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 U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

Jeff Landry
Attorney General
Elizabeth Baker Murrill
Solicitor General
**Counsel of Record*
Shae McPhee
Deputy Solicitor General
Josiah M. Kollmeyer
Assistant Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6766
murrille@ag.louisiana.gov

Hillar Moore
District Attorney
Stacy Wright
Assistant District Attorney
East Baton Rouge Parish
222 St. Louis Street, Ste. 550
Baton Rouge, LA 70802
(225) 389-3400

Jeffrey M. Harris
Consovoy McCarthy PLLC
1600 Wilson Blvd, Suite 700
Arlington, VA 22209

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QUESTION PRESENTED

Whether this Court's decision in *Ramos v. Louisiana*, 590 U. S. ___ (2020), applies retroactively to cases on federal collateral review.

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STATEMENT

A. Factual Background

After turning himself into police custody and signing a waiver acknowledging his right to counsel,[1] Petitioner Thedrick Edwards confessed to a host of crimes. Police officers captured Edwards' confession on video, which is available in the joint appendix.

According to Edwards, he and a friend—Joshua Johnson—began a crime spree by rushing a truck owned by a Louisiana State University student named Ryan Eaton.[2] Eaton was stepping out of the truck, on his way to visit his girlfriend's apartment, when they pointed guns at him and forced him back into the vehicle.[3]

Johnson drove them to an ATM[4] and instructed Eaton to "put your card in" so they could steal his money.[5] When it turned out that Eaton, a poor college student, had no funds in his account,[6] his kidnappers grew angry. Eaton later explained that, "[t]hey started talking to one another about what they would do with me and where they would leave

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[1] Volume II of V at 319–20.

[2] J.A., Videotape at 0:07:16–07:20.

[3] *Id.* at 0:07:35–07:37.

[4] *Id.* at 0:10:05–10:10; *see* Volume II of II at 1456 (Eaton testimony).

[5] J.A., Videotape at 0:11:17–11:19.

[6] *Id.* at 0:11:32–11:34

me."[7] They threatened to "[l]eave him in the woods" and shoot him in the gut.[8]

Desperate, Eaton suggested returning to his apartment so they could take the belongings of his "rich roommate."[9] The kidnappers agreed, and so they drove to Eaton's apartment and took numerous items including a light blue polo shirt.[10] On a subsequent evening, footage from a camera at a bowling alley captured Edwards wearing Eaton's polo.[11]

Meanwhile, Eaton's girlfriend grew worried when he failed to show up at her apartment as they had planned. Eaton's assailants had his cell phone when she began texting and calling. Johnson "wanted to mess with [Eaton's] girl."[12] With a gun to his head, they told Eaton to use his phone to call his girlfriend and "make like there wasn't nothing wrong" and tell her "he just wanted to come over."[13] They forced Eaton to ask his girlfriend if she was

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[7] Volume II of II at 1456.

[8] *Id.*

[9] J.A., Videotape at 0:11:50–12:03; *see* Volume II of II at 1457.

[10] J.A., Videotape at 0:15:15–15:25; Volume II of II at 1459–60.

[11] J.A., Videotape at 0:15:15–15:25; Volume IV of V at 861.

[12] J.A., Videotape at 0:17:45–17:50.

[13] *Id.* at 0:20:50–21:07; Eaton later explained that they "put it on speaker and told [him] to act cool with a gun to [his] head." Volume II of II at 1462.

alone, and they learned that other girls were also at her apartment.[14]

On their way to Eaton's girlfriend's apartment, Eaton noticed that one of his kidnappers—he later learned it was Edwards—briefly removed his face covering.[15] Eaton managed to study Edwards' face for a "solid five seconds."[16] This allowed Eaton to identify Edwards in a photo lineup.[17]

Eventually, they made it to Eaton's girlfriend's apartment. Edwards and Johnson had devised a plan to "rush in[to]" the apartment after they opened the door for Eaton.[18] Once inside, Johnson—with a gun in his hand—instructed everybody to "lay down."[19] In the video, Edwards explained how Eaton had his arms over his girlfriend, trying to protect her when they were lying on the floor.[20] Edwards and Johnson proceeded to dump items from the girls' purses and gather them up.[21]

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[14] J.A., Videotape at 0:21:10–21:27.

[15] Volume II of II at 1500–01.

[16] *Id.*

[17] Volume V of V at 958–59.

[18] J.A., Videotape at 0:21:20–22:40.

[19] *Id.* at 0:23:00–23:15.

[20] *Id.* 0:39:22–39:35. This coincides with Eaton's testimony that, "We were kind of interlocked." Volume II of II at 1509; *see* Volume IV of V at 771, 778 (testimony of Eaton's girlfriend explaining that they were locking arms when on the ground).

[21] J.A., Videotape at 0:24:45–25:00; Volume II of II at 1465.

At this point in the video, Edwards grew hesitant and explained to the police officer, "I told you, this is when all the mistakes started happening."[22] Edwards then confessed to laying down next to one of the girls (who was a senior in high school), putting a condom on, and ordering her to perform "oral sex."[23] Edwards admitted that he "had sex with her" after forcing her to give him oral sex.[24] When asked whether he had anal or vaginal sex with the girl, Edwards said, "both."[25]

Edwards explained how he hit the girl as he raped her.[26] When she began crying, Edwards told her "don't move" and "be quiet."[27] Meanwhile, Johnson had dragged another girl upstairs and "had sex with her."[28] Edwards lamented to the officer: "I know it was wrong."[29]

The girl later testified that, "[He] told me to suck his dick with a gun to my head,"[30] and "He hit me with his hand,"[31] and "I thought I was gonna

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[22] J.A., Videotape at 0:25:10–25:27.

[23] *Id.* at 0:25:30–26:10; 0:26:50–27:07.

[24] J.A., Videotape at 0:28:58–29:09.

[25] *Id.* at 0:29:06–29:18.

[26] *Id.* at 0:29:34–30:37.

[27] *Id.* at 0:32:10–32:40.

[28] *Id.* at 0:27:49–27:56; *see* Volume IV of V at 681.

[29] J.A., Videotape at 0:28:40–28:50.

[30] Volume IV of V at 663.

[31] Volume IV of V at 665.

die."[32] Edwards hit her because she looked up at him: "He said I was stupid to look up and then he hit me."[33]

After raping the two girls, Edwards and Johnson stole many things from their apartment before leaving. Eaton and the girls immediately contacted the police. The girl Edwards raped was "hysterical, just tears, [a] frantic mess."[34]

Their crime spree did not end there. Two days later, Edwards and Johnson—armed with guns—rushed Marc Verret as he exited his car.[35] They forced him back into his vehicle and drove him to an ATM. Once there, Verret withdrew $300 from his account and gave it to his kidnappers before they released him.

Police developed Edwards as a subject and put out a warrant for his arrest and DNA.[36] Edwards turned himself into police custody and confessed to these crimes.

B. Procedural History

The State charged Edwards with 5 counts of armed robbery, 1 count of attempted armed robbery, 2 counts of aggravated kidnapping, and 1 count of

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[32] *Id.*

[33] *Id.*

[34] Volume II of II at 1469; *see* Volume IV of V at 667.

[35] J.A., Videotape at 0:52:00–52:30; Volume IV of V at 750–59.

[36] Volume II of V at 309.

aggravated rape. J.A. 17. Edwards pleaded not guilty.

Edwards moved to suppress his confession. But after viewing the video, the state trial judge found that, "[t]he demeanor of the tape -- interview that I saw, I didn't see where anybody was threatening [Edwards], or harassing, or intimidating, or coercing him in any way."[37] The court denied Edwards' motion to suppress.

At voir dire, the State struck 10 of 11 minority panelists from the jury pool—either for cause or through a peremptory challenge. J.A. 251–52. Edwards' counsel made no challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986).

At trial, the jury viewed the video of Edwards' confession. The jury found Edwards guilty on 5 counts of armed robbery, 2 counts of aggravated kidnapping, and one count of aggravated rape. J.A. 17–25. The jury divided 10-2 on 4 counts of armed robbery. They divided 11-1 on 1 count of armed robbery, 2 counts of aggravated kidnapping, and the aggravated rape charge. The jury unanimously found Edwards not guilty of attempted armed robbery.

Edwards received mandatory life sentences for the aggravated kidnapping and aggravated rape charges. And the trial judge sentenced him to 30 years' imprisonment for each of the armed robbery

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[37] Volume III of V at 486. The video manifestly supports the state court's finding. At one point in the tape, Edwards jokes with the officer about the officer's weight. J.A., Videotape at 0:44:10–44:30.

charges.[38] At the sentencing hearing, the trial judge said, "I can say without hesitation that this is the most egregious case that I've had before me."[39] Edwards' conviction and sentence were upheld on direct review. J.A. 170.

Edwards sought state post-conviction relief—raising the argument that the non-unanimous jury verdict violated his constitutional rights. J.A. 87, 89, 96–99. The state court expressly relied on this Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), when denying relief. J.A. 130, 144–45.

For the first time, Edwards also raised a challenge under *Batson*, asserting without explanation that the State violated his rights by challenging five minority panelists for cause and another five through peremptory challenges. J.A. 92, 110–11. The state district court rejected Edwards' claim, observing that Edwards failed to timely raise his *Batson* challenge and that Edwards was unable to identify any particular panelist who was likely struck because of his or her membership in a protected class. *See* J.A. 136.

The state intermediate appellate court denied relief, J.A. 148, and the state supreme court denied review. J.A. 149.

Edwards next sought habeas relief in federal district court, which was denied. J.A. 278–81. The magistrate judge concluded that *Apodaca* remained

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[38] Volume V of V at 1113–14.

[39] *Id.* at 1113.

settled law and foreclosed Edwards' challenge to his conviction by a non-unanimous jury. J.A. 250–51.

The magistrate judge also found that Edwards' *Batson* claim was meritless, holding that "[t]here is nothing in the record that rebuts the determination of the trial court that the State's expressed reasons were non-pretextual and were legitimate grounds for the exercise of the challenges against the prospective jurors." J.A. 251–52 (listing race-neutral reasons why several black jurors were struck, including inability to concentrate during the trial, having been the victim of similar crimes, and a self-proclaimed inability to be fair).

The United States Court of Appeals for the Fifth Circuit denied Edwards' request for a COA on procedural and substantive grounds: (1) he failed to adequately brief the petition; and (2) he failed "to make the requisite showing" for a COA. J.A. 298–99. Edwards petitioned this Court for certiorari.

While his petition was pending here, this Court decided *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Through a set of fractured opinions, the Court overturned *Apodaca*, held that the Sixth Amendment requires a unanimous jury verdict, and incorporated the unanimous jury guarantee against the States.

Two weeks later, the Court granted certiorari in this case and asked the parties whether *Ramos* applies retroactively to cases on federal collateral review.

SUMMARY OF ARGUMENT

In *Teague v. Lane*, 489 U.S. 288, 311 (1989), this Court held that "new rules" of criminal procedure should not apply to cases on collateral review unless they constitute "watershed" rules. This Court's decision in *Teague* and the plain text of 28 U.S.C. §2254(d)(1) each independently foreclose retroactive application of *Ramos*. The Court should affirm the denial of Edwards' federal habeas petition.

I. Edwards first asserts that *Teague*'s retroactivity bar does not apply because the outcome in *Ramos* was "logically dictated" by precedent, and thus *Ramos* was merely applying an "old rule." But "[t]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision." *Graham v. Collins*, 506 U.S. 461, 467 (1993). That is exactly what *Ramos* did. In 1972, the Court held in *Apodaca* that nothing in the Constitution prohibited States from accepting non-unanimous verdicts in state court. A clear majority of the Court in *Ramos* viewed *Apodaca* as binding precedent that needed to be overruled in order to mandate unanimous verdicts in state courts. A decision that discards a nearly 50-year-old precedent is the very definition of a new rule.

A case also announces a new rule when it "imposes a new obligation on the government." *Chaidez v. United States*, 568 U.S. 342, 347 (2013). Once again, that is exactly what *Ramos* did. Until 2020, States had discretion to accept non-unanimous verdicts in criminal cases in state court, as Oregon, Louisiana and the territory of Puerto Rico did for decades. After *Ramos*, however, the Sixth and

Fourteenth Amendments now prohibit States from experimenting with less-than-unanimous verdicts. *Ramos* unquestionably changed the law and broke new ground by eliminating policy choices that were previously available to the States.

Edwards argues that *Ramos* was merely applying an old rule because it was dictated by "well-settled principles" or the "logical implications" of other precedents. But that is not the relevant test. For *Ramos* to be deemed an old rule, Edwards must show that it would have been "apparent to all reasonable jurists" that the later-announced rule was dictated by then-existing precedent. *Lambrix v. Singletary*, 520 U.S. 518, 527–28 (1997). Even if Edwards thinks *Apodaca* was poorly reasoned or had been undercut by later decisions, it surely was not apparent to all reasonable jurists that *Apodaca* was not good law or was no longer controlling. Indeed, between 1972 and 2019, this Court often cited and acknowledged *Apodaca*'s holding without suggesting that it had somehow been abrogated. Until *Ramos* was decided, a reasonable jurist surely could have concluded that States retained discretion to allow convictions by a non-unanimous vote.

II. Edwards also fails to make the demanding showing that *Ramos* created a "watershed" new procedural rule that should apply retroactively to cases on collateral review. States have powerful interests in the certainty and finality of their criminal convictions—especially where, as here, they obtained those convictions in direct reliance on this Court's then-existing precedents. This Court has been extraordinary careful about applying new rules

retroactively. The only procedural right the Court has *ever* applied retroactively is the right to counsel in serious criminal cases. The Court did not retroactively apply the jury right to the States once that right was incorporated through the Fourteenth Amendment. It did not retroactively apply *Batson*'s protections against racial discrimination in the selection of jurors. And it has not applied retroactively a host of procedural rules that apply in capital cases. Indeed, since the Court decided *Teague* in 1989, it has declined *every* invitation to make a new procedural rule apply retroactively. This case should not be the first.

Edwards and his *amici* argue that retroactivity of *Ramos* is needed to prevent a risk of inaccuracy in jury verdicts. But there is no reason to believe that non-unanimous verdicts are disproportionately likely to put innocent people behind bars. Louisiana's rate of exonerations per capita is comparable to that of New York and Texas—and much lower than the exoneration rate in Illinois. Oregon's exoneration rate is lower still, and is a fraction of that in many other States that have always required unanimity.

Moreover, unanimity may increase or decrease the accuracy of a verdict depending on the circumstances. Unanimity may increase accuracy if the holdout juror is uniquely attuned to a flaw in the prosecution's case. But there are numerous circumstances where a unanimity mandate will *decrease* accuracy, *e.g.*, if the holdout has an irrational view of the evidence, has a bias in favor of the defendant, or is simply seeking nullification notwithstanding overwhelming evidence of guilt.

The Court's treatment of the new rule in *Crawford v. Washington*, 541 U.S. 36 (2004), is instructive. Like *Ramos*, *Crawford* was primarily based on history and the original understanding of the Bill of Rights. And, also like *Ramos*, the rule in *Crawford*—which reformulated the standard for admissibility of hearsay evidence under the Confrontation Clause—could increase or decrease the accuracy of a trial depending on the circumstances. This Court unanimously declined to apply *Crawford* retroactively, *see Whorton v. Bockting*, 549 U.S. 406 (2007), and there is no reason for a different outcome here.

Edwards and his *amici* further assert that *Ramos* should apply retroactively in light of what they call the "racist origins" of the non-unanimity policy. But that argument is flawed several times over. Whatever the origins of Louisiana's law in 1898, the State reassessed and readopted that policy through the post-*Apodaca* 1974 constitutional convention, which was never alleged to be the product of racial animus. In all events, the *Batson* doctrine is a fundamental protection against racial discrimination in jury service, but even *Batson* did not apply retroactively to cases on collateral review—in large part due to the serious disruption that would result from such a holding. *Allen v. Hardy*, 478 U.S. 255 (1986). Edwards offers no plausible reason why *Ramos* should be treated differently.

Finally, although Edwards and his *amici* claim that non-unanimous verdicts are *inherently* inaccurate or biased, "one could advocate for and justify a non-unanimous jury rule by resort to

neutral and legitimate principles," *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring), such as judicial efficiency and minimizing the likelihood of hung juries. Non-unanimous verdicts have been supported over the years by leading professional organizations (such as the American Bar Association and American Law Institute), prominent scholars, and a number of countries that share our common-law legal tradition (such as the United Kingdom). There is not the slightest indication that this support was driven by racial animus as opposed to good-faith policy judgments about the best way to structure the jury system.

III. Edwards makes no meaningful attempt to grapple with the relitigation bar in 28 U.S.C. §2254(d)(1), which independently forecloses application of *Ramos* to this case. Where, as here, a state court has adjudicated the relevant federal issues on the merits, §2254(d)(1) forecloses federal habeas relief unless the state court decision was contrary to or an unreasonable application of clearly established federal law *at the time of the state court's decision*.

Whether *Ramos* is deemed an old rule or a new rule, it surely was not a *clearly established* rule at the time the state habeas court rejected Edwards' constitutional challenge to his non-unanimous conviction. The state court expressly relied on *Apodaca* in rejecting Edwards' claim, and there can be no plausible argument that reliance on a then-binding decision of this Court was somehow contrary to clearly established federal law. The text of §2254(d)(1)'s relitigation bar is categorical and

unequivocal, and provides no exceptions even if a new procedural rule is deemed "watershed." Section 2254(d)(1) independently forecloses retroactive application of *Ramos* even apart from the *Teague* doctrine.

ARGUMENT

I. *RAMOS* ANNOUNCED A "NEW RULE."

"Under *Teague*, as a general matter, 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'" *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). To avoid *Teague*'s retroactivity bar, Edwards contends that the Court did not announce a *new* rule in *Ramos*. He argues that, because "[l]ong-settled precedent logically dictated the result in *Ramos*," the rule was old. *See* Pet. Br. 12.

That argument is wrong for at least two reasons. First, a majority of the Court in *Ramos* agreed that *Apodaca* was a binding precedent. As this Court has explained, "[t]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision." *Graham*, 506 U.S. at 467. Second, even if *Apodaca* were not binding precedent, *Ramos* announced a new rule for purposes of *Teague* because its holding would not have been apparent to "all reasonable jurists" when the state courts upheld Edwards' conviction. *Chaidez*, 568 U.S. at 347.

A. *Ramos* Broke New Ground By Overruling Precedent.

"A case announces a new rule, *Teague* explained, when it breaks new ground or imposes a new obligation on the government." *Id.* (cleaned up). Put differently, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* The clearest harbinger of a new rule is a discarded precedent. *Graham*, 506 U.S. at 467.

At the time of the Founding, the States had power to accept non-unanimous jury verdicts because the Sixth Amendment applied only to the *federal* government. *See Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833). After the passage of the Fourteenth Amendment, however, the Court began "initiating what has been called a process of 'selective incorporation,' *i.e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments" against the States. *McDonald v. City of Chicago*, 561 U.S. 742, 763 (2010). The Court's "general rule" was to apply an Amendment's guarantee against the States exactly as it applied against the federal government. *See id.* at 766 n.14. But the Court made an "exception" in *Apodaca* by holding that, "although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." *Id.* This Court unanimously acknowledged the existence of that exception as recently as 2019. *See Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019)

(acknowledging the Court's "holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings").

Ramos unquestionably broke new ground, imposed new constitutional obligations, and announced a new rule by expressly overruling *Apodaca*. In *Apodaca*, the Court considered exactly the same question it considered in *Ramos*: whether "conviction of [a] crime by a less-than-unanimous jury violates the right to trial by jury in criminal cases specified by the Sixth Amendment and made applicable to the States by the Fourteenth." *Apodaca*, 406 U.S. at 406; *compare Ramos*, 140 S. Ct. at 1394 ("We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense."). The Court's answer to this question in *Apodaca* was no. The Court's answer in *Ramos* was yes. That is the very definition of a "new rule."

It does not matter that the *Apodaca* decision was fractured or that the "ruling was the result of an unusual division among the Justices." *McDonald*, 561 U.S. at 766 n.14. In *Apodaca*, "four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials . . . and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials." *Id.* (citations omitted). "Justice Powell's concurrence in the judgment broke the tie, and he concluded that

the Sixth Amendment requires juror unanimity in federal, but not state, cases." *Id.*

The fact that a majority of the Court could not agree on a definitive rationale in *Apodaca* does not mean that the Court failed to create a precedent. This Court explained in *Marks v. United States* that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977) (internal quotation marks omitted); *see June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring).[40]

Justice Powell's concurrence reflected the narrowest rationale among the Justices in the majority in *Apodaca*. Four of the Justices in the *Apodaca* majority believed the Sixth Amendment did not require unanimity in either state *or* federal court—but Justice Powell believed that only state courts had discretion to accept non-unanimous

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[40] Indeed, under this Court's precedent, even summary affirmances and denials "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *see Ramos*, 140 S. Ct. at 1430 (Alito, J., dissenting) ("If the *Apodaca* Court had summarily affirmed a state-court decision holding that a jury vote of 10 to 2 did not violate the Sixth Amendment, that summary disposition would be a precedent."). Accordingly, *a fortiori*, this Court's "full-blown decision" in *Apodaca* was binding precedent. *Ramos*, 140 S. Ct. at 1430 (Alito, J., dissenting).

verdicts. *See Ramos*, 140 S. Ct. at 1431 (Alito, J. dissenting). Under *Marks*, the Court's *holding* was that the Sixth and Fourteenth Amendments did not prohibit States from allowing non-unanimous verdicts. Until *Apodaca* was overruled in *Ramos*, any challenge to a non-unanimous state court jury verdict under the Sixth and Fourteenth Amendments would have failed. *See Mandel*, 432 U.S. at 176.

A majority of the Court in *Ramos* agreed that *Apodaca* was binding precedent that required overruling before the Court could mandate unanimous jury verdicts in state court. *See Ramos*, 140 S. Ct. at 1429 (Alito, J., dissenting, joined by Roberts, C.J., and Kagan, J.) ("The idea that *Apodaca* was a phantom precedent defies belief."); *id.* at 1408 (Sotomayor, J., concurring) ("[O]verruling precedent here is not only warranted, but compelled."); *id.* at 1410 (Kavanaugh, J., concurring) ("I agree with the Court that the time has come to overrule *Apodaca*."). And Justice Thomas would have decided the case under the Privileges and Immunities Clause but he, too, noted that the majority "decided to abandon *Apodaca*." *Id.* at 1425 (Thomas, J. concurring in the judgment). As Justice Alito explained, only "three of the Justices in the majority" held the belief that *Apodaca* was not binding authority. *id.* at 1429 (Alito, J., dissenting). And in *McGirt v. Oklahoma*, the Court again recognized that *Ramos* had overruled precedent. *See* 140 S. Ct. 2452, 2480 (2020) ("And if the threat of unsettling convictions cannot save a *precedent* of this Court, *see Ramos*, 140 S. Ct. at 1406–08, it certainly cannot force us to ignore a statutory promise when

no precedent stands before us at all." (emphasis added) (citation shortened)).

To be sure, the members of the *Ramos* majority that viewed *Apodaca* as precedent disagreed about whether *Apodaca* should be abandoned or preserved. A differently composed majority ultimately held that unanimity is required in state courts. But that result does not change the basic reality that at least six of the Justices who decided *Ramos* viewed *Apodaca* as a binding precedent of this Court that was being overruled.

In short, once this Court issued its opinion in *Ramos* and overturned *Apodaca*, the law changed throughout the country. Now, as a direct consequence of *Ramos*, States no longer have the option to accept non-unanimous jury verdicts or to "experiment" with different types of less-than-unanimous verdicts.[41] *Ramos* unquestionably broke new ground and "impose[d] a new obligation" that removed the States' discretion to accept non-unanimous jury verdicts. *Chaidez*, 568 U.S. at 347.

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[41] *See* Br. of Amici Curiae Utah, *et. al*, at 1, https://bit.ly/2EjncaT; *see also Ramos*, 140 S. Ct. at 1407 (plurality op.) ("In fact, 14 jurisdictions have already told us that they would value the right to 'experiment' with nonunanimous juries.").

B. The Rule Established In *Ramos* Was Not Apparent To "All Reasonable Jurists" When The State Courts Considered Edwards' Unanimity Claim.

Even if this Court concludes that *Apodaca* was not binding precedent, that does not end the inquiry. Indeed, even if this Court believes *Ramos* fits "within the logical compass" of its earlier decisions, or the result of *Ramos* was "controlled by a prior decision," that is not "conclusive" of whether *Ramos* issued a new rule under *Teague*. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Instead, the "principal task is to survey the legal landscape" when the state court upheld the conviction and determine whether it would be "apparent to all reasonable jurists" that the later-announced rule was dictated by then-existing precedent. *Lambrix v. Singletary*, 520 U.S. at 527–28; *accord Beard v. Banks*, 542 U.S. 406, 413 (2004); *Chaidez*, 568 U.S. at 347.

When the state post-conviction court considered Edwards' challenge to his non-unanimous verdict, it was not apparent to all reasonable jurists that *Apodaca* either was not good law or did not control in non-unanimous jury cases. This Court never expressly repudiated *Apodaca* until it issued its opinion in *Ramos*, despite numerous opportunities to do so. *See Ramos*, 140 S. Ct. at 1428 (Alito, J., dissenting) (collecting more than 20 instances in which Court denied certiorari on this question without a single noted dissent). To the contrary, this Court cited *Apodaca* on numerous occasions, as recently as 2019, without suggesting that it had

somehow been discarded or overruled. *See, e.g.*, *Timbs*, 139 S. Ct. at 687 n.1; *McDonald*, 561 U.S. at 766 n.14.

Before this Court's decision in *Ramos*, reasonable jurists readily concluded that *Apodaca* remained binding law and that the States retained discretion to accept non-unanimous jury verdicts. Adopting the opposite conclusion yields absurd results. A majority of this Court in *Ramos* was not *unreasonable* when treating *Apodaca* as binding law. Nor were the many, many state judges in Louisiana and Oregon that have upheld thousands of non-unanimous jury convictions over the years since *Apodaca* was decided. These results were surely not beyond the realm of what *any reasonable jurist* could have concluded.

At bottom, "[t]he rule of *Teague* serves to 'validat[e] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" *Sawyer v. Smith*, 497 U.S. 227, 234, (1990) (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)); *accord Beard*, 542 U.S. at 413. This Court instituted the "new rule" framework to address situations exactly like the one here. As the *Ramos* plurality explained, "*Teague* frees [the Court] to say what [it] know[s] to be true about the rights of the accused under our Constitution today, while leaving questions about the reliance interest States possess in their final judgments for later proceedings crafted to account for them." *Ramos*, 140 S. Ct. at 1407 (plurality op.). Gutting *Teague* by suggesting that no reasonable jurists could have accepted *Apodaca* as

binding precedent between 1972 and 2020 would subvert the Court's ability to correct the law in future cases.

C. Edwards' Attempt To Characterize *Ramos* As Applying An Old Rule Lacks Merit.

Because reasonable jurists could conclude *Apodaca* remained good law at the time the state courts upheld Edwards' conviction, Edwards' argument that *Ramos* was merely applying an "old rule" for purposes of *Teague* does not withstand scrutiny.

Edwards (at 12–13) relies heavily on *Stringer v. Black*, 503 U.S. 222, 228 (1992), for the proposition that a rule is deemed "old" if it follows from the "logical implications of past precedent." Notably, however, *Stringer* was not addressing the retroactive effect of a decision of this Court that *overturned Supreme Court precedent*. At most, the State argued in *Stringer* that the rule in question should be deemed "new" because the question had been "express[ly] . . . left open" in previous cases, *id.* at 230, and the Fifth Circuit had previously endorsed the State's position, *id.* at 236–37. This Court rejected those arguments on the ground that the Fifth Circuit's decision was a "serious mistake" and prior Supreme Court precedent already reflected the rule the State now claimed to be new. *Id.* at 237. But that is a far cry from a situation—as here—in which this Court overturns a 50-year-old decision that had expressly upheld the very same state laws later found unconstitutional.

Edwards also argues at length (at 13–17) that the outcome in *Ramos* was "controlled" by "three well-settled principles": that unanimity is central to the jury system; that the jury right was incorporated against the States; and that incorporated rights must apply the same against both the States and the federal government. But those arguments suggest, at most, that *Apodaca* was wrongly decided or that its reasoning had been undermined by subsequent decisions. They do not change the fact that *Apodaca* was a precedent of this Court that state courts and lower federal courts were bound to follow from 1972 until 2020. While *Apodaca* was in force, the lower courts were bound to faithfully apply its holding even if they believed—as Edwards does, *see* Pet. Br. 17–22—that its holding was wrong or was inconsistent with other "well-settled principles." *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Finally, Edwards is wrong when he suggests (at 22) that "the State of Louisiana was not even willing to argue [in *Ramos*] that *Apodaca* supplied a binding precedent." Louisiana did state in its brief that "neither party is asking the Court to accord Justice Powell's solo opinion in *Apodaca* precedential force." La. *Ramos* Br. at 47. That is because Louisiana's primary legal argument in *Ramos* was that the Sixth Amendment did not require unanimity *at all*, whether in state or federal court. *See id.* at 49–50

("Louisiana is not defending State law on the ground that the Sixth Amendment should not apply to it. Louisiana is instead arguing that its jury system complies with the Sixth Amendment in all respects."). But Louisiana never wavered in defending the ultimate *holding* of *Apodaca*—that "States may allow criminal convictions based on jury verdicts that are not unanimous." *Id.* at 47; *see also id.* at 9 ("[T]here is no 'special justification' for this Court to abandon nearly 50 years of precedent holding that States have discretion to permit convictions by a non-unanimous vote."). In any event, the fact that a majority of Justices in *Ramos* viewed *Apodaca* as binding precedent is sufficient reason for the State to adopt that view in this separate litigation.

In sum, *Ramos* broke new ground by overruling precedent and requiring unanimity in every jurisdiction throughout the United States. At the very least, reasonable jurists could disagree about the import of *Apodaca* at the time the state courts decided Edwards' unanimity claim. For these reasons, Edwards' argument that *Ramos* announced an old rule should fail.

II. *RAMOS* DID NOT ANNOUNCE A "WATERSHED" RULE OF CRIMINAL PROCEDURE.

Because *Ramos* articulated a new rule, *Teague*'s retroactivity bar applies to Edwards' claim unless the rule falls under one of two exceptions. *See Beard*, 542 U.S. at 411. The *Teague* test "is demanding by design." *Ramos*, 140 S. Ct. at 1407 (plurality op.) (citing *Stringer*, 503 U.S. at 228). That is especially

true for new *procedural* rules that affect "'only the manner of determining the defendant's culpability.'" *Id.* at 1419 (Kavanaugh, J., concurring) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

This Court will give "retroactive effect to only a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Summerlin*, 542 U.S. at 352 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)); *accord Teague*, 489 U.S. at 311. The *Ramos* rule, "while undoubtedly important, is not a 'watershed' procedural rule." *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring). As such, it should "not apply retroactively on federal habeas corpus review and [] not disturb convictions that are final." *Id.* at 1420.

A. New Procedural Rules Are Virtually Never Retroactive Because Of Their "Speculative Connection To Innocence."

Under *Teague*'s first exception, *substantive* new rules generally apply retroactively. *Summerlin*, 542 U.S. at 351–52. These are "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). They are retroactive "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 351–52.

Edwards does not contend that the new rule *Ramos* announced was substantive. *See* Pet. Br. 10.

Under *Teague*'s second exception, an "extremely narrow" class of new *procedural* rules may apply retroactively. *Summerlin*, 542 U.S. at 352. Procedural rules differ fundamentally from substantive rules because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 136 S. Ct. at 730.

Because new procedural rules have a "more speculative connection to innocence" than substantive rules, this Court has sharply curtailed *Teague*'s second exception. *Summerlin*, 542 U.S. at 352. The Court has "repeatedly emphasized the limited scope of the second *Teague* exception, explaining that it is clearly meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Beard*, 542 U.S. at 417 (cleaned up).

This Court has identified only *one* procedural rule that "might fall within this exception"—the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.* at 417. That "sweeping rule . . . established an affirmative right to counsel in all felony cases." *O'Dell v. Maryland*, 521 U.S. 151, 167 (1997). The *Gideon* rule, "it is fair to say, 'alter[ed] our

understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" *Beard*, 542 U.S. at 418 (quoting *Sawyer*, 497 U.S. at 242).

A rule satisfying *Teague*'s second exception—like *Gideon*—must be "central to an accurate determination of innocence or guilt." *Graham*, 506 U.S. at 478. For this reason, the Court "has flatly stated that 'it is unlikely that any such rules' have 'yet to emerge.'" *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring) (quoting *Whorton*, 549 U.S. at 417).

It should thus "come as no surprise" that this Court has *never* identified a new rule satisfying *Teague*'s second exception, despite considering the question numerous times since adopting the *Teague* framework. *Beard*, 542 U.S. at 417. This Court has declined every previous invitation to declare a new procedural rule "watershed," prioritizing States' tremendous interests in the finality of their convictions over prisoners' interests in retroactive application of a new procedural rule that has only a speculative connection with innocence. *Schriro*, 542 U.S. at 352; *see also*:

- *Chaidez*, 568 U.S. 342 (rejecting retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that defense counsel is ineffective for not advising defendant about risk of deportation arising from guilty plea);
- *Whorton*, 549 U.S. at 406 (rejecting retroactivity of *Crawford*, 541 U.S. 36, which held that admission of certain hearsay evidence violated the Confrontation Clause);

- *Summerlin*, 542 U.S. at 348 (rejecting retroactivity of *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury must determine presence or absence of aggravating factors to impose death penalty);
- *Beard*, 542 U.S. at 406 (rejecting retroactivity of *Mills v. Maryland*, 486 U.S. 367 (1988), which held invalid capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously);
- *Tyler v. Cain*, 533 U.S. 656 (2001) (rejecting retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990), which held that jury instruction is unconstitutional if there is a reasonable likelihood the jury understood it to allow conviction without proof beyond reasonable doubt);
- *O'Dell*, 521 U.S. at 151 (rejecting retroactivity of *Simmons v. South Carolina*, 512 U.S. 154 (1994), which held that capital defendant must be allowed to inform sentencer that he would be ineligible for parole if prosecution argues future dangerousness);
- *Gilmore v. Taylor*, 508 U.S. 333 (1993) (rejecting retroactivity of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), in which Seventh Circuit held that instruction which left jurors with false impression that they could convict even if defendant possessed one of the mitigating states of mind violated due process);

- *Sawyer*, 497 U.S. at 227 (rejecting retroactivity of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which held that Eighth Amendment barred imposition of death penalty by jury that had been led to believe responsibility for the ultimate decision rested elsewhere).

Contrary to Edwards' suggestion (at 33–35), this Court's decision in *Brown v. Louisiana*, 447 U.S. 323 (1980), does not support applying *Ramos* retroactively to cases currently pending on collateral review. In *Brown*, the question before the Court was whether to retroactively apply the holding of *Burch v. Louisiana*, 441 U.S. (1979), which required unanimity for six-person jury verdicts. But, as Edwards acknowledges in passing in a footnote (at 34 n.12), *Brown* reached this Court on *direct review*, not habeas. Only three Justices believed that *Burch* should be made fully retroactive under the Court's then-applicable retroactivity standards (which *Teague* further tightened). Two other Justices—Justices Powell and Stevens—joined the plurality's judgment because it was their view that new rules should apply retroactively on direct review. A majority of the Court eventually adopted that view in *Griffith v. Kentucky*, 479 U.S. 314 (1987). If anything, the fact that only a plurality of the Court believed the *Burch* rule should be fully retroactive even before the Court adopted the *Teague* framework should count as an argument *against* finding the new *Ramos* rule retroactive.

B. Allowing Convictions By A 10-2 Or 11-1 Vote Does Not Seriously Diminish The Accuracy Of Criminal Convictions.

To qualify as "watershed," a new rule must first be "necessary to prevent an impermissibly large risk of an inaccurate conviction." *Whorton*, 549 U.S. at 418 (cleaned up). It is not enough to say that the rule is "aimed at improving the accuracy of trial" or that the rule "is directed toward the enhancement of reliability and accuracy in some sense." *Sawyer*, 497 U.S. at 242–43. Rather, "the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Summerlin*, 542 U.S. at 352 (emphasis added). Notably, this Court has declined to mandate retroactivity even for new rules regarding components of the jury right and rules designed to prevent racial discrimination in jury selection. And the Court has repeatedly declined to make such procedural rules retroactive even in *capital cases*, where the consequences of an inaccurate verdict or sentence are particularly acute.

In *Schriro v. Summerlin*, the Court was asked to decide whether the new rule it announced in *Ring v. Arizona* was a watershed rule of criminal procedure. In *Ring*, the Court "held that a sentencing judge, sitting without a jury, may not find an aggravating circumstance necessary for imposition of the death penalty." *Summerlin*, 542 U.S. at 353 (cleaned up).

When considering whether judicial factfinding seriously diminished the accuracy of the proceeding in *Summerlin*, the Court looked to its decision in *DeStefano v. Woods*, 392 U.S. 631 (1968), where the

Court "refused to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145 (1968)." *Id.* at 356. "*Duncan* applied the Sixth Amendment's jury-trial guarantee to the States." *Id.* Although the Court decided *DeStefano* under the pre-*Teague* retroactivity framework, *Summerlin* emphasized that *DeStefano*'s "reasoning is germane" to the question of *Ring*'s retroactivity. *Id*. *DeStefano* held in no uncertain terms that "the values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *Id.* (cleaned up).

Citing *DeStefano*, *Summerlin* observed that if "a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Id.* at 356–57. That reasoning applies *a fortiori* here. If a trial held *entirely without a jury* was not impermissibly inaccurate, it is hard to see how a trial where at least 10 of 12 jurors must agree to convict a defendant could be.

Similarly, in *Allen*, 478 U.S. 255, the Court held in a *per curiam* decision that this Court's landmark decision in *Batson*, 478 U.S. 255, would not apply retroactively. In *Batson*, the Court held that "a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019).

Allen's reasoning—though it predates *Teague*—is also "germane" to the present case because it directly addressed whether the *Batson* rule

sufficiently enhanced the accuracy of criminal trials. *Summerlin*, 542 U.S. at 356. In *Allen*, the Court observed that a new rule is more likely to deserve retroactive application when it "goes to the heart of the truthfinding function." 478 U.S. at 259. The *Batson* rule may have had "some bearing on the truthfinding function of a criminal trial." *Id.* But that rule also "serves other values as well," such as preventing discrimination against jurors and strengthening "public confidence" in the justice system. *Id.* Moreover, the Court noted that retroactive application of *Batson* to cases pending on collateral review would "seriously disrupt the administration of justice" because "prosecutors, trial judges, and appellate courts" had relied on the cases that *Batson* overruled, and retroactive application would result in countless vacated convictions and retrials. *Id.* at 260.

Allen is germane to the present case for another reason. Edwards and his *amici* suggest that non-unanimity allowed prosecutors to avoid the *Batson* rule. *See* Ctr. Race, Inequality, and the Law Br. at 14. But there is absolutely no evidence here, as the magistrate judge observed below, that any jury panelist was struck because of race. J.A. 251–52. In any event, if *Batson* did not receive retroactive application, then neither should *Ramos*. *See Ramos*, 140 S. Ct. at 1420 n.8 (Kavanaugh, J., concurring).

Edwards (at 27–29) and his *amici* are wrong to suggest that declining to apply *Ramos* retroactively would impair the accuracy or reliability of jury verdicts. Under this Court's precedents, the relevant question is not whether *Ramos* "resulted in *some* net

improvement in the accuracy of factfinding in criminal cases," but instead whether the absence of the unanimity rule "*seriously*" diminishes the likelihood of an accurate conviction. *Whorton*, 549 U.S. at 420 (emphasis added).

Here, there is no reason to believe that non-unanimous verdicts lead to an "impermissibly large risk of an inaccurate conviction." *Id.* at 418. An "inaccurate" conviction means the conviction of someone who is factually innocent. *See Bousley v. United States*, 523 U.S. 614, 620 (1998) (quoting *Teague*, 489 U.S. at 312). As Oregon explained in its *amicus* brief in *Ramos*, "non-unanimous juries do not appear to be a significant causal factor" of wrongful convictions. *Amicus Curiae* Br. of Oregon, at 8 n.6, https://bit.ly/34AIZ8H. This can be seen by comparing the number of wrongful convictions in Oregon and Louisiana to those States that have always required unanimity.

Oregon has had 21 exonerations (approximately 0.5 per 100,000 residents) and Louisiana has had 66 exonerations (1.4 per 100,000).[42] Louisiana's rate of exonerations per capita is comparable to that of New York (298 exonerations; 1.5 per 100,000) and Texas (388 exonerations; 1.3 per 100,000), and considerably lower than that of Illinois (335 exonerations; 2.7 per 100,000 residents), even though the latter three

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[42] The per capita figures cited here are derived by dividing the state-level statistics in the National Registry of Exonerations, *see* https://bit.ly/3091xdd (last visited 9/27/2020), by each State's population as of July 1, 2019, *see* U.S. Census Bureau, State Population Totals, https://bit.ly/363ZLxN.

States have mandated unanimity all along. And, if anything, these figures *overstate* the impact of non-unanimous verdicts in Louisiana and Oregon, since not all exonerations in those States involved non-unanimous convictions. Even Edwards' *amici* concede that only around 25% of the exonerations in Louisiana involved non-unanimous verdicts. *See* Innocence Project Br. 6–7.[43] And only 15% of the exonerations in Oregon involved non-unanimous verdicts. Lawyers' Committee Br. 14.

Edwards and his *amici* are also wrong to suggest that non-unanimous convictions are "inherently inaccurate," NAACP Br. 6, or that unanimity is "essential" to a "fair process," NACDL Br. 13. Although there may be some instances in which unanimity helps promote accuracy through better deliberations, that will surely not always be the case. In other circumstances, unanimity will *diminish* the accuracy of a verdict and merely promote delay, frustration, and gridlock. *See Whorton*, 549 U.S. at 419–20 (similarly noting that *Crawford* rule could increase or decrease the accuracy of trial proceedings depending on the circumstances).

For example, under a unanimity rule, a holdout juror might "continue[] to insist upon acquittal without having persuasive reasons in support of [his]

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[43] The Innocence Project claims (at 14–18) there are 100 other innocent people in Louisiana who were convicted by non-unanimous verdicts. But that figure should be viewed with some skepticism given that it counts defendants with still-pending cases, many of whom the Project is currently representing in an advocacy role.

position." *Johnson*, 406 U.S. at 361. As Prof. Akhil Amar explained, an "eccentric holdout" juror might "refuse[] to listen to, or even try to persuade, others." Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1191 (1995). It hardly advances the accuracy of the jury's deliberations if a holdout juror, empowered by a unanimity rule, can block a verdict based on an irrational interpretation of the evidence, an improper bias in favor of the defendant, or a desire to nullify the charges notwithstanding compelling evidence of guilt. *Cf. Saffle*, 494 U.S. at 495 ("The objectives of fairness and accuracy are more likely to be threatened rather than promoted by a rule allowing the sentence to turn on whether the defendant . . . can strike an emotional chord in a juror.").

Because unanimity may or may not improve the accuracy of convictions, *Ramos* is more analogous to *Crawford* than *Gideon*. In *Crawford*, the Court overturned *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of a new interpretation of the Confrontation Clause. In *Whorton*, the Court unanimously declined to retroactively apply *Crawford*'s new rule. The Court reasoned that "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of factfinding in criminal trials." *Whorton*, 549 U.S. at 419. Similarly, in *Ramos* the Court explained that "a jurisdiction adopting a nonunanimous jury rule *even for benign reasons* would still violate the Sixth Amendment." 140 S. Ct. at 1401 n.44 (emphasis added). Unanimity

may be an "ancient guarantee," *id.* at 1390, but it is by no means the only way for a jury to fairly and accurately determine the guilt or innocence of the defendant.

Numerous other countries that employ a jury system—even those that share our common-law heritage—allow juries to return non-unanimous verdicts. In fact, "among the class of countries that embraces the jury, the unanimous decision rule for guilt and acquittal generally enforced by the American system is very much an anomaly." Ethan J. Lieb, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio St. J. Crim. L. 629, 642 (2008). "Although Canada and some jurisdictions in Australia maintain unanimity as a requirement (for conviction and acquittal)," this is far from the majority rule; instead, "more relaxed majoritarian and supermajoritarian rules clearly dominate the global jury system landscape." *Id.* at 642.

Notably, England no longer requires juries to render verdicts unanimously. "In England . . . the requirement of a unanimous verdict was dropped in 1967 by the Criminal Justice Act, which permitted verdicts of ten to two." Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62-SPG Law & Contemp. Probs. 7, 36 (1999). The Supreme Court of Ireland has similarly explained that a "requirement of unanimity" is not needed to ensure that jurors can "bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused." *O'Callaghan v.*

Attorney General, [1993] 2 I.R. 17, 26. It would be odd to say the least for this Court to hold that the same rule used by several countries that share our same legal heritage is *so fundamentally unfair* that it significantly diminishes the likelihood of an accurate verdict.

Finally, the facts of Edwards' case highlight why non-unanimous verdicts do not present an impermissibly large risk of an inaccurate conviction, as the unanimity rule would have *impaired* the accuracy of Edwards' criminal trial. In a taped interview, Edwards confessed to orally, vaginally, and anally raping the victim. He confessed to kidnapping and robbing Ryan Eaton and Marc Verret. Edwards lamented: "I know it was wrong." This is overwhelming evidence of guilt.

Significant corroborating evidence supported Edwards' confession. At trial, the jury learned, for example, that Edwards knew details the police did not give him. He knew Eaton and Verret's names. He described the shirt he stole from Eaton. Video evidence from a bowling alley depicted him wearing that shirt. He had not been provided with the information that Verret's assailants took $300 from him. Video surveillance tape from a gas station showed Johnson stalking Eaton shortly before they rushed his truck.[44] Despite this overwhelming evidence, at least one juror voted against the conviction on each count.

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[44] Volume II of V at 221; Volume IV of V at 719–25.

This is not the only case where a juror voted to acquit despite overwhelming evidence. *See, e.g.*, *State v. Webb*, 2013-0146 (La. App. 4 Cir. 1/30/14), 133 So. 3d 258, 262 (jury verdict for rape was non-unanimous despite positive DNA match); *State v. Krodinger*, 2012-0134 (La. App. 4 Cir. 2/27/13), 128 So. 3d 270, 273 (same). It was exactly this problem—"judicial [in]efficiency"—that the State sought to eradicate when it re-adopted the non-unanimous jury rule in 1974. *State v. Hankton*, 2012-0375 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1038.

In light of the emphasis this Court has placed on procedural rules' speculative connection to innocence, it would be strange for the Court to announce the first watershed rule since adopting the *Teague* framework in a case where the habeas petitioner confessed his guilt. Edwards cannot meet his heavy burden to show that "the likelihood of an accurate conviction is *seriously* diminished" without the *Ramos* rule. *Summerlin*, 542 U.S. at 352.

C. Unanimity Is Not A Previously Unrecognized Bedrock Procedural Rule.

A new rule also may not be deemed watershed unless it "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418. This second requirement "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right." *Id.* at 420–21. Rather, the new rule "must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of

a proceeding." *Id.* at 421 (citations omitted). Edwards cannot make that showing here.

There can be little doubt that *Ramos* was based on other bedrock rights. Edwards argues at length that "*Ramos* was controlled by three well-settled principles logically dictating that the Jury Trial Clause requires a unanimous verdict in federal and state court alike." Pet. Br. at 13 (internal quotation omitted); *see id.* at 12–17. Of course, as explained above, a majority of Justices agreed in *Ramos* that *Apodaca* was binding precedent, and so the Court had to expressly overrule that decision in order to hold that the Sixth and Fourteenth Amendments required unanimous jury verdicts in state courts. But there is no question that this Court laid the groundwork for *Ramos* by recognizing other bedrock rights in previous cases. Given that non-unanimity had never "become part of our national culture," *Ramos*, 140 S. Ct. at 1406, it is highly implausible for Edwards to assert that the Court's holding involved a "previously unrecognized" "bedrock" right.

D. The States' Significant Finality Interests Remain Unimpaired.

Teague's demanding test is "expressly calibrated" to account for States' legitimate reliance interests in their convictions. *Ramos*, 140 S. Ct. at 1407 (plurality op.) (citing *Stringer*, 503 U.S. at 228); *see also Montgomery*, 136 S. Ct. at 735 (noting importance of "avoid[ing] intruding more than necessary upon the States' sovereign administration of their criminal justice systems"). Louisiana, Puerto Rico, and Oregon's finality interests here are difficult

to overstate. Although there are only two States and a Territory that are directly impacted by the *Ramos* rule, those jurisdictions have been accepting non-unanimous jury verdicts for decades. If the Court grants relief, they would potentially be forced to retry hundreds or thousands of defendants—many of whom were convicted years or decades ago. *See Allen*, 478 U.S. at 260 (discussing same concerns in rejecting retroactivity of *Batson* rule). Although Edwards asserts that a finding of retroactivity would impact "a relatively small number of cases," Pet. Br. 35–37, one of Edwards' *amici* estimates that more than 1,600 cases in Louisiana alone could be affected in some way by a holding that *Ramos* applies retroactively (with 1,300 of those defendants requiring "new proceedings"). *See* Promise of Justice Institute Br. 9–20.

It would be impossible to retry many of those defendants. Beyond the incredible financial burden that flooding the States' criminal systems with retrials would impose, important practical problems would impede the States' efforts to obtain justice for victims. Over the decades, witnesses die or become unavailable[45] and their memories fade. *See Allen*, 478 U.S. at 260–61 (noting, in rejecting retroactivity of *Batson* rule, that retrials would be hindered by "'problems of lost evidence, faulty memory, and

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[45] Some of the witnesses in Edwards' case had to fly to Louisiana from other States to testify. *See* Volume II of II at 1450; Volume IV of V at 771.

missing witnesses'"). Evidence decays or is destroyed in storms like Hurricane Katrina.[46]

Moreover, the jurisdictions that accepted non-unanimous jury verdicts had especially powerful reliance interests because they expressly relied on this Court's holding in *Apodaca* that such verdicts were constitutional. And "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance[.]" *Quill Corp. v. North Dakota*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring), *overruled by South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). The Court in *Allen* found this to be a highly pertinent consideration in the retroactivity analysis: Because "prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of [previous precedent]," the Court found the "reliance interest of law enforcement officials" to be a "compelling" reason why the new *Batson* rule "should not be retroactive." 478 U.S. at 260.

At bottom, what matters is that Edwards received "a full trial and one round of appeals in which the State faithfully applied the Constitution as [the Court] understood it at the time." *Summerlin*, 542 U.S. at 358. He should not be able to "continue to litigate his claims indefinitely in hopes that [the Court] will one day have a change of heart." *Id.*

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[46] Molly McDonough, *Picking Up the Pieces*, (February 2, 2006), ABAjournal.com, https://bit.ly/3hMe7FU ("[A]t least some, possibly a large portion, of the records and evidence may not survive.").

E. The Racial Issues Cited By Edwards And His *Amici* Provide No Basis To Make *Ramos* Retroactive.

Edwards asserts in passing at the end of his brief that "the racist origins of non-unanimous jury rules vitiate Louisiana and Oregon's finality interests." Pet. Br. 37–38. But that argument is undercut by *Ramos* itself. To be sure, *Ramos* discussed what the Court viewed as the race-tainted origins of the non-unanimous jury rule.[47] But when pressed by the dissent about why such discussions were necessary considering "that Louisiana and Oregon eventually recodified their nonunanimous jury laws in new proceedings untainted by racism," the Court observed that "the States' proceedings took place only *after* the Court's decision" in *Apodaca*. 140 S. Ct. at 1401 n.44.

This demarcation in time is important. *Ramos* observed that Louisiana adopted its non-unanimous jury laws during its 1898 constitutional convention. *Id.* at 1394. But in 1974, the State held another constitutional convention and passed sweeping reforms guaranteeing "every person shall be free from discrimination based on race." La. Const. art. I,

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[47] Louisiana respectfully disagrees with that conclusion. As Louisiana explained at length in its *Ramos* merits brief, there was no contemporaneous evidence that the non-unanimity rule was the product of racial animus. La. *Ramos* Br. 36–37. Many provisions of the 1898 constitution (especially those involving voting) were unfortunately expressly motivated by racial animus. The non-unanimity rule, however, was included in a section regarding judicial administration that had no apparent racial motivation. *See id.* (collecting sources).

§ 12; *see id.* § 3 ("No law shall discriminate against a person because of race . . . ."). At that time, the Louisiana Legislature "adopted a new, narrower [non-unanimity] rule, and its stated purpose [for doing so] was 'judicial efficiency.'" *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting) (quoting *Hankton*, 122 So. 3d at 1038); *accord* 7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184–89 (La. Constitutional Convention Records Comm'n 1977). Indeed, Louisiana expressly relied on *Apodaca* in 1974 when it readopted its rule and revised the minimum vote to 10-2. *See* Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Vol. 7, pp. 1184–89 (La. Constitutional Convention Records Commission 1977).

This Court has reserved the question of whether a facially race-neutral provision, through legislative amendment or reenactment, can overcome any taint of racial animus associated with its original enactment. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). But every circuit court to address that question has held that impermissible motives associated with the enactment of a race-neutral provision are cleansed when a legislature, acting without racial animus, reenacts or amends the law. *See, e.g., Hayden v. Paterson*, 594 F.3d 150, 166–67 (2d Cir. 2010); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005) ("Florida's 1968 re-enactment eliminated any taint from the allegedly discriminatory 1868 provision."); *Chen v. City of Hous.*, 206 F.3d 502, 521 (5th Cir. 2000); *Cotton v. Fordice*, 157 F.3d 388, 392 (5th Cir. 1998); *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994)

("In light of the changes in American society since 1914, changes in no small way effected by successive Congresses—including the impact of the Voting Rights Act on the nature of Congress itself—it would be anomalous to attempt to tar the present Congress with the racist brush of a pre-World War I debate.").

The Louisiana Legislature unquestionably cleansed its non-unanimous jury law of any purported racial animus in 1974 when it re-adopted a narrower form of that policy through a convention that no one suggested was tainted by racial animus. Edwards' conviction became final in 2011. By that point, Louisiana's non-unanimity rule had not only been cleansed of any racial animus but also upheld as constitutional by this Court in *Apodaca*. Louisiana's powerful and legitimate finality interests in Edwards' conviction are unimpaired by any racial taint.

Edwards' *amici* further contend that the non-unanimity rule has a racially disparate impact. *See* NAACP Br. 17–20; Lawyers' Committee Br. 16–19. But is it well established that disparate impacts alone do not rise to the level of constitutional violations. *See Washington v. Davis*, 426 U.S. 229 (1976). And *amici* cite no authority for the proposition that a disparate racial impact is relevant to the retroactivity analysis; if it were, then surely this Court would have decided *Allen* the other way and applied *Batson* retroactively.

In all events, concerns about the racial effects of the non-unanimity policy were front and center when that issue was put before Louisiana voters in 2018. And, based in part on those concerns, the People

voted to amend the Louisiana Constitution to require unanimity—but to do so only on a *prospective* basis, without undoing existing convictions. *See* Senate Bill No. 243 (2018) (proposing amendment that would mandate unanimity for "offenses committed on and after January 1, 2019"). In short, the citizens of Louisiana engaged in a "prompt and considered legislative response" to concerns about the non-unanimity rule. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72–73 (2009). This Court should not "short-circuit" the political process that led to a constitutional amendment abolishing non-unanimous verdicts on a prospective basis only.

Finally, Edwards' arguments notwithstanding, it is important to emphasize that there is nothing inherently invidious or fundamentally unfair about allowing convictions based on non-unanimous verdicts. Quite the opposite. As noted, many developed countries, including some of our closest allies, have moved toward non-unanimous verdicts in recent years. *See supra* at 35. Prominent scholars such as Akhil Amar have urged reconsideration of unanimity rules. And major professional organizations such as the American Bar Association and American Law Institute championed a movement away from unanimity in the years leading up to *Apodaca*. *See* American Bar Association, *Project on Standards for Criminal Justice, Trial By Jury* § 1.1 (1968); ALI, Code of Criminal Procedure §355 (1930). As Justice Kavanaugh correctly observed in his concurring opinion in *Ramos*: "[O]ne could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles."

Ramos, 140 S. Ct. at 1418 (Kavanaugh, J., concurring); *see also id.* at 1427 (Alito, J., dissenting) (finding it "undeniably false" that "there were no legitimate reasons" to adopt a non-unanimity rule).

III. AEDPA'S RELITIGATION BAR INDEPENDENTLY FORECLOSES RETROACTIVE APPLICATION OF *RAMOS*.

In this case, Edwards seeks relief from his conviction under 28 U.S.C. §2254. But Edwards makes no attempt to explain why he is entitled to relief under the demanding standards set forth in that provision. Nor can he. AEDPA's relitigation bar in §2254(d)(1) forecloses retroactive application of *Ramos* regardless of whether that decision set forth an "old rule" or a "new rule."[48]

A. If *Ramos* Applied An "Old Rule," AEDPA Bars Relief Because That Rule Was Not Clearly Established.

If *Ramos* applied an old rule, AEDPA's relitigation bar forecloses retroactive application of *Ramos* to Edwards' case. *See Greene v. Fisher*, 565 U.S. 34, 39 (2011). This Court has explained that *Teague* provides a "threshold . . . analysis" that courts must conduct *before* "performing any analysis

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[48] This issue is squarely encompassed within the question presented, which broadly asks whether *Ramos* applies retroactively "to cases on federal collateral review." Because §2254 establishes the standard for "cases on federal collateral review" arising out of state court judgments, the interaction between §2254(d)(1) and *Teague* falls within the question presented.

required by AEDPA." *Beard*, 542 U.S. at 409 (quoting *Horn v. Banks*, 536 U.S. 266, 272 (2002)). If *Ramos* reiterated an old rule, then *Teague*'s retroactivity bar does not apply. *Whorton*, 549 U.S. at 416 ("[A]n old rule applies both on direct and collateral review."). But that does not end the inquiry: Edwards must still satisfy AEDPA's "difficult" standard before he can obtain habeas relief. *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *see Greene*, 565 U.S. at 39; *Horn*, 536 U.S. at 272.

Generally speaking, if a state prisoner seeks a writ of habeas corpus in federal court after a state court has adjudicated his claim on the merits, AEDPA's religitgation bar prevents relief. But Congress has provided two exceptions to the relitigation bar: The state prisoner must show either that the state court's adjudication of the claim "resulted in a decision that was [1] contrary to, or [2] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A state court decision is not contrary to this Court's precedent unless it "arrives at a conclusion opposite to that reached by this Court on a question of law"—*Williams v. Taylor*, 529 U.S. 362, 405 (2000)—or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a [different] result." *Id.* at 406. And a state court's decision does not unreasonably apply federal law unless it identifies the correct legal standard but applies it in a way that is not merely incorrect or erroneous, but

unreasonable. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.").

This Court has emphasized the difficulty of overcoming AEDPA's relitigation bar: "As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Harrington*, 562 U.S. at 102. "It preserves authority to issue the writ in cases where there is *no possibility fairminded jurists could disagree* that the state court's decision conflicts with this Court's precedents. It goes no further." *Id.* (emphasis added). In other words, the relitigation bar forecloses relief unless a prisoner can show that the state court's error was "*well understood and comprehended in existing law* beyond any possibility for fairminded disagreement." *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (emphasis added).

If *Ramos* applied an old rule, Edwards cannot surmount AEDPA's relitigation bar. It is undisputed that the state courts adjudicated Edwards' non-unanimity claim on the merits during post-conviction review. *See* J.A. at 131; Pet. Br. at 7. That means a federal court can grant habeas relief only if Edwards' claim meets one of the two narrow exceptions articulated in § 2254(d)(1).

This Court has explained that, when conducting this analysis, the federal court should "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's

federal claims." *Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018). When the state supreme and state intermediate appellate court decisions do not "come accompanied" with reasons—as in this case—the federal habeas court should "look through the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Id.* at 1192; *see* J.A. at 148–49. Here, the relevant state court decision is the state district court's order, which adopted the state commissioner's recommendation. *See* J.A. 144–45 (adopting J.A. 114–38).

The state district court expressly relied on this Court's opinion in *Apodaca* when it rejected Edwards' constitutional challenge to his non-unanimous verdict. J.A. 130 ("The U.S. Supreme Court has upheld a state's use of non-unanimous verdicts in *Apod[a]ca v. Oregon*."). *Apodaca*, of course, presented facts and claims *identical* to the claims Edwards makes here. *Apodaca*, 406 U.S. at 406 ("The vote in the cases of Apodaca and Madden was 11-1, while the vote in the case of Cooper was 10-2."). And the state court here arrived at exactly the same result that this Court reached in *Apodaca*: the non-unanimous conviction did not violate the Constitution. Under AEDPA and this Court's jurisprudence, nothing about that decision was contrary to or an unreasonable application of then-existing federal law. Thus, even assuming *Ramos* reiterated an old rule for the purposes of *Teague*, Edwards' federal habeas petition should fail under AEDPA's demanding relitigation bar.

B. Edwards' Conviction Was Not Contrary To Clearly Established Federal Law Even If *Ramos* Announced A New "Watershed" Procedural Rule.

This Court has reserved the question of whether a claim satisfying *Teague*'s "watershed procedural rule" exception could survive AEDPA's relitigation bar in § 2254(d)(1). *Greene*, 565 U.S. at 39 n*. The answer is no. Even if *Ramos* announced a new "watershed" procedural rule, the state post-conviction court's adjudication of Edwards' claim on the merits did not result in a decision that was contrary to or an unreasonable application of clearly established federal law.

It is well established that AEDPA's "backward-looking language requires an examination of the state-court decision *at the time it was made*." *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011) (emphasis added). As discussed above, *Apodaca* remained the controlling decision at the time the state courts adjudicated Edwards' challenge to non-unanimity on the merits. With binding, on-point Supreme Court precedent addressing the precise issue before the state court, Edwards cannot plausibly contend that the state court's reliance on that precedent was contrary to or involved an unreasonable application of clearly established federal law. *See supra* Section I.B, III.A. If anything, it would have been contrary to clearly established federal law to *grant* Edwards habeas relief under those circumstances.

Nothing in the plain text of §2254(d)(1) provides any "*Teague* exceptions" to the relitigation bar. To

the contrary, this provision is crystal clear that "an application for a writ of habeas corpus" on behalf of a state prisoner "*shall not be granted* with respect to any claim adjudicated on the merits in state court unless that adjudication resulted in a decision that was contrary to or an unreasonable application of clearly established federal law. §2254(d)(1) (emphasis added). There is no mention of *Teague* exceptions and no authorization for federal courts to retroactively apply "new rules" to cases on federal collateral review.

That stands in sharp contrast to other AEDPA provisions that do expressly reference the *Teague* doctrine. For example, § 2244(b)(2)(A) authorizes a second or successive petition if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court . . . ." 28 U.S.C. § 2244(b)(2)(A). Several other AEDPA provisions also accommodate new rules that are deemed to apply retroactively under *Teague*. *See, e.g.*, 28 U.S.C. § 2244(d)(1)(C); 28 U.S.C. § 2254(e)(2)(A)(i); 28 U.S.C. § 2255 ¶ 6, (3); 28 U.S.C. § 2264(a)(2).

These other AEDPA provisions underscore that Congress intentionally excluded any *Teague*-like exceptions from § 2254(d)(1): "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *cf. Duncan v. Walker*, 533 U.S. 167, 172 (2001).

Congress' decision to withhold any *Teague*-like exceptions from §2254(d)(1) is within its constitutional powers. This Court has observed that "the power to award the writ by any of the courts of the United States, must be written by law" and "judgments about the proper scope of the writ are normally for Congress to make." *Felker v. Turpin*, 518 U.S. 651 (1996); *see Danforth v. Minnesota*, 552 U.S. 264, 309 (2008) (Roberts, C.J., dissenting) ("Congress has substantial control over federal courts' ability to grant relief for violations of the Federal Constitution . . . .").

This Court's opinion in *Montgomery v. Louisiana* is not to the contrary. 136 S. Ct. at 729. Although the Court held that new *substantive* rules have a constitutional dimension, the Court expressly reserved the question of whether new *procedural* rules would also bear a constitutional dimension. *See id.* Because new procedural rules have a "more speculative connection to innocence" than substantive rules, *Summerlin*, 542 U.S. at 352, the Court should limit its holding in *Montgomery* to substantive rules alone.

At bottom, even if the holding of *Ramos* satisfies *Teague*'s second exception, Edwards' claim should fail anyway under AEDPA's relitigation bar.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

Jeff Landry
Attorney General
Elizabeth Baker Murrill
Solicitor General
**Counsel of Record*
Shae McPhee
Deputy Solicitor General
Josiah M. Kollmeyer
Assistant Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6766
murrille@ag.louisiana.gov

Hillar Moore
District Attorney
Stacy Wright
Assistant District Attorney
East Baton Rouge Parish
222 St. Louis Street, Ste. 550
Baton Rouge, LA 70802
(225) 389-3400

Jeffrey M. Harris
Consovoy McCarthy PLLC
1600 Wilson Blvd, Suite 700
Arlington, VA 22209

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