inquiries are distinct," and describing *Teague* as "threshold"). The question presented in-

volves only this first step: whether *Ramos* is retroactive under *Teague*. See *Welch* v. *United States*, 136 S. Ct. 1257, 1264 (2016) ("The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague*."); *accord* U.S. Br. 9 n.* (observing "the question presented does not clearly reference Section 2254(d)," and requesting supplemental briefing if reached). The Court did not ask the parties to address the question reserved in *Greene* v. *Fisher*, 565 U.S. 34, 39 n.* (2011), and it need not reach that significant issue here and now.

2. If the Court is inclined to reach the distinct AEDPA issue, it should permit supplemental briefing for the parties to present their divergent views. Ultimately, however, the Court should reject the State's AEDPA arguments.

First, Louisiana argues AEDPA's relitigation bar forecloses relief because, when Mr. Edwards's petition was adjudicated, fair-minded jurists reasonably could have believed a single-Justice concurrence in *Apodaca* was binding. Resp. Br. 48–49. This argument defeats itself. Louisiana advances it only *if* the Court finds *Ramos* did *not* announce a "new rule." *Id.* at 46. But "old" rules are presumptively retroactive, *Whorton*, 549 U.S. at 416, and are equivalent to "clearly established Federal law" under § 2254(d)(1). *Chaidez*, 568 U.S. at 348 n.4; *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) ("[W]hatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law.'").

Second, Louisiana argues AEDPA forecloses retroactivity under "any *Teague*-like exceptions." Resp. Br. 50–52. According to the State, Congress intended to forbid retrospective application of "new" rules to first-time habeas petitioners while allowing second or suc-

cessive petitioners to seek that same relief. *Id.* at 51–52. That is untenable. "[A] statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). It is implausible that one part of AEDPA, 28 U.S.C. § 2244(b)(2)(A), would explicitly allow successive habeas petitioners to pursue relief based on new rules, while another section, 28 U.S.C. § 2254(d)(1), would deny that relief for diligent, first-time petitioners. Section 2244 imposes *additional* gatekeeping requirements on successive petitions to preserve judgments that have already survived one round of collateral attack. *Magwood* v. *Patterson*, 561 U.S. 320, 333–34 (2010). Those strict requirements make sense only if petitioners *could have* brought all constitutional claims the first time around.

Lower courts correctly understand AEDPA to permit relief under Section 2254(d)(1) based on new "substantive" or "watershed" rules made retroactive by the Supreme Court. *E.g.*, *Williams* v. *Cain*, 229 F.3d 468, 475 (5th Cir. 2000); *Muhleisen* v. *Ieyoub*, 168 F.3d 840, 844 n.2 (5th Cir. 1999). That is consistent with AEDPA's structure. Sections 2254(e)(2) and 2244(b)(2) incorporate the *Teague* doctrine. Congress would not have included those provisions if Section 2254(d)(1) ultimately foreclosed relief for all new rules made retroactive by the Supreme Court. A contrary interpretation would raise serious constitutional concerns. Cf. *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 729 (2016) (recognizing *Teague* exception for substantive rules has constitutional dimensions). And if any ambiguity exists, it should be resolved in favor of the habeas petitioner. *E.g.*, *McQuiggin* v. *Perkins*, 569 U.S. 383, 392 (2013); *Holland* v. *Florida*, 560 U.S. 631, 645 (2010).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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