IN THE SUPREME COURT
STATE OF LOUISIANA

Docket number 2021-KP-1893

STATE OF LOUISIANA,
Applicant
v.

REGINALD REDDICK,
Respondent

Writ of Certiorari and/or Review from
Fourth Circuit Court of Appeal, No. 2021-K-0589

On writ to review the final order from the
25th Judicial District Court,
Parish of Plaquemines No. 93-3922-B
Hon. Michael D. Clement, Div. B

BRIEF OF *AMICI CURIAE* ON BEHALF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., AND VOICE FOR THE EXPERIENCED IN SUPPORT OF THE RESPONDENT, REGINALD REDDICK

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Education Fund, Inc. constitute the foremost civil rights legal organizations in the nation. Voice for the Experienced constitutes a non-profit uniquely positioned to present argument to this Court given its membership's personal experiences with the consequences of non-unanimous juries in Louisiana.

1. The *Lawyers' Committee for Civil Rights Under Law* is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. Much of the Lawyers' Committee's work involves combatting racial inequities in the criminal justice system through litigation, public policy advocacy, and serving as amicus curiae.

2. The *NAACP Legal Defense and Educational Fund, Inc.* (LDF) has fought to secure the constitutional promise of equality for all people since its founding in 1940. LDF's advocacy has included efforts to enforce the Fourteenth Amendment's promise of equality, *see, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958), *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), and to overcome the persistent and pernicious influence of race in the criminal justice system by fighting to eradicate discrimination that affects jury verdicts, *see, e.g.*, *Ham v. South Carolina*, 409 U.S. 524 (1973), *Alexander v. Louisiana*, 405 U.S. 625 (1972), *Swain v. Alabama*, 380 U.S. 202 (1965). The LDF submitted an amicus brief in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), urging the Supreme Court to hold that Louisiana's non-unanimous jury rule was unconstitutional under the

Sixth Amendment's jury guarantee, which applies to all States through the Fourteenth Amendment. The question presented in this case—whether *Ramos* should apply retrospectively to cases on collateral review— has major implications for the disproportionately Black defendants sentenced by non-unanimous juries and would restore the lost voices of dissenting minority jurors.

3. *Voice of the Experienced* (VOTE) is a 501c3 nonprofit organization in Louisiana. The group was originally formed as the Angola Special Civics Project in 1987 by a group of men incarcerated at the Louisiana State Penitentiary. Several of those men, including co-founder (and executive director of VOTE since 2004 incorporation) Norris Henderson, were convicted by non-unanimous juries. VOTE is a membership-based, grassroots organization with offices in New Orleans, Baton Rouge, and Lafayette. Among the 25 staff are 16 formerly incarcerated people, and nine were convicted by non-unanimous juries. The membership includes dozens of people with such verdicts, including people currently on parole, families of currently incarcerated people, and hundreds more currently incarcerated people who rely on VOTE as a conduit to the community, media, and legislature. During the 2019 ballot amendment campaign to eliminate the non-unanimous jury, VOTE was one of three anchor organizations creating the campaign, and Norris Henderson served as the statewide campaign director. VOTE is named to the related legislative task force, routinely provides legislative testimony, legal analysis, and media comments, and is widely accepted as representative of people impacted by the criminal legal system. VOTE has been a plaintiff in multiple lawsuits on behalf of the broader base, and has drafted dozens of bills that impact incarceration, criminal procedure, and post-conviction discrimination. Finally, the VOTE community is inextricably linked to this issue, having spent decades incarcerated, bound together by an overtly White Supremacist law that has now been partially dismantled.

INTRODUCTION

The movie *12 Angry Men* was not set in Louisiana. Nor could it have been. The movie would have ended after the first five minutes when the juror votes were tallied before any deliberation: 11 votes for guilty, 1 for not guilty. Elsewhere in America, the jury would have to deliberate until all 12 agreed. Until recently, for the last 120 years in Louisiana, the accused would be sent to prison. Louisiana now knows that such practice is unconstitutional, but many Louisianans still languish in its prisons after being convicted in this unconstitutional fashion. Justice requires that these individuals receive new trials.

The reasons Louisiana had such a system in place deserve discussion and warrant scrutiny. Louisiana created its non-unanimous jury system specifically to limit the influence of Black jurors, and to convict Black defendants who might otherwise be acquitted. Until recently, it was "the last of Louisiana's Jim Crow laws." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring) (quoting Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana* 63). By injecting racial bias into the criminal justice system, Louisiana seriously diminished the accuracy of convictions. The system has produced wrongful convictions of innocent defendants, and wrongful "over-convictions" (*e.g.*, murder would have been manslaughter if unanimity were required), and these effects have been disproportionately imposed on Black defendants.

In addition to being fundamentally unjust, the system was unconstitutional. The U.S. Supreme Court decided that in *Ramos*, 140 S. Ct. 1390 (2020). But then the Court determined in *Edwards v. Vannoy*, 141 S. Ct. 1547, 1550–51 (2021), that for federal post-conviction purposes, the *Ramos* rule applied only going forward and not retroactively. Importantly, however, the U.S.

Supreme Court indicated the States could decide the retroactivity question differently under state law. *Edwards*, 141 S. Ct. at 1559 n.6 (citing *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008)). Here, Louisiana can never fully right the wrong that led to an untold number of defendants in the last 120-plus years being wrongly convicted (or over-convicted). But this Court has an opportunity to end continuing damage being wrought by the system that has undermined basic notions of justice in Louisiana for those imprisoned by non-unanimous juries.

Justice requires this Court to take that opportunity, and this Court can choose one or more of at least two paths to get there:

1) Apply the framework for determining retroactivity of rules of criminal procedure set forth in *Teague v. Lane*, 489 U.S. 288 (1989), which this Court has previously applied—and which the U.S. Supreme Court effectively overruled, for federal post-conviction purposes only, in *Edwards*—and find that *for Louisiana's purposes*, the rule announced in *Ramos* is unquestionably a watershed procedural rule; or

2) Cast aside the *Teague* framework in favor of a new test for determining retroactivity that considers the system's racist origins and systemic discrimination against Black Louisianans by relying on the State's guarantees of equal protection.

The consequences of the Court's failure to make the jury unanimity requirement retroactive would be severe, and would further the pernicious Jim Crow-era objectives that created the possibility for non-unanimous juries to send Louisianans to jail for alleged serious crimes.

ARGUMENT

I. Understanding the Origins of the State's Non-Unanimous Jury System Is Critical.

Regardless of the specific path the Court chooses for finding *Ramos* retroactive under Louisiana law, the foundation of that decision should be the racially discriminatory purposes for which Louisiana's lawmakers created the unconstitutional system.

Louisiana created its non-unanimous jury system with the indisputable intent to introduce race-based inaccuracy into the criminal justice system. The citizens who governed Louisiana in the late 1800s, exclusively white, feared Black jurors would prevent convictions of Black defendants. On the heels of the ratification of the Fourteenth Amendment and passage of the Civil Rights Act of 1875, the U.S. Supreme Court held in *Strauder v. West Virginia*, 100 U.S. 303 (1880), that States could no longer outright bar Black jurors. Previously, Louisiana required a unanimous jury for a felony conviction. *See State v. Hankton*, 122 So. 3d 1028, 1031–32 n.5 (La. Ct. App. 4th Cir. 2013). In the face of the ruling that Louisiana's white political leaders could not deny Black participation on juries as a matter of law, they had to get creative.

Louisiana newspapers promulgated a fear that Black jurors simply would subvert the interests of justice. *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1617 (2018) (quoting Louisiana newspaper articles from the relevant period). That reporting captured the racist underpinnings of that fear, characterizing Black jurors "as ignorant, incapable of determining credibility, and susceptible to bribery." Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 376 (2012). The white majority worried that Black jurors would not vote to convict Black defendants. *See* Frampton, *supra*, at 1603.

The specter of fewer convictions of Black defendants also threatened Louisiana's practice of convict leasing, which involved the State leasing penal labor to plantation owners and corporations to work on farms. "The abolition of slavery changed the penitentiary from a predominantly white institution to one that was majority black. It changed the direction of prison work from industrial to agricultural labor, as white politicians sought to reinstitute a form of control over its newly freed workforce." Aiello, *supra*, at 10 (explaining that after the Civil War, convict leasing overwhelmingly targeted Black men); Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).

Because a convict was "leased" only for the duration of his sentence, there was little-to-no economic incentive for private lessees to maintain safe work environments. Aiello, *supra*, at 12 ("Unlike a slave system that kept workers with an owner for life, and therefore made them a long-term investment, [the lessee] had custody of his 'slaves' only for the duration of their sentence ... and made the potential for [a convict's] illness and death that much greater."). "In economic terms, it made sense to keep the convict at a subsistence, if not lower, level. . . . 'Before the war we owned the negroes. . . . But these convicts we don't own 'em. One dies, get another.'" Nathan Cardon, *"Less than Mayhem": Louisiana's Convict Lease*, *1864-1901*, Louisiana History: The Journal of the Louisiana Historical Association 423 (2017); *see also* Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928*, 3 (Univ. of S. Car. Press 1996). An official of the Prison Reform Association of Louisiana estimated that the death rate per 1,000 prisoners per year from 1893 to 1901 was more than 100, which made Louisiana one of the most brutal convict lease systems in the world. Mark T. Carleton, *The Politics of the Convict Lease System in Louisiana: 1868-1901*, Louisiana History: The Journal of the Louisiana Historical Association 6 (1967).

In 1880, to ensure that the State had an ample supply of people to sustain its convict-leasing needs, particularly in light of so many convicted persons dying because of inhumane conditions, the Louisiana legislature lowered the verdict requirement to allow for non-unanimous jury decisions. *See Acts Passed by the General Assembly of the State of Louisiana at the Regular Session* 141–142 (New Orleans, E.A. Brandao 1880). "Supply had to meet demand. And so the Louisiana legislature created a new law in 1880 that removed the unanimity requirement. . . . The law created a larger criminal population . . . and reenslaved more and more of the state's black population." Aiello, *supra*, at 12.

In 1898, the State adopted the non-unanimous jury system into the Louisiana Constitution during a constitutional convention focused on eradicating any meaningful civic participation of Black citizens. *See generally Official Journal of Proceedings of the Constitutional Convention of the State of Louisiana* (New Orleans, H.J. Hearsey 1898) ("Louisiana Convention Record"). The convention adopted the rule that only nine of twelve jurors needed to vote guilty for a conviction, ensuring that three jurors could be ignored; the odds of having more than three Black jurors on one jury were low given the small number of jury-eligible Black Louisianans. *See Ramos*, 140 S. Ct. at 1394 (noting convention crafted rule "[w]ith a careful eye on racial demographics").

Convention delegates did not hide their racist goals. The convention president proclaimed that the purpose of the convention was "to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics." Louisiana Convention Record, at 9. The Judiciary Committee Chair declared that the "mission was . . . to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done. . . ." *Id.* at 375; *see also* 33 Cong. Rec. 1063–64 (1900) (Statement of U.S. Senator McEnery from Louisiana describing 1898 convention as aimed at preventing "ignorant

blacks" from "getting control of the State"). The resulting enactments also included a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white Louisianans from most of those requirements, all hallmark measures of the Jim Crow era.[1] *See Ramos*, 140 S. Ct. at 1394.

Louisiana's reenactment of the non-unanimous jury system in 1973, when the State changed the number of votes for a guilty verdict from nine to ten, did not in any way sweep those origins under the rug. *See Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring) ("Although *Ramos* does not bring an equal protection challenge, the history is worthy of this Court's attention. That is not simply because that legacy existed in the first place—unfortunately, many laws and policies in this country have had some history of racial animus—but also because the States' legislatures never truly grappled with the laws' sordid history in reenacting them.").

The U.S. Supreme Court in *Ramos* emphasized the racist purposes of the non-unanimous jury system when declaring it unconstitutional. *Ramos*, 140 S. Ct. at 1394 (discussing racist origins of non-unanimous jury laws); *id.* at 1401 (same); *id.* at 1408 (Sotomayor, J., concurring) ("[T]he racially biased origins of the Louisiana and Oregon laws uniquely matter here."); *id.* at 1417 (Kavanaugh, J., concurring) ("In light of the racist origins of the non-unanimous jury, it is no

[1] As Justice Gorsuch wrote in *Ramos*, "Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the U.S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African-Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'" *Ramos*, 140 S. Ct. at 1394 (internal citations omitted).

surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors.").

II. The Rule Announced in *Ramos* Is Watershed for Louisiana.

In *Edwards*, the U.S. Supreme Court, in a fractured opinion, determined that, despite the Court's strong condemnation of the racist origins of the system in deciding *Ramos*, the *Ramos* rule was not watershed. The Court then took a leap and decided that no rule of criminal procedure could ever be a watershed rule to justify retroactivity. Justice Kagan, however, pointed out in dissent that a fair application of the *Teague* standards show why *Ramos* was watershed. *See Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting) ("The majority could not rely on the absence of watershed rules to topple *Teague* if it had just faithfully applied that decision to this case.").

In reaching its decision, however, the U.S. Supreme Court expressly acknowledged that its holding applied only to cases on *federal* collateral review and indicated that States could still find the *Ramos* rule to be retroactive as a matter of state law in state post-conviction proceedings. *Edwards*, 141 S. Ct. at 1559 n.6 (citing *Danforth*, 552 U.S. at 282).

Since 1992, this Court has applied the *Teague* framework for potential retroactivity of rules in all criminal cases on collateral review in Louisiana. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992). Under that framework, the new rule announced in *Ramos* must apply retroactively if it requires the observance of those procedures that are implicit in the concept of ordered liberty; that is, the rule must be a "watershed rule" of criminal procedure that "alter[s] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Id.* at 1299 (quoting *Teague*, 489 U.S. at 311).

Under *Teague*, a "'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding" will have retroactive effect. *Whorton v.*

Bockting, 549 U.S. 406, 417 (2007) (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)). To qualify as "watershed," a rule must be "necessary to prevent an impermissibly large risk of an inaccurate conviction." *Id.* at 418 (internal quotations omitted). The rule must also "constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421. *Ramos* qualifies because non-unanimous juries were designed to, and did, produce inaccurate results in criminal trials. Unanimity requires the entire jury to consider and accept or reject minority viewpoints.

A fair application of *Teague*, which the U.S. Supreme Court's decision does not disturb as a matter of Louisiana law, shows that the *Ramos* rule is "watershed" within the borders of this State. Louisiana created the unconstitutional system and caused the deleterious consequences of the system that has impaired the liberty interests of criminal defendants (mostly Black) for more than 120 years. *See State v. Waldron*, No. 2021-K-0512, 2022 La. App. LEXIS 87, at *16 (La. Ct. App. 4th Cir., Jan. 24, 2022) ("[A]s it applies to this state and our history of maintaining an unconstitutional procedure, the definitive ruling in *Ramos* alters the understanding and application of a bedrock procedural element of felony trials that persisted in Louisiana for 120 years.").

The right not to be imprisoned without the unanimous votes of a jury is implicit in the concept of ordered liberty. *See, e.g.*, *Thompson v. Utah*, 170 U.S. 343, 351 (1898) (indicating a defendant enjoys a "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") (emphasis added); *Ramos*, 140 S. Ct. at 1395 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (advocating that a State can punish a defendant for committing a crime only when "the truth of [an] accusation" is "confirmed by the unanimous suffrage" of a jury "of his equals and neighbors")).

A non-unanimous jury fosters the likelihood of jury deliberations being verdict-driven rather than evidence-driven. *See* Reid Hastie et al., *Inside the Jury* 115, 173–74 (1983). Verdict-driven juries vote early and often (including before any deliberation), gloss over analysis of evidence, and steer toward swift judgment at the expense of minority views. *Id.* at 164–65; Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych. Pub. Pol'y & L. 622, 669 (2001); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity in Civil Jury Decision Making*, 4 Del. L. Rev. 1, 24–25 (2001).

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), Justice Thurgood Marshall authored a dissenting opinion that is worth consideration, particularly now that the U.S. Supreme Court has agreed that *Apodaca* was wrongly decided. Justice Marshall was critical that the Court's decisions stripped a criminal defendant's safeguards of the right to submit a case to a jury and the right to proof beyond a reasonable doubt, "safeguards [that] occupy a fundamental place in our constitutional scheme, protecting the individual defendant from the awesome power of the State." *Johnson*, 406 U.S. at 399–400 (Marshall, J., dissenting) ("After today, the skeleton of these safeguards remains, but the Court strips them of life and of meaning."). Justice Marshall poignantly declared that once a prosecutor has tried and failed to persuade a single juror of a defendant's guilt, "it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a reasonable doubt." *Id.* at 401. Fencing out a dissenting juror removes a voice from the community "and undermines the principle on which our whole notion of the jury now rests." *Id.* at 402. A rule announcing that such practices cannot take place is watershed, at least in this State where such practices were created and have been allowed to persist.

Add racial bias to the equation and the risk that non-unanimous juries produce inaccurate convictions becomes not just impermissibly large, but overwhelmingly so. "[D]iscrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice,'" damaging the jury system both in "fact" and in "perception." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (citing *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

Louisiana created its non-unanimity system to put more Black people in jail. "[T]he whole point of adopting the non-unanimous jury requirement" was to "make a difference in practice" by "silenc[ing] the voices and negat[ing] the votes of black jurors." *Ramos*, 140 S. Ct. at 1417–18 (Kavanaugh, J., concurring). As the data show, the system worked the way the adopters intended. One report suggests that "[r]oughly 40 percent of the people who are convicted after jury trials in Louisiana are convicted by nonunanimous juries."[2] And, in Louisiana, Black people were more likely than white people to be convicted by a non-unanimous jury: available data shows that 43% of Black defendants were convicted by a non-unanimous jury, compared to 33% of white defendants.[3] In other words, Black defendants were overrepresented in the pool of defendants who were convicted non-unanimously; by contrast, white defendants "were overrepresented . . . among unanimous convictions and underrepresented . . . among nonunanimous convictions." Frampton, 71 Vand. L. Rev. at 1639.

Moreover, a non-unanimous verdict is, by definition, inaccurate: "[a] 'verdict, taken from eleven, [is] no verdict' at all." *Ramos*, 140 S. Ct. at 1395 (quoting James Bradley Thayer, *A*

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[2] Dan Swenson, *Understanding Louisiana's nonunanimous jury law findings: Interactive, animated slideshow*, The Advocate (Apr. 1, 2018), https://www.nola.com/article_6f93e1a3-8c1d-51b0-ae77-e3980ec8decb.html.

[3] Jeff Adelson et al., *How an abnormal Louisiana law deprives, discriminates and drives incarceration: Tilting the scales*, The Advocate (Apr. 1, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

Preliminary Treatise On Evidence At The Common Law 88–89 n.4 (Boston, Little, Brown & Co. 1898)). It is no response to say that some who voted to acquit might have changed their minds—to do so is to disregard the votes those jurors actually cast, which was the whole point of the non-unanimous jury system.

Exonerations of Black defendants convicted by non-unanimous juries provide quintessential evidence of the system's seriously diminished accuracy. According to a 2015 report by the National Registry of Exonerations ("NRE"), Louisiana is second in the nation in the rate of wrongful convictions.[4] And, according to the NRE, Orleans Parish, Louisiana (New Orleans) has the highest per capita rate of proven wrongful convictions of any major metropolitan county.[5] In fact, New Orleans's per capita rate of proven wrongful convictions is almost ten times the national average and more than 40% higher than the city with the second highest rate (Boston). Brief of Amicus Curiae from Innocence Project New Orleans and the Innocence Project, *Ramos v. Louisiana*, 2019 WL 2563177, at *6 (U.S. 2019) (No. 18-5924) ("Innocence Project Brief"). This rate exists in New Orleans despite the fact that thousands of items of evidence in closed or cold cases that could have been DNA tested to prove innocence were lost during the flooding following Hurricane Katrina in 2005. *See* Christopher Drew, *In New Orleans, Rust in the Wheels of Justice*, N.Y. TIMES (Nov. 21, 2006).

In 39 of the 70 Louisiana exonerations, the jury was permitted to convict by a non-unanimous vote and at least 20 people were convicted by non-unanimous verdicts. *See* Innocence Project Brief, 2019 WL 2563177, at *8 n.12. Other innocent people certainly remain incarcerated

[4] *See* Nat'l Registry of Exonerations, *The First 1600 Exonerations* 14 (2015), http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf.

[5] *Id.* at 15.

because of non-unanimous jury verdicts, but their convictions remain intact because of the difficulty in overturning a conviction based on an innocence claim. *See* Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard Univ. Press 2012).

These racially disparate results are consistent with academic research about how racial bias affects juror perception, including with respect to false memories and judgments about ambiguous evidence. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1146 (2012) ("[J]urors of one race treat defendants of another race worse with respect to verdict and sentencing."); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 404 (2007); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 337 (2010) (participants found ambiguous evidence significantly more indicative of guilt when perpetrator had dark skin). Empirical evidence also shows that requiring unanimity among jurors lessens the impact of racial bias. Smith & Sarma, *supra*, at 379, 395 (juries with no black male members imposed death sentences in more than 71% of cases compared to 42.9% where at least one black person served). Allowing non-unanimous jury verdicts to stand thus increases the risk that convictions are infected by racial bias, which is constitutionally unacceptable. *See Pena-Rodriguez*, 137 S. Ct. at 868 ("[R]acial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.").

Louisiana's non-unanimous jury rule not only continued to discriminate against Black defendants until it was abolished in 2018, it also continued to discriminate against Black jurors. A 2018 analysis of non-unanimous Louisiana convictions showed that "black jurors found themselves casting 'empty votes'– that is, 'not guilty' votes overridden by the supermajority vote

of the other jurors – with 164% of the frequency we would expect if jurors voted 'guilty' and 'not guilty' in a racially balanced manner." Frampton, *supra*, at 1637.

In considering whether verdicts and resulting sentences are "inaccurate" for purposes of retroactivity analysis, it is important to go beyond exonerations where defendants have been shown to be innocent of any crime, as damning as those are. Every defendant convicted by a non-unanimous jury has presumptively been convicted of a more serious crime than a unanimous jury would have found, resulting, in every case, in an unconstitutionally excessive sentence. That is so even in those cases where the defendant might have been convicted by a unanimous jury of a lesser included offense. *Ramos* recognized a bedrock procedural element essential to fairness. And the unconstitutional practices *Ramos* forbade resulted in unconstitutionally excessive—and thus inaccurate—sentences in 100% of the cases that practice impacted. That is much more than an impermissibly large risk of inaccuracy—it is a certainty of inaccuracy, in every case. As the numbers set out above demonstrate, these unconstitutionally excessive sentences have, as intended, been disproportionately imposed on Black defendants. Each of those verdicts and sentences must now be subject to reconsideration in order to remedy this racist, unconstitutional deprivation of rights.

The rule announced in *Ramos* is watershed for the State of Louisiana.

III. The Court Could Discard the *Teague* Framework and Adopt an Arguably More Reasonably Tailored Framework for Purposes of Determining Retroactivity.

If the Court chooses to depart from *Teague*, the Court should adopt a retroactivity test that takes into account the harm done by the past use of a particular law, including harms that violate this State's constitutional guarantees, which includes the guarantee of equal protection. The U.S. Supreme Court has afforded the States with the ability to provide broader retroactive effect than provided by *Teague*. *See Danforth*, 552 U.S. at 282 ("[t]he *Teague* decision limits the kinds of

constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague*").

Other States have crafted their own tests for retroactivity instead of following *Teague*. *See, e.g.*, *In re Brown*, 259 Cal. Rptr. 3d 56, 71 (Cal. Ct. App. 2020) (citing *In re Lucero*, 132 Cal. Rptr. 3d 499, 504–05 (Cal. Ct. App. 2011) (adopting three-pronged approach)); *Missouri ex rel. Taylor v. Steele*, 341 S.W.3d 634, 650–51 (Mo. 2011); *Hawaii v. Jess*, 184 P.3d 133, 153–54 (Haw. 2008); *West Virginia v. Kennedy*, 735 S.E.2d 905, 923–24 (W. Va. 2012); *Wyoming v. Mares*, 335 P.3d 487, 503 (Wyo. 2014) ("Rather, in the future, the decisions of the courts of this state whether to give retroactive effect to a rule of law should reflect independent judgment, based upon the concerns of this Court and the 'uniqueness of our state, our Constitution, and our long-standing jurisprudence.'" (citation omitted)). And some states have found rules of criminal procedure to be retroactive even after the U.S. Supreme Court has found otherwise. *See, e.g.*, *Delgadillo v. Woodford*, 527 F.3d 919, 922 (9th Cir. 2008) (finding California state court's decision proper that *Crawford v. Washington*, 541 U.S. 36 (2004), should be retroactive for state-court purposes, even though U.S. Supreme found the *Crawford* rule not retroactive in *Whorton v. Bockting*, 549 U.S. 406, 409 (2007)).

The Louisiana Constitution provides that "[n]o person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime." La. Const., art. I, § 3. This constitutional provision has been interpreted as "mandat[ing] that state laws affect

alike all persons and interests similarly situated." *Beauclaire v. Greenhouse*, 922 So. 2d 501, 505 (La. 2006). Under this principle, when a "law classifies individuals by race or religious beliefs, it shall be repudiated completely." *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1107 (La. 1985).

Former Chief Justice Johnson explained that she would have granted a writ of certiorari in *State v. Gipson* in order to recognize the retroactive application of *Ramos* to cases on state collateral review. 2019-01815 (La. 06/03/20), 296 So. 3d 1051 (La. 2020) (Johnson, C.J., dissenting). In cases involving an "intentionally racially discriminatory law that has disproportionately affected Black defendants and Black jurors," there is "no principled or moral justification for differentiating between the remedy for a prisoner convicted by that law whose case is on direct review and one whose conviction is final," because "[b]oth are equally the product of a racist and unconstitutional law." *Id.* at 1055–56 ("[i]f … federal courts do not force us to remedy those convictions …, the moral and ethical obligation upon courts of this state to address the racial stain of our own history is even more compelling, not less"). Even if "functionalist assessments" such as the administrative and fiscal costs are taken into account, those costs must be borne "if [the Court] mean[s] to show that [it] guarantee[s] all Louisianans equal justice." *Id.* at 1056. Chief Justice Johnson then cited to *Ramos*, emphasizing that the Court "must not 'perpetuate something [it] know[s] to be wrong only because [it] fear[s] the consequences of being right." *Id.* (citing *Ramos*, 140 S. Ct. at 1408).

The State is categorically barred from establishing a caste system, whether explicitly or implicitly. *See Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985) (finding that 1901 Alabama facially neutral constitutional provision violated Equal Protection Clause due to racist intent and results). Because the non-unanimous jury system was the product of racist intent and produced

racially disparate outcomes, it contributed to such a racial caste system, whose results can only be remedied through the retroactive application of *Ramos*.

Indeed, preserving convictions by non-unanimous juries not only perverts our system of justice but, like all systems of discrimination, inflicts "serious social and personal harms" upon racial minorities. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984); *see also Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) ("[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community can cause serious noneconomic injuries . . . ." (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Discriminatory harm is especially concerning when manifested in the criminal justice process. *See, e.g.*, *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

Moreover, "[t]he injury is not limited to the defendant." *Ballard v. United States*, 329 U.S. 187, 195 (1946). Just as race-based exclusion of petit jurors violates the *juror*'s rights under the Equal Protection Clause, *Powers v. Ohio*, 499 U.S. 400, 409 (1991), so too did the non-unanimous jury rule violate the rights of minority jurors whose voices Louisiana purposefully silenced because of their race. By rendering irrelevant the votes of non-white jurors, Louisiana imposed "a brand upon them" and the defendants, functioning as "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder*, 100 U.S. at 308.

The community is also harmed "by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140

(1994); *see also Ballard*, 329 U.S. at 195 (noting harm "to the law as an institution" and "to the community at large"). Allowing convictions obtained under Jim Crow laws to stand "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 555–56. *Ramos* made clear that non-unanimous convictions must not stand in the future. The Court today should announce that *past* Louisiana convictions under this scheme similarly must not stand.

Thus, because "[s]imply pledging to uphold the Constitution in future criminal trials does not heal the wounds already inflicted on Louisiana's African American community by the use of this law for 120 years," *Ramos* should be applied retroactively in order for "*all* citizens [to have] confidence in the courts to apply equal justice." *Gipson*, 296 So. 3d at 1057 (Johnson, C.J., dissenting).

CONCLUSION

Former Chief Justice Johnson put it well: "The original purpose of the non-unanimous jury law, its continued use, and the disproportionate and detrimental impact it has had on African American citizens for 120 years is *Louisiana*'s history." *Id.* at 1055. Whether the Court applies the *Teague* framework and finds *Ramos* announced a watershed rule for Louisianans, or alternatively jettisons the *Teague* framework in favor of a new test for determining retroactivity that considers the broader societal harms caused by the system's racist origins and systemic discrimination against Black Louisianans, the result is the same—the rule announced in *Ramos* should be retroactive to Louisianans convicted of serious crimes by non-unanimous juries. In cases where the voices of dissenting jurors were silenced, justice requires that those defendants convicted in such cases must receive new trials.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Leave to File *Amici Curiae* of the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense and Education Fund, Inc., and Voice for the Experienced in Support of Respondent, Reginald Reddick, has been served upon all counsel of record by electronic mail and/or U.S. Mail, all of whom are identified as follows:

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