

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

EVANGELISTO RAMOS,)
)
 Petitioner,)
)
 v.) No. 18-5924
)
 LOUISIANA,)
)
 Respondent.)

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EVANGELISTO RAMOS,)

Petitioner,)

v.) No. 18-5924

LOUISIANA,)

Respondent.)

- - - - -

Washington, D.C.

Monday, October 7, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

JEFFREY L. FISHER, Stanford, California;

on behalf of the Petitioner.

ELIZABETH MURRILL, Solicitor General, Baton Rouge,

Louisiana; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-5924, Ramos versus Louisiana.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

Last term in *Timbs* against Indiana, this Court reaffirmed the well-settled rule that incorporated provisions of the Bill of Rights apply the same way to the states as they apply to the federal government.

Taking that rule as the given, the state does not defend Justice Powell's pivotal vote in the *Apodaca* case. And, indeed, that reasoning flouted precedent at the time and has since been relegated to nothing more than an isolated relic of an abandoned doctrine.

The state's only defense in support of the judgment below is that the Sixth Amendment does not require unanimity at all; that is, not in state courts or in federal courts.

1 This Court should reject that
2 argument. As the Court has said many times over
3 many decades, the Sixth Amendment requires a
4 unanimous verdict to convict. In particular,
5 what the Court has said is that the Sixth
6 Amendment right to trial by jury carries with it
7 the essentials of the common law.

8 And the common law authorities are
9 uniform, explicit, and absolute. Unanimity is
10 an absolute requirement to trial by jury. And
11 the reasons that the common law commentators
12 gave for that rule are the -- resonate just as
13 powerfully now as they did then. In a nutshell,
14 we are not prepared to take away someone's
15 liberty unless a cross-section of the community
16 uniformly agrees that criminal punishment is
17 appropriate.

18 Now, I don't think the state disputes
19 that historical account that I just gave you or
20 even that unanimity is central to the proper
21 functioning of the jury trial right. Instead,
22 what the state says are two primary things.

23 First, that the drafting history of
24 the Sixth Amendment suggests that the framers
25 meant to dispense with that historical rule,

1 and, second, that that historical requirement of
2 unanimity is no more important than the
3 12-person rule, which this Court said is not
4 part of the Sixth Amendment, in Williams.

5 So let me turn to those two arguments.
6 Let me start with the drafting history. And we
7 think for three reasons the state has over-read
8 the drafting history.

9 First, as the Court itself said in
10 cases dealing with provisions like the Second
11 Amendment and the Double Jeopardy Clause, we do
12 not read into a deletion of language any meaning
13 when there's no contemporary evidence that it
14 was designed to change the meaning of the
15 provision.

16 And that's all the more true here
17 because of the contextual backdrop. The state
18 talks about the fact that many states at the
19 time had trial by jury provisions in their own
20 constitutions and correctly notes that some of
21 those provisions explicitly required unanimity
22 but some of them didn't.

23 And the rule was the same across all
24 of those states, so the thing that the framers
25 would have taken from the context at the time

1 would have been that it doesn't matter whether
2 you have unanimity in the provision; it requires
3 it either way.

4 CHIEF JUSTICE ROBERTS: Well, but
5 still that --

6 MR. FISHER: And I think --

7 CHIEF JUSTICE ROBERTS: I mean, to
8 give them -- to be fair, even if you see some
9 have unanimity, some don't, and you've got a
10 draft that says unanimity, I don't understand
11 why you would take it out and just then be able
12 to argue later, well, it doesn't matter whether
13 it was in or not. It's in there in the draft;
14 why would they take it out?

15 MR. FISHER: Well, the best historical
16 evidence, Mr. Chief Justice, is that it was --
17 it got latched onto a debate about the vicinage
18 requirement. And so what James Madison did is
19 take away all of the elaboration of the -- of
20 the right to trial by jury.

21 And so I think actually the best
22 example also to respond is -- is -- is the
23 Pennsylvania Constitution, which at the time of
24 the founding required unanimity explicitly. And
25 then Justice Wilson actually amended the --

1 rewrote the constitution in -- in Pennsylvania
2 to take it out. And, remember, Justice Wilson,
3 as we note at length in our brief, was one of
4 the leading expositors of the common law notion
5 of trial by jury and the Sixth Amendment
6 requiring unanimity.

7 And I think that was the last thing I
8 wanted to say about the drafting history, is
9 that one would think that if the framers had
10 dispensed with 400 years of uniform practice,
11 that somebody would have said something about
12 it. But what you have is the reverse. You have
13 Justice Wilson, right after the Constitution's
14 founding, talking at great length about how
15 unanimity is "indispensable."

16 You have Justice Story in his
17 Commentaries using exactly the same word,
18 "indispensable." And you have any number of
19 other criminal law treatises at the time, all of
20 which are gathered in our brief and at greater
21 length in the ACLU brief that canvasses the
22 history, all reinforcing this notion.

23 JUSTICE ALITO: You are asking us to
24 overrule *Apodaca*, so we do have to think about
25 *stare decisis*. And last term, the majority was

1 lectured pretty sternly in a couple of dissents
2 about the importance of stare decisis and about
3 the impropriety of overruling established rules.
4 I'm thinking about the dissent in Franchise Tax
5 Board and the dissent in Knick versus Township
6 of Scott.

7 And a very important consideration in
8 considering stare decisis is reliance. So it
9 would be helpful to me if you could compare the
10 reliance that's at issue here. Louisiana and
11 Oregon have tried thousands of cases, in
12 reliance on Apodaca. The Court said: This was
13 okay. We've never -- we've never suggested that
14 it wasn't. We've denied cert in lots of cases.

15 So can you compare the reliance here
16 with the reliance in Franchise Tax Board and in
17 Knick?

18 MR. FISHER: Well, I think Justice
19 Alito, I'd like to make both a legal comparison
20 and a factual comparison.

21 So starting with the law, I think it's
22 important to note that the state here is
23 claiming to rely on Apodaca, but they are not
24 defending the rule of Apodaca, which is that the
25 Fourteenth Amendment doesn't require states to

1 have unanimous verdicts. Instead, they're
2 asking the Court to adopt a new rule of Sixth
3 Amendment law that the Court has never adopted.

4 And I know the Court last term, as you
5 -- as you note, in part of those disagreements,
6 some justices were saying, well, it's okay to
7 come up and rehabilitate an old rule; that
8 shouldn't forgo stare decisis value.

9 JUSTICE ALITO: Well, but that's --

10 MR. FISHER: But here the state is
11 asking for a brand-new rule.

12 JUSTICE ALITO: I -- I don't want to
13 interrupt. That's a fair point, but we're not
14 tied in deciding this case to the position
15 that's taken by the state. We have a decision
16 of this Court, *Apodaca*, and we could -- we could
17 affirm it on -- on a different ground from the
18 one that the -- the exact one the state has --
19 has advanced.

20 But I want you to complete what you
21 were saying.

22 MR. FISHER: Yeah, so let me give you
23 three reasons why, even if you take that as a --
24 as a given, stare decisis shouldn't carry the
25 day. And then I'll turn to the facts.

1 But still sticking with the law, three
2 things: One is remember Justice Powell's vote
3 was an isolated vote where there was no majority
4 for the Court, and it was -- indeed, his vote
5 was rejected by the other --

6 JUSTICE KAGAN: So could I ask you --

7 MR. FISHER: -- eight justices on the
8 Court.

9 JUSTICE KAGAN: This is so unfair, Mr.
10 Fisher, but could I ask you to take that out of
11 your analysis and just pretend for the remainder
12 of your analysis, I -- I think that's an
13 important consideration, which I'm not quite
14 sure how to think about, but if you assume that
15 this was, you know, just any old 5-4 decision.

16 MR. FISHER: So I would then move to
17 my second point, which would be that the -- the
18 -- that Fourteenth Amendment rule, even if it
19 had been adopted by a majority, is a derelict in
20 the law. It is isolated -- it is really an
21 abandoned relic of past jurisprudence. And you
22 don't have to look further than last term in
23 *Timbs*. You can look at the *McDonald* opinion and
24 you can look at any number of other --

25 JUSTICE KAGAN: Well --

1 MR. FISHER: -- opinions from this
2 Court that say the same standards have to apply
3 to the states as the federal government.

4 JUSTICE KAGAN: I mean, it would be an
5 outlier. It would be something that says, look,
6 we just -- we have an exception here. We -- we
7 are going to treat this amendment differently.

8 But you know we tolerate a pretty
9 significant degree of diversity in state
10 criminal procedure, and this could just be one
11 of those sorts of rules, where -- where we say
12 you -- you know there are occasional times where
13 we think that the state gets to decide something
14 on its own. And so, yeah, it's anomaly.
15 Usually, we do look in stare decisis reasoning
16 for anomalies, but this is not the kind of
17 anomaly that should concern us overmuch because,
18 in general, criminal procedure law is loaded
19 with anomalies.

20 MR. FISHER: Well, Justice Kagan, I
21 think -- let me respond one thing I hope isn't
22 fighting the premise, but what I would say is if
23 the -- if you look at the Court's incorporation
24 jurisprudence, that is the one place the Court
25 has not accepted anomalies and where the Court

1 has said that stare decisis is at a very low ebb
2 when it comes to states following the
3 fundamental rules of the road and the Bill of
4 Rights. So I think on that level, it is a
5 different kind of a situation than the ordinary
6 stare decisis case.

7 JUSTICE GINSBURG: Did Timbs recognize
8 that exception?

9 MR. FISHER: Pardon me?

10 JUSTICE GINSBURG: Timbs, in saying
11 the Excessive Fines Clause applies to the
12 states, recognize Apodaca as an exception?
13 Recognized the Sixth Amendment was the one
14 exception to complete incorporation?

15 MR. FISHER: That's right, Justice
16 Ginsburg. And I think my argument today is that
17 even though that's been an exception for several
18 years, it shouldn't go forward.

19 It doesn't have any footing in the
20 law. There's no --

21 JUSTICE KAGAN: What else have you got
22 --

23 MR. FISHER: -- Fourteenth Amendment
24 footing. So let me turn to the -- to I think
25 back to Justice Alito's question, because I

1 think you were asking about convictions.

2 And I think this is another area where
3 stare decisis actually has less to say than
4 normal. And that's because the Court already
5 has a developed set of doctrines, like the
6 Teague jurisprudence and the Griffith
7 jurisprudence that are themselves designed to
8 give states a reliance interest in their past
9 and past precedent from this Court.

10 So unlike the ordinary case, Franchise
11 Tax Board and any number of other doctrines, you
12 have this whole separate set of doctrines that
13 the state can invoke to support its reliance
14 interest --

15 JUSTICE ALITO: Well, we don't know --

16 MR. FISHER: -- in those past
17 convictions.

18 JUSTICE ALITO: -- how a decision in
19 your favor in this case would play out in
20 collateral review, either in federal court or in
21 state court.

22 But do you think -- I mean, I -- I can
23 well envision seeing you up here in a term or
24 two arguing this is a water -- the rule that you
25 are trying to persuade us to accept today is a

1 watershed rule of criminal procedure.

2 Do you think that's a frivolous
3 argument?

4 MR. FISHER: I don't think it's
5 frivolous, Justice Alito. I think the best
6 thing the state will have to say for itself in
7 that respect is that Duncan itself, when the
8 Court incorporated the right to jury trial,
9 Duncan itself was not held to be retroactive in
10 the DeStefano opinion, and in Schiro against
11 Summerlin the court reaffirmed that precedent.

12 But, Justice Alito, the core point
13 that I'm making to you today is, in deciding
14 whether to overrule a past case, absolutely
15 reliance interests are at stake.

16 But there are separate doctrines to
17 protect those reliance interests, so that I
18 don't think you should give them undue weight in
19 this situation. And I don't think the Court has
20 given those kinds of things undue weight in the
21 past. And I would direct the Court back to its
22 McDonald decision where it catalogued all the
23 times over the years in the Court's
24 incorporation jurisprudence that it has
25 overruled past cases.

1 And I don't think there is any other
2 area of law in the Court's jurisprudence where
3 stare decisis over the years has held less value
4 than incorporation.

5 JUSTICE KAVANAUGH: What about --
6 sorry.

7 MR. FISHER: No, go ahead.

8 JUSTICE KAVANAUGH: What about the
9 size of the jury, if we were to accept your
10 argument here, how or could we draw a
11 distinction between this case and the precedence
12 on size of a jury?

13 MR. FISHER: Well, Justice Kavanaugh,
14 I think Williams itself tells you how you would
15 do that. It says that the question under the
16 Sixth Amendment is whether the feature at issue
17 is an indispensable feature or, as the Court
18 also put it, an essential feature of the right
19 to jury trial as we practice it in this country.

20 And what the Court concluded in
21 Williams after looking at historical sources was
22 they were mixed. And probably the better
23 reading of those sources were the 12-person rule
24 was just a historical accident.

25 And so that is a holding of this Court

1 that puts it on the other side of the ledger
2 from the uniform common law authorities when it
3 comes to unanimity and that holding, moreover,
4 Justice Kavanaugh, would be entitled to a stare
5 decisis effect.

6 JUSTICE KAGAN: Do you think --

7 JUSTICE GORSUCH: What -- what --

8 JUSTICE KAGAN: -- we would have to --

9 JUSTICE GORSUCH: Sorry.

10 JUSTICE GINSBURG: Mr. Fisher,
11 Williams, I think, is a problem for you. If
12 only six minds need to agree to convict of a
13 criminal offense, why shouldn't ten be enough?

14 MR. FISHER: Justice Ginsburg, the key
15 principle is not how many. It's the degree of
16 agreement. And so my -- my core proposition to
17 you today is that a 10/2 verdict is less
18 guaranteed to be accurate and less guaranteed to
19 be consonant with the purposes of jury trial
20 than a 6/0 verdict. And I think --

21 CHIEF JUSTICE ROBERTS: And that's --

22 MR. FISHER: -- maybe it would help --

23 CHIEF JUSTICE ROBERTS: You prefaced
24 -- you prefaced that by saying that's a key part
25 of the distinction you are trying to draw?

1 MR. FISHER: Well, maybe it is the
2 very distinction.

3 CHIEF JUSTICE ROBERTS: Well, I know.
4 But, I mean, I guess I'm not sure that's
5 self-apparent. I mean, I don't know whether you
6 play it out in game theory or something, but if
7 you asked the defendant, what do you want, do
8 you want six, and they have to agree across the
9 board, or do you want 12, and you have got to
10 convince -- that's not immediately apparent to
11 me which -- which I would take.

12 MR. FISHER: Well, Mr. Chief Justice,
13 can I give you a legal answer and a practical
14 answer?

15 So as a legal answer, the -- the
16 unanimity required even of a six-person verdict
17 is more consistent with -- and, in fact, is the
18 only consistent outcome -- with the purposes of
19 the jury trial clause because the core purposes
20 are effective deliberation towards an accurate
21 decision and a cross-section of the community.

22 Now, remember what happens in
23 Louisiana and in Oregon is that a cross-section
24 of the community somewhat by design can be left
25 out of and canceled out of those deliberations.

1 And that's very different than a 6/0 verdict
2 when it comes to the way things happen in the
3 jury room and the public confidence in that
4 verdict.

5 And I'll also give you a practical
6 answer to your question. When Louisiana was
7 considering changing its law, and, indeed, did
8 change its law, which I would say
9 parenthetically is also something that I think
10 should be taken into account when it comes to
11 stare decisis, that Louisiana has even changed
12 its law, but during those deliberations there
13 was a prosecutor who testified before the
14 legislature and said that he used to sometimes
15 charge felonies instead of misdemeanors because
16 it was easier to get a 10/2 verdict than it was
17 to get a 6/0 verdict.

18 JUSTICE GORSUCH: Mr. Fisher, let's
19 say I am not entirely persuaded by your
20 functionalist arguments about the distinction
21 between unanimity and numbers between this case
22 and Williams.

23 Have you got anything else besides
24 these functionalist arguments about the real
25 great importance about unanimity and the

1 relative lack of importance about numbers?

2 MR. FISHER: I think what I would say
3 to you, Justice Gorsuch, is the text of the
4 Sixth Amendment understood through its purpose
5 distinguishes this case from Williams. And so
6 let me explain what I mean by that.

7 The text of the Sixth Amendment says
8 the defendant has a right to trial by jury. And
9 so the key is what does that phrase mean? And
10 from history we know that that phrase meant that
11 not just that the defendant got a jury, but that
12 the trial by jury included the way the jury
13 reached its decision.

14 In fact, if we -- if we have a jury
15 who hangs or can't reach a verdict, there is a
16 mistrial. So we don't even have trial by jury.
17 So that's inherent in the term.

18 I think what the Court said in
19 Williams is that of course there are going to be
20 some features of the common law. Imagine, for
21 example, that the justice -- that the jurors all
22 had to wear a particular color jacket to the
23 courtroom. There is going to be certain
24 incidental features of the right to jury trial
25 that don't necessarily have to be read along

1 with the Sixth Amendment.

2 There would be certain things that
3 happened to occur at common law that wouldn't
4 necessarily be brought forward today.

5 Now, I think maybe what you're driving
6 at to some degree is I think there is an
7 argument and there was a powerful argument made
8 in Williams that 12 -- that the 12-person
9 requirement shouldn't be thought of that way.
10 There were some people who thought the 12-person
11 requirement was also a very important feature.

12 But, of course, there were others who
13 didn't. Lord Coke, which the Court quoted, and
14 many other commentators thought, well, no, 12
15 people is just a fanciful number. It's
16 inherently arbitrary. It doesn't really mean
17 anything. And so all we're getting at in this
18 case I think are what's the core meaning of the
19 phrase -- phrase trial by jury.

20 JUSTICE KAGAN: Do you think, Mr.
21 Fisher, that we would also have to overrule
22 Ludwig versus Massachusetts if we overruled
23 Apodaca?

24 If I understand it right, that was
25 another case in which Justice Powell's unusual

1 approach to incorporation ended up being the
2 deciding vote in the case. It was about a
3 two-tiered jury system.

4 MR. FISHER: That's right, Justice
5 Kagan. I think that all my position here today
6 would tell you, if you were to revisit that, is
7 that -- is that Justice Powell's vote in that
8 case, just like in this case, doesn't set up a
9 rule of law the Court should adhere to. But you
10 would still have a separate Sixth Amendment
11 question in Ludwig which the Court -- I'm sorry
12 -- which the Court divided on and you would
13 consider that case on its own terms.

14 And to be perfectly candid with you, I
15 don't even know what the common law would say
16 about the two-tiered jury system. That was not
17 something the Court considered in that case and
18 it would be a whole different set of arguments.

19 JUSTICE KAGAN: You --

20 JUSTICE GORSUCH: Do you --

21 JUSTICE KAGAN: You -- you started off
22 and then I told you to stop, but I thought I'd
23 give you an opportunity to do it again.

24 I mean, what are we to make of this
25 4/1/4 reasoning of Apodaca and -- and -- and

1 what do you think the rule should be about stare
2 decisis going forward? Do you need a majority?
3 Do you just need a controlling rule? What's --
4 what's the right way to think about that?

5 MR. FISHER: Well, I can tell you what
6 I think and I can tell you what the Court has
7 done. I think that there are times where a
8 single vote could be accorded stare decisis
9 effect, particularly if it's comfortably a
10 narrower ground within the Marks rule.

11 But then you have other cases more
12 like this where Marks doesn't so easily fit onto
13 that system. And I think that the most recent
14 time the Court dealt with a situation like that
15 was the Hughes case a couple terms ago, where
16 you had a 4/1/4 vote in the prior case and what
17 the Court said is we're going to consider this
18 issue fresh.

19 The Court did the same thing in
20 Seminole Tribe. And -- and Seminole Tribe is a
21 good example of a case that drew deep divisions
22 within the Court as to what the substantive
23 meaning of the Eleventh Amendment was. But
24 Justice Souter in his dissent said I do not
25 begrudge the majority for considering this issue

1 fresh, because there was no majority of the
2 Court that had previously spoken to it and our
3 votes were all over the map.

4 JUSTICE ALITO: Well, what about a
5 party that has to make decisions about how it's
6 going to order its affairs in the wake of a
7 decision that it wins but does it in a 4/1/4
8 decision? What are they -- what is that party
9 supposed to do? Say, well, all right, we won
10 this case, but we really can't rely on it
11 because we don't know what -- because it has no
12 stare decisis effect, and then what happens as
13 the years go by and nothing happens, the Court
14 doesn't come back to that question?

15 MR. FISHER: Well, Justice Alito, I
16 think that at least in the ordinary case, the --
17 the -- the party would have every -- every right
18 to rely on this Court's decision, subject to the
19 ordinary principles of stare decisis that we're
20 deciding.

21 I think the one thing that makes this
22 case unusual is you would think that if the
23 party did rely on that prior case they'd at
24 least come up and defend it instead of ask the
25 Court for a different rule.

1 And I think that just tells you
2 something about how -- how discredited the fifth
3 vote in this -- in this case is, which I think
4 makes it almost a universe of one. I can't
5 think of -- I -- I've looked and I haven't found
6 any other case where somebody has gone to --
7 come up to this Court and said: I'm not even
8 going to make an argument based on the provision
9 of the constitution on which the previous
10 decision rests.

11 JUSTICE ALITO: Can I come back to the
12 -- the math question that was alluded to
13 earlier? I am not myself, I must confess,
14 capable of doing this math, but somebody could.

15 So if you hypothesize a jury pool with
16 a certain percentage of jurors who were inclined
17 to acquit, and you ask is there a greater
18 likelihood of acquittal with a 6/0 verdict than
19 a 10/2 verdict or an 11/1 verdict or if the
20 state decides to have a jury that's bigger than
21 12, a 15/1 -- a 15-person injury, 14/1; 19/1,
22 when we get to the point where the chance of
23 acquittal is -- is in favor of the non-unanimous
24 rule, would that be unconstitutional?

25 MR. FISHER: My rule is that any time

1 the state deviates from unanimity, it is
2 unconstitutional, so even if a state were to go
3 beyond the number of 12. And I think the reason
4 why is because it's a different phenomenon when
5 somebody disagrees in the jury room.

6 And I don't mean to be presumptuous,
7 but I've heard some justices of this Court
8 remark there's a difference between a 9/0
9 opinion and an 8/1 opinion. When somebody puts
10 reasonable, good-faith views on the table and
11 requires an answer from the others, it sharpens
12 ones thinking, it leads to better results
13 sometimes --

14 JUSTICE ALITO: I mean, you really --

15 MR. FISHER: -- and at least in a jury
16 room, that would be case.

17 JUSTICE ALITO: You really want to
18 argue that? So if a -- if a petit jury had to
19 be as big as a grand jury and you were
20 representing a criminal defendant, you would
21 rather -- you would say we want -- 6/0 is better
22 for us than 21 to 1?

23 MR. FISHER: Justice Alito, perhaps
24 there'd be a number where that argument would
25 start to be difficult, and I think that -- that

1 what I would tell you is the history and
2 tradition of this country makes it highly
3 unlikely that we're ever going to see a system
4 like that.

5 What we have uniformly, almost,
6 throughout the states is a ceiling of 12. And I
7 think -- you talked about a math problem. And I
8 think maybe it's also helpful to remind the
9 Court of the Court's term -- decision last term
10 in *Flowers*, where the Court talked about the
11 math of preemptory challenges.

12 And I think you have a similar math
13 problem here, which is if you have one or two
14 members of a minority on a jury, it could be a
15 racial minority, it could be a political
16 minority, it could be a religious minority, are
17 we really prepared to say that those one or two
18 votes can be utterly canceled out?

19 JUSTICE KAVANAUGH: Do the racial
20 origins of this rule have an impact on how we
21 think about stare decisis in this case?

22 MR. FISHER: I think they do, Justice
23 Kavanaugh. I think --

24 JUSTICE KAVANAUGH: How? How do --
25 how should we factor those in?

1 MR. FISHER: I think in a couple ways.
2 I think, when you talk about how reasonable the
3 reliance is from the state, I think it's perhaps
4 justifiable to look at the origins of the law
5 that it's defending.

6 But I also think more directly, if
7 you're asking whether Justice Powell's
8 Fourteenth Amendment reasoning should stand, he
9 didn't even consider this history. I'm not sure
10 it was put in front of the Court. And as the
11 Court has said many other times like in
12 McDonald, like in Pena-Rodriguez, when we're
13 reading provisions of the Bill of Rights against
14 the states through the Fourteenth Amendment, the
15 history and purpose of the Fourteenth Amendment
16 is a salient way to --

17 JUSTICE ALITO: You really --

18 MR. FISHER: -- think that.

19 JUSTICE ALITO: -- want to make that
20 argument? You made a big deal of it in your
21 brief.

22 I thought you'd -- I thought you would
23 abandon it here today. But if -- if another
24 state were to enact the same statute that
25 Louisiana has tomorrow and did it for all of the

1 legitimate policy reasons that have led such
2 entities as the American Bar Association and the
3 American Law Institute and lots of reputable
4 scholars and the framers of the Constitution of
5 Puerto Rico and the people who made the rule in
6 the United Kingdom, all of which allow
7 non-unanimous juries, if they -- if that was
8 enacted for that reason, that might be
9 constitutional, but this statute is not
10 constitutional and the Oregon statute is not
11 constitutional because of the -- the origin that
12 you a attribute to them?

13 MR. FISHER: No, Justice -- Justice
14 Alito. Let me make sure that I am clear with
15 the Court.

16 We think that purpose perhaps could
17 inform the Court's decision-making, and
18 particularly if you're looking at stare decisis,
19 it could inform whether to stick with an old
20 Fourteenth Amendment rule, but we don't think
21 it's essential to our Sixth Amendment argument.
22 And we think if a state had followed the old ALI
23 recommendation before the Sixth Amendment was
24 incorporated in the states, that I'd be making
25 all -- all the other same arguments I'm making

1 here today.

2 But I think the thing I would leave
3 you with, before I sit down for rebuttal, is
4 that it is telling, Justice Alito, I think, that
5 no state has ever done that. The only two
6 states that have ever deviated did -- did so
7 under circumstances where the cross-section of
8 the community that the jury trial was designed
9 to bring into the courtroom had changed. And
10 part of the design was to leave a part of that
11 cross-section perhaps out of deliberations.

12 JUSTICE KAGAN: You -- you mentioned a
13 couple of times earlier in your argument where
14 the Court has said that a decision is entitled
15 to less stare decisis effect because the parties
16 have come into Court and tried to kind of
17 improve the reasoning, so the Court has said, of
18 the earlier decision.

19 And as I understood what you were
20 saying, you were saying that this even goes
21 beyond that.

22 MR. FISHER: Right.

23 JUSTICE KAGAN: Could -- could you
24 explain why or is it the same as that or --
25 because I've never liked that argument. So is

1 this just -- is -- is -- is your argument just
2 the same thing?

3 MR. FISHER: No. I think it's a step
4 further, Justice Kagan. I think even if you
5 believe that parties ought to be entitled,
6 especially when there's many years between an
7 old decision and a new one, to -- to make --
8 defend the old decision with the rhythms and the
9 precedents and the ideas that have intervened --
10 so, for example, to take a case like Citizens
11 United, perhaps the government could have come
12 in in that case and made other First Amendment
13 arguments in support of that statute in that
14 case.

15 I think we have here something
16 entirely different, though. The state is not
17 even making a Fourteenth Amendment argument.
18 They're asking the Court to adopt a rule -- and
19 let me be clear, the rule that they're asking
20 the Court to adopt is the Sixth Amendment does
21 not require unanimous verdict. Five justices in
22 Apodaca squarely rejected that argument. And
23 the Court, itself, in 14 -- 14 other opinions
24 have rejected that argument.

25 JUSTICE GINSBURG: It was unsettled --

1 MR. FISHER: So, Justice Kagan, I
2 think this is different in kind.

3 JUSTICE GINSBURG: It was unsettled
4 until Apodaca. The unanimity question was not
5 settled until Apodaca, right? Well, because
6 four -- four of the justices there thought
7 unanimity was not required; four thought it was.

8 MR. FISHER: My --

9 JUSTICE GINSBURG: So it was Apodaca,
10 the fifth vote being Powell's vote, that said --
11 set the precedent for you to require a unanimity
12 in federal trials.

13 MR. FISHER: Let me say something
14 about before Apodaca and then after, Justice
15 Ginsburg. Before Apodaca, the Court had
16 squarely held in Andres in the 1940s that the
17 Sixth Amendment requires a unanimous verdict.
18 And it had said it many other times, but I think
19 in that case, it was integral to the holding.
20 And so what I understood the four-justice
21 plurality to be saying in Apodaca was doing what
22 Justice White had said in a footnote in Duncan
23 it could do, which is reconsider the old
24 precedents.

25 But even if I didn't have that, I

1 would have the five votes in Apodaca, Justice
2 Ginsburg, and the statements in cases like
3 Richard and Descamps later, where the Court has
4 cited Justice Powell's opinion as the law and
5 said that it settles the Sixth Amendment
6 question.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Ms. Murrill.

10 ORAL ARGUMENT OF ELIZABETH MURRILL

11 ON BEHALF OF THE RESPONDENT

12 MS. MURRILL: Mr. Chief Justice, and
13 may it please the Court:

14 We agree with Petitioner that this
15 case presents two issues: whether the Sixth
16 Amendment requires unanimity and, if so, whether
17 that requirement applies to the states.

18 The Court should decide this case on
19 the first issue because nothing in the text,
20 structure, or history of the Sixth Amendment
21 requires unanimous jury verdicts.

22 Nor has this Court ever held that the
23 framers wholesale adopted the common law. In
24 fact, the Court has expressly rejected that view
25 in *Hurtado* with regard to the Bill of Rights and

1 in Williams. Those correct holdings, plus
2 historical evidence that the framers expressly
3 rejected unanimity and the Sixth Amendment, are
4 fatal to Petitioner's request to add back words
5 that the Senate rejected in 1789.

6 The reliance interests here are
7 overwhelming. Because the Sixth Amendment is
8 not a code of criminal procedure, over two
9 centuries of states -- two -- for two centuries,
10 states have adapted their criminal justice
11 systems to their particular circumstances, and
12 Louisiana for the last 50 years has specifically
13 relied on this Court's express approval of the
14 system that's challenged here today again.

15 We have 32,000 people that are
16 currently serving time for serious crimes. And
17 each of these convictions would be subject to
18 challenge if Apodaca is reversed. Overruling
19 Apodaca strikes -- would strike at the
20 foundation of widespread state practices that
21 include indictment by information and juries of
22 fewer than 12.

23 The beauty of our system, is that
24 people can change the rules. So if they now
25 want to require unanimity, they can do so. They

1 can amend their state laws, as Louisiana
2 recently did, or they can amend the federal
3 Constitution.

4 The judgment in Apodaca should be
5 affirmed. And I'm happy to take questions.

6 JUSTICE GINSBURG: Are you asking the
7 Court to take up a question that five justices
8 answered in Apodaca? That is, that the Sixth --
9 Apodaca, five -- there were five votes to say
10 that the Sixth Amendment requires jury unanimity
11 in federal trials.

12 You are asking to -- us to reject a
13 rule that five justices adhered to.

14 MS. MURRILL: Justice Ginsburg, we
15 don't think that Justice Powell's decision was
16 entirely clear with regard to the rule as it
17 would apply historically. We think the text is
18 very, very clear that unanimity was -- is -- is
19 not there and that it was rejected.

20 So --

21 JUSTICE GINSBURG: But --

22 MS. MURRILL: -- we're happy --

23 JUSTICE GINSBURG: -- there were --
24 there were four justices who said unanimity was
25 required. And then there was Justice Powell,

1 who said unanimity is required in federal
2 trials. You are asking us to overturn that
3 position, that unanimity is required in federal
4 trials?

5 MS. MURRILL: Justice Ginsburg, we
6 don't believe that that was central to his
7 holding or to his position in his plurality
8 opinion. And -- and our position would be that
9 one justice's opinion that is not central to his
10 -- his plurality opinion plus four dissenters
11 does not -- is not equal to a holding.

12 JUSTICE GORSUCH: Then aren't we --
13 aren't we in -- having to address this fresh,
14 just as you really seem to want us to do? I
15 mean, that -- that -- that seems to me an
16 admission that we are in a proper place to -- to
17 take this up afresh.

18 If precedent weighs for anything, what
19 do we do with Andres? What do we do with those
20 14 cases throughout Supreme Court history that
21 seem to treat unanimity as part of the Sixth
22 Amendment?

23 And what do we do as well with Hughes
24 and with Seminole Tribe and a lot of other cases
25 where we have been facing similarly splintered

1 decisions and the Court has come back and
2 addressed the question fresh without considering
3 stare decisis in those cases?

4 Sometimes the -- the Court can't reach
5 majority opinion. Sometimes it's just unable
6 to. And why doesn't a state take that risk when
7 it relies on a decision that is so splintered?

8 MS. MURRILL: Justice Gorsuch, I think
9 that Louisiana reasonably relied on a decision
10 of this Court that it -- that non-unanimous
11 juries were constitutional. They also did that
12 on the tail end of a decision by this Court in
13 Williams that found that a six-man jury was also
14 constitutional.

15 JUSTICE GORSUCH: Well we're not
16 dealing with a --

17 MS. MURRILL: And -- and I don't --

18 JUSTICE GORSUCH: -- a six-person
19 jury, so we can put that aside. We're -- we're
20 dealing with unanimity. And I -- I don't think
21 you're arguing that the Court did anything
22 improper in Hughes or did anything improper in
23 Seminole Tribe by taking up the question afresh.

24 And I'm just curious why it would be
25 different here and why the state shouldn't be

1 assigned some degree of risk, assuming risk, by
2 proceeding in this area on the reliance of one
3 -- one member of the Court's opinion that is
4 rather, I think fair to say, idiosyncratic?

5 MS. MURRILL: Well, for one thing, I
6 think that incorporation doctrine evolved over
7 time. So I'm not sure that the state was -- it
8 was -- it was reasonable to expect the state to
9 ignore an actual holding in a case and
10 anticipate that that would change over time.

11 So that's -- that's one response that
12 I have to that question.

13 My second response is that I think you
14 can take it up afresh. But -- but I also --
15 this is a non-textual --

16 JUSTICE GORSUCH: Appreciate --
17 appreciate that. That's helpful.

18 JUSTICE KAGAN: Well, just on that,
19 General Murrill, so, I mean, you don't really
20 want us to take that up afresh, do you? I mean,
21 aren't you -- I'm sort of confused because there
22 is the sentence in your brief that says neither
23 party is asking the Court to accord Justice
24 Powell's solo opinion in Apodaca precedential
25 force.

1 Is that right, that you're not asking
2 us to accord Justice Powell's solo opinion
3 precedential force? Because if that's right,
4 then -- I mean, are you basically just saying to
5 me: Forget Justice Powell's opinion in Apodaca;
6 just decide what the Sixth Amendment requires?

7 MS. MURRILL: Justice Kagan, I -- I
8 think that given the evolution of incorporation
9 theory, we find ourselves in a position where it
10 is even more important to get the text right and
11 to get the history right.

12 So if -- if -- if that means taking
13 that issue up afresh --

14 JUSTICE KAGAN: But, you see --

15 MS. MURRILL: -- then we should do
16 that.

17 JUSTICE KAGAN: -- I think I agree
18 with Justice Alito. You have some strong
19 reliance interests here, but -- but your
20 reliance interests are only relevant in the
21 context of an argument from stare decisis.

22 And I guess I would like to know then
23 how are your reliance interests relevant? What
24 argument from stare decisis are you making?

25 MS. MURRILL: Well, we think that the

1 text and the history do not include a
2 non-unanimous jury verdict. We think that
3 that's a constitutional -- that is a choice that
4 states can make.

5 JUSTICE KAVANAUGH: That's not --

6 MS. MURRILL: And so, you know, that's
7 -- we think that the -- the four Justices, plus
8 Justice Powell's decision, were a ruling that
9 said that it was not unconstitutional to have
10 non-unanimous jury verdicts and it was
11 reasonable for us to rely on that.

12 So we don't -- we don't entirely
13 disavow stare decisis. I mean, we still believe
14 we have enormous reliance interests.

15 JUSTICE KAVANAUGH: You were relying
16 on Justice Powell's opinion in Apodaca. That's
17 the only --

18 MS. MURRILL: We're also relying --

19 JUSTICE KAVANAUGH: For stare decisis
20 that must be what you're relying on, combined
21 with the other four that said the states don't
22 have to provide unanimous juries.

23 MS. MURRILL: Well, I think, Justice
24 Kavanaugh, that we're also relying on this
25 Court's opinions in -- in Williams and in

1 Hurtado that said that the Court -- that has
2 never adopted the common law wholesale.

3 I mean, that's --

4 JUSTICE GINSBURG: But you -- you --

5 MS. MURRILL: -- that is I think
6 critical to the analysis.

7 JUSTICE GINSBURG: Just to be clear,
8 you are not urging the Apodaca. You want us to
9 go back and say what the Sixth Amendment
10 requires, the -- the issue on which the Court
11 was divided, you want us to say unanimity is not
12 required in federal trials and it's not required
13 in state trials, and on that issue, what is your
14 view of the Seventh Amendment? Does the Seventh
15 Amendment require unanimity in civil trials?

16 MS. MURRILL: Justice Ginsburg, I
17 think the Seventh Amendment is a different
18 question. Its text is different. Its structure
19 --

20 JUSTICE GINSBURG: But just -- just
21 the --

22 MS. MURRILL: -- is different.

23 JUSTICE GINSBURG: -- the answer to my
24 question: Is unanimity required under the
25 Seventh Amendment in civil trials in federal

1 court?

2 MS. MURRILL: I don't believe that it
3 would be required in the Seventh Amendment but I
4 don't think you need to determine that here
5 today.

6 JUSTICE GORSUCH: Well --

7 MS. MURRILL: That's not the issue.

8 JUSTICE GORSUCH: Well, this Court has
9 held --

10 MS. MURRILL: The issue is the Sixth
11 Amendment.

12 JUSTICE GORSUCH: -- that it --
13 there's a -- there's a holding of the Supreme
14 Court that's over 100 years old so holding. And
15 so no reliance interests for anybody there?

16 MS. MURRILL: Justice Gorsuch, my
17 answer is specifically related to the text and
18 what the text would require. I'm not disputing
19 that there might be precedent that would apply
20 --

21 JUSTICE GORSUCH: Oh, okay.

22 MS. MURRILL: -- in the Seventh
23 Amendment.

24 JUSTICE GORSUCH: All right.

25 MS. MURRILL: I just --

1 JUSTICE GORSUCH: All right. So we
2 don't count precedent in the Seventh Amendment
3 but we do in this area on Justice Powell's
4 opinion.

5 Let's say the Seventh Amendment does
6 require a jury trial. In what universe does it
7 make sense to imagine that the framers of the
8 constitution would have insisted on a jury trial
9 for civil cases where property is at stake but
10 not in criminal cases where liberty is at stake,
11 and lives?

12 MS. MURRILL: I -- I believe that the
13 structure and the history of both reach --
14 ultimately on the textual answer reach the same
15 result.

16 JUSTICE GORSUCH: All right.

17 MS. MURRILL: I -- I -- I don't think
18 that they would.

19 JUSTICE GORSUCH: You disagree with
20 the Supreme Court's analysis on the Seventh
21 Amendment. I understand that.

22 But spot for me a moment that the
23 Supreme Court might have gotten the Seventh
24 Amendment right. Okay? It may be possible.
25 All right? In -- in what universe would the

1 rule be different for criminal cases?

2 MS. MURRILL: I -- I -- I don't think
3 necessarily the rule would be different. I
4 think that the -- that we have to look at what
5 the text and the history demand, and that when
6 we are talking about a non-textual right, I
7 think that it is very, very important that the
8 Court get the history right.

9 And the history tells us that this --
10 that unanimity was rejected for a reason, that
11 there were -- there was a very specific decision
12 that was made to reject unanimity. It was
13 proposed, it was rejected, it was debated, it
14 was discussed, it was a known issue, because
15 four states had --

16 CHIEF JUSTICE ROBERTS: How far --

17 MS. MURRILL: -- actually adopted
18 unanimity.

19 CHIEF JUSTICE ROBERTS: How far are
20 you willing to depart from unanimity? Would a
21 7/5 requirement be okay under your theory?

22 MS. MURRILL: Mr. Chief Justice, I
23 think this Court has established some of the
24 outer boundaries already in Williams and in
25 Burch and in Will -- and in Apodaca. So nine,

1 under Apodaca, 9/3 is okay.

2 I would -- I would also remind the
3 Court that Louisiana in reliance on this Court's
4 decision in Apodaca and in Johnson went and at a
5 constitutional convention the year after this --
6 that case was decided, discussed it, expressly
7 relied on it, and increased voting rules to
8 ten/two.

9 JUSTICE SOTOMAYOR: Can we go back to
10 reliance a moment? Putting aside that in Janus
11 a couple of decisions from the Supreme Court put
12 the unions on notice that things should -- that
13 the constitutional theory was on shaky ground,
14 and here you have a series of cases, much older,
15 telling you that the incorporation theory was on
16 shaky ground.

17 But you're talking about a parade of
18 horrors if we rule against you. How about the
19 parade of horrors if we rule in your favor?
20 How do we decide what's at the essence of the
21 common law jury trial?

22 Would issues like having a fair
23 cross-section of the community and the veneer be
24 in question -- we have a case that says that's
25 incorporated -- or what about what we said in

1 Sullivan, that the Sixth Amendment jury right
2 requires a jury verdict of guilty beyond a
3 reasonable doubt?

4 None of those terms are in the
5 Constitution. None of those terms, as far as I
6 know, were part of the discussions at the
7 convention. Are they going to be open to attack
8 now, too, if we rule in your favor? There's no
9 history, there's no anything, except our sense
10 of what the essence of the common law right was.

11 MS. MURRILL: And --

12 JUSTICE SOTOMAYOR: Not our sense, but
13 the history of what happened and why.

14 MS. MURRILL: So I think, Justice
15 Sotomayor, that we have the text and what made
16 the cut after the debates over what was missing.

17 JUSTICE SOTOMAYOR: But the debates --

18 MS. MURRILL: So --

19 JUSTICE SOTOMAYOR: -- we have a bunch
20 of people who were in favor of the cuts telling
21 everybody else everybody understands that a
22 unanimous verdict is the standard.

23 So we have part of the constitutional
24 debate. Hamilton himself, who drafted it and
25 took out the right to a unanimous jury,

1 basically said during the -- the discussion it's
2 so self-evident, we don't need to include it.

3 So you're looking at history just in
4 terms of what was taken out, but without the
5 context of the discussion.

6 MS. MURRILL: Not exclusively, Justice
7 Sotomayor. I think we also would agree that due
8 process and -- and equal protection play a role.
9 I mean, we -- we don't have requirements anymore
10 that it's only 12 white male freeholders.

11 JUSTICE SOTOMAYOR: Exactly.

12 MS. MURRILL: So -- and I think that's
13 an example of how we did not adopt the common
14 law in all of its -- its historical terms. We
15 actually -- Congress adopted some of that
16 language over time. It was not embedded in the
17 Constitution.

18 So we know that there was an
19 historical debate. We know that states had
20 adopted a different rule, and -- and then some
21 of them wrote this rule into their own state
22 constitution. So known debated problem.

23 There's a -- there -- Madison proposes
24 an amendment, thinks he solved this problem, and
25 then it gets rejected by the Senate. So --

1 JUSTICE GINSBURG: But why was it
2 rejected? I mean, one -- one account is it was
3 totally unnecessary. Everybody understood a
4 jury trial meant unanimous agreement.

5 So he took it out because we didn't
6 want to clutter up the Constitution with
7 unnecessary statements. The words "jury trial"
8 themselves mean unanimous verdict.

9 MS. MURRILL: Well, Justice Ginsburg,
10 we did clutter it up with an impartial -- with
11 the word "impartial." And we did clutter it up
12 with a number of other terms.

13 And -- and I don't -- and I think that
14 the history showing that states felt that it was
15 important to write it into some of their
16 constitutions indicates that there certainly was
17 at least a view that -- that it should be
18 written in by some and not -- so I don't think
19 it's a fair reading to -- to assume that that
20 was simply because we would all know that it
21 would be there, especially because they knew
22 that they were writing a document for the
23 future.

24 JUSTICE KAVANAUGH: For the sake of
25 argument, assume that I think the Sixth

1 Amendment requires a unanimous jury. Just for
2 the sake of argument. What are your best
3 arguments, then, for why the right is not
4 incorporated and relatedly your best arguments
5 for not overruling Apodaca, which is read, the
6 -- the opposing counsel says, to have allowed
7 the states to do that?

8 MS. MURRILL: Justice Kavanaugh, they
9 are concededly not very good. I mean, I -- I
10 think that based on Timbs, that we recognize
11 that this Court at least at this point in time
12 has taken a view of incorporation that says that
13 there's no daylight. So if you find that
14 unanimity is required, I find myself in a far
15 more difficult position --

16 JUSTICE KAGAN: Well, yes --

17 JUSTICE KAVANAUGH: What about --

18 JUSTICE KAGAN: -- and no --

19 MS. MURRILL: -- to make that
20 argument.

21 JUSTICE KAGAN: Yes and no, General
22 Murrill, because you have this stare decisis,
23 except you're giving it away. And I don't know
24 what to make of that --

25 MS. MURRILL: I --

1 JUSTICE KAGAN: -- because I would
2 think what you would do is to say something
3 like: This is an outlier in our incorporation
4 doctrine. There's no question that it is. But
5 it has been an on outlier for 50 years. It has
6 been completely administrable. It has been
7 completely clear. States have had every right
8 to rely on this for 50 years. It doesn't matter
9 whether it was wrong because overruling
10 something requires more than just the decision
11 be wrong. It has been there. States have
12 relied on it. There's no reason to change it.
13 The end. Stare decisis.

14 But you're telling me that Justice
15 Powell's opinion isn't entitled to precedential
16 force, isn't entitled to stare decisis effect.
17 So I don't know what to do with that argument
18 anymore.

19 MS. MURRILL: Justice Kagan, I agree
20 with everything that you said about the reasons
21 why this Court should affirm Apodaca and that it
22 should be given stare decisis effect.

23 I -- i think that we are struggling
24 with the fact that Justice Powell's decision
25 doesn't seem to be the view of the Court and --

1 and that it -- the text and the history also, I
2 -- we strongly and firmly believe, are on our
3 side.

4 JUSTICE ALITO: Well, you're not the
5 only state who has an interest here. And, in
6 fact, there's only one state going forward as of
7 this moment that has an interest in this, and
8 that's Oregon. And Oregon might change its rule
9 or it might not change its rule.

10 But Oregon filed a brief and Oregon
11 doesn't make the arguments you're making.
12 Oregon says it should be made clear what this
13 brief does not do. It does not address the
14 merits of whether Apodaca was correctly decided.

15 MS. MURRILL: I -- and I think that
16 Oregon finds itself in a position where the
17 democratic process has stalled in anticipation
18 of this decision. So they've -- they've written
19 a brief that expressly, I think, emphasizes all
20 of our reliance interests. Puerto Rico has
21 similar reliance interests. There's a long line
22 of cases that dealt with territorials and the
23 right -- and the Constitution's application to
24 territories. They have similar interests too.

25 So we do think that the reliance

1 interests are very, very important.

2 JUSTICE ALITO: I mean, it's true --

3 MS. MURRILL: We believe that the
4 judgment was correct.

5 JUSTICE ALITO: It is certainly true
6 that we, in recent years, have rejected the
7 two-track idea about incorporation, but the
8 opposite isn't a crazy argument. As recently as
9 McDonald, there were some voices on this Court
10 that it was -- were essentially making that
11 argument with respect to the Second Amendment.

12 And earlier, there were -- it's a very
13 respectable argument. It hasn't won the light
14 -- it hasn't won the day completely, but that's
15 what Apodaca rests on.

16 MS. MURRILL: Well, Justice Alito, if
17 you're telling me that there is a little bit of
18 daylight, then I'll take it. I mean, I -- I
19 think that, you know, we -- but I also believe
20 the history -- that -- that the history shows
21 that unanimity was rejected and that that is the
22 correct view.

23 JUSTICE BREYER: Is --

24 MS. MURRILL: So I -- we are not
25 entirely repudiating the -- the Apodaca

1 judgment. And we do have 50 years of reliance,
2 which is why I emphasize that we have 32,000
3 people who are incarcerated right now at hard
4 labor for serious crimes, and every one of them
5 would be subject -- would be able to file an
6 appeal.

7 JUSTICE BREYER: Do you think 32,000
8 people were non-unanimous?

9 MS. MURRILL: No, no, no, Justice
10 Breyer.

11 JUSTICE BREYER: Or how -- I mean, I
12 can't -- I don't understand why it would apply
13 to people who were unanimously convicted, maybe,
14 but -- but I think the stronger case would be
15 those people convicted by juries that were not
16 unanimous. And how many of those are there?

17 MS. MURRILL: We don't know, because
18 they --

19 JUSTICE BREYER: I mean --

20 MS. MURRILL: -- there wasn't --

21 JUSTICE BREYER: -- have you any idea?
22 Is there -- with all the work gone into this,
23 has anybody got any rough idea of what
24 percentage of those people who are convicted are
25 convicted by non-unanimous juries?

1 MS. MURRILL: There's just no reliable
2 data --

3 JUSTICE BREYER: Well, if there's --

4 MS. MURRILL: -- but I can --

5 JUSTICE BREYER: -- no reliable data,
6 we'd think -- can I fairly think if there had
7 been some data, even if you just take a sample,
8 you would be telling us? And, therefore, the
9 fact that you're telling us that there are a lot
10 of people in jail, which I did know --

11 MS. MURRILL: Well --

12 (Laughter.)

13 JUSTICE BREYER: -- that that suggests
14 something.

15 MS. MURRILL: Well --

16 JUSTICE BREYER: Now, then you say
17 there's you, there's Oregon, that they're
18 waiting. All right. But Puerto Rico is a tough
19 case, actually. There's a Hispanic tradition,
20 and I don't know, you might have to bring up the
21 Insular Cases. You might -- you might have to
22 revise them. You might have -- get into the
23 status question. Puerto Rico is worrying me.

24 So is there -- is there something you
25 want to say about that since you raised it?

1 MS. MURRILL: Well, we have the same
2 tradition, but I -- but the -- the --

3 JUSTICE BREYER: You have the same
4 tradition, but you don't have as a matter of
5 fact the whole system of trials that grows out
6 of the civil tradition. Or is it --

7 MS. MURRILL: Well, that's why I think
8 all 32,000 --

9 JUSTICE BREYER: Well, all right, skip
10 that. That wasn't --

11 MS. MURRILL: -- are at risk because
12 we do have a system built around --

13 JUSTICE BREYER: I got past the
14 32,000. I now want to know, since you've looked
15 into Puerto Rico, is there a particular problem
16 there if we overturn Apodaca? If we --

17 MS. MURRILL: I believe there is.

18 JUSTICE BREYER: I know you believe
19 there is. I just want to know what there is,
20 rather than my making it up.

21 MS. MURRILL: Because the territorial
22 decisions were based on the authority of
23 Congress to write laws that were different for
24 territories notwithstanding the fact that they
25 still came under the protection of the

1 Constitution, I think that there's a problem.

2 So it's the same -- I mean, the issue
3 here is, does the Sixth Amendment require
4 unanimity? And unless you're going to continue
5 a special carveout for the territories, then
6 they have the same question.

7 CHIEF JUSTICE ROBERTS: Is the
8 32,000 -- is the reason you don't know because
9 the jury is not typically polled or -- or what?

10 MS. MURRILL: Because it is not always
11 polled and because the defense -- that is a
12 responsibility of the defense to do that. And
13 even in some cases where it may have been, it
14 may not have been recorded or kept. And so the
15 data -- the case files are -- seem to be very
16 inconsistent on this.

17 We do know that we are already
18 receiving a flood of these cases, as is this
19 Court. We know that -- you know, we filed 25
20 briefs in the Louisiana Supreme Court last
21 Friday. So we have a -- this case -- this is
22 certainly unsettling the cases, but because a
23 number of those people pleaded guilty based on
24 their expectation of potential -- of facing a
25 10/2 verdict, the criminal defense attorneys

1 filed an amicus brief arguing that point.

2 We also have people who would
3 receive -- everyone that went to trial received
4 this jury instruction. So we're not saying they
5 all win. We are saying --

6 JUSTICE BREYER: All right. Maybe
7 I --

8 MS. MURRILL: -- that every one of
9 them could file. And it's like throwing --

10 JUSTICE BREYER: I got the -- the
11 reliance point.

12 MS. MURRILL: Okay.

13 JUSTICE BREYER: The -- if I believe,
14 one, contrary to what you say, assume it, I
15 believe that, in fact, the federal right in the
16 constitution does include unanimity in the Sixth
17 Amendment.

18 Then, two, I think that thereafter it
19 was fairly clear in the law that same -- the
20 federal rules apply to states, if we
21 incorporate. But you do have a point if you say
22 there are anomalies in the law. And perhaps we
23 should leave the anomaly alone. And that's
24 where you bring in your reason, the reason being
25 that 32,000 people, et cetera, et cetera. Okay.

1 I've got that structure.

2 Is there any other instance you can
3 think of where, despite a contradiction, which
4 you're allowing under my assumptions to remain,
5 a legal contradiction, the Court says: Okay,
6 because let sleeping dogs lie; otherwise we get
7 serious harm?

8 JUSTICE SOTOMAYOR: Just a footnote.
9 That's not taken care of by Teague and the other
10 doctrines your adversary talked about.

11 MS. MURRILL: Your Honor, I think that
12 one of the -- the -- the significant lines of
13 jurisprudence that comes to my mind is Rowe. I
14 mean, I -- I, you know, hesitate to bring that
15 into this, but I do think that's an area and I
16 think that any time you have a non-textual right
17 that -- that the Court has relied on, discussed,
18 related to in passing, I mean, or -- or quoted
19 in passing over time and changed the
20 incorporation doctrine, that it is that much
21 more important to get the text and the history
22 right.

23 So we think that Apodaca was -- that
24 the judgment in Apodaca was correct. We do have
25 enormous reliance interests.

1 JUSTICE GORSUCH: Counsel, on your
2 reliance interests, you say we should worry
3 about the 32,000 people imprisoned. One might
4 wonder whether we should worry about their
5 interests under the Sixth Amendment as well.

6 And then I -- I can't help but wonder,
7 well, should we forever ensconce an incorrect
8 view of the United States Constitution for
9 perpetuity, for all states and all people,
10 denying them a right that we believe was
11 originally given to them because of 32,000
12 criminal convictions in Louisiana?

13 MS. MURRILL: No, Justice Gorsuch.
14 But we don't believe that it was a right that
15 was given to them in the Sixth Amendment.

16 JUSTICE GORSUCH: I understand that.
17 I'm talking about a reliance argument. Doesn't
18 that greatly diminish a single state's claim of
19 reliance with respect to a subset of criminal
20 convictions, when we're talking about a
21 constitution that's supposed to endure?

22 MS. MURRILL: No one, and least of all
23 me, is going to stand here and diminish anyone's
24 liberty interests. I -- I think that -- so I'm
25 not -- I -- I wouldn't take that position.

1 But even in a long line of this
2 Court's significant decisions related to
3 criminal law and criminal procedure, the Court
4 has applied them in a forward fashion instead of
5 retroactively. So, I mean, that's a concern for
6 us.

7 JUSTICE KAVANAUGH: Well, if the jury
8 -- go ahead.

9 JUSTICE GINSBURG: That's not -- the
10 case of retroactivity to convictions that are
11 already final is not before us. It would come
12 before us in a case if you lose this one, but it
13 -- that -- that is not a question that we can
14 properly address here. It hasn't been briefed.
15 It hasn't been decided below.

16 MS. MURRILL: Justice Ginsburg, we
17 certainly do appreciate you not addressing that
18 issue without our opportunity to brief it. I
19 would point out that our law that we just passed
20 makes the law -- it -- it does draw a line and
21 it says that it will apply to all crime, that
22 unanimity will apply to crimes that were
23 committed after January 1st, 2019.

24 So to some extent we are talking about
25 at -- at least some retroactivity, because we've

1 already made a decision to address it going
2 forward.

3 JUSTICE KAVANAUGH: Can I pick up on
4 Justice Gorsuch's question a second?

5 So assume that the Sixth Amendment
6 requires unanimity. I know you disagree. And
7 assume that our law ordinarily requires
8 incorporation against the states of rights that
9 apply against the federal government. So assume
10 ordinarily it would be incorporated.

11 Then we get to the Apodaca question.
12 It seems to me there are two practical arguments
13 for overruling Apodaca if you accept that's
14 holding. One is, as Justice Gorsuch says, there
15 are defendants who have been convicted and
16 sentenced to life, 10/2 or 11/1, who otherwise
17 would have not been convicted. So that seems
18 like a serious issue for us to think about in
19 terms of overruling.

20 And the second is that the rule in
21 question here is rooted in a -- in racism, you
22 know, rooted in a desire, apparently, to
23 diminish the voices of black jurors in the late
24 1890s. So do either of those two -- and that
25 doesn't go to the Sixth Amendment. That goes to

1 the stare decisis angle.

2 Do either of those two things -- or I
3 guess I should say why aren't those two things
4 enough to overrule, if you accept the legal
5 premises, which I know you don't, but if you
6 accept those, why aren't those two things
7 enough, again, unfairness to defendants and
8 rooted in racism?

9 MS. MURRILL: So as -- as to the first
10 question with regard to unfairness to
11 defendants, I just do not see how you can
12 separate this from the six-man jury that -- that
13 was approved of in Williams, which is a six-man
14 jury for all crimes less than capital, and six,
15 granted, unanimous rule but still only six, and
16 Louisiana's rule still requires ten.

17 So I -- I don't think it's
18 fundamentally unfair, nor do I think that this
19 Court in any precedent has ever held that it is.

20 JUSTICE GINSBURG: But Williams held
21 that the number, the number of jurors was not at
22 the heart of the jury trial right. The Court
23 said it was a historical accident. It resembled
24 certain biblical references like 12 apostles, 12
25 tribes of Israel. There was nothing inevitable

1 about the number 12. But there was about the
2 requirement that, whatever the number is, they
3 all agree.

4 CHIEF JUSTICE ROBERTS: You may
5 respond.

6 MS. MURRILL: Justice Ginsburg, I -- I
7 think that it was not an historical accident. I
8 would disagree with that -- that description.

9 I think that these two things were
10 married together in every description, the
11 number 12 and unanimous in every description,
12 have always been --

13 JUSTICE GINSBURG: Well, it's hard,
14 hard to say you disagree when Williams described
15 the number 12 as a historical accident. Did you
16 just say Williams was wrong in that respect?

17 MS. MURRILL: I think that
18 characterization of it was dismissive. That's
19 all. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Five minutes, Mr. Fisher.

23 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

24 ON BEHALF OF THE PETITIONER

25 MR. FISHER: Thank you. I'd like to

1 make a couple of quick factual points and then
2 talk about stare decisis and reliance.

3 Justice Breyer, you asked a couple of
4 questions about numbers and facts. So we say in
5 our reply brief, using one of the state's own
6 filings, that there are 36 cases on direct
7 review right now in Louisiana where this issue
8 has been presented.

9 And then even within those 36 is --
10 even within that 36 you're going to have
11 arguments about whether it was adequately
12 preserved and all the rest. And so we think, at
13 least in the direct review level, the numbers
14 are actually quite modest and low.

15 And as the Court has described
16 throughout the -- the last half of the argument,
17 the retroactivity questions can be left for
18 another day and covered by their own reliance
19 doctrines.

20 You also asked about Puerto Rico.

21 In Footnote 10 of our brief, we note
22 that the Court held in Balzac that the right to
23 jury trial does not apply the same way in Puerto
24 Rico as to the states. And so that would be a
25 question about the insular cases. You're going

1 to be talking about that next week, perhaps.

2 But it's something that this case
3 doesn't -- doesn't necessarily address.

4 So as to stare decisis and reliance,
5 let me make a couple points about the state's
6 framing of its arguments and then talk about, I
7 think, Justice Kagan, your sort of alternative
8 framing of the arguments.

9 As to the state's framing of the
10 arguments, I think it's helpful to remember why
11 we have the stare decisis in the first place.
12 It's about settled expectations in the law.

13 And what we're asking you today to do
14 are to reaffirm two things the Court has said
15 many, many times over the years. One is the
16 Sixth Amendment requires unanimous verdict.
17 And, second, when an incorporated provision
18 applies to the states, it applies the same way
19 as it does to the federal government.

20 So to write that opinion all you have
21 to do is reaffirm what you said many, many times
22 under the law.

23 It is the state's position that it
24 would create upheaval as to the law. It would
25 raise questions like the one the Chief Justice

1 asked about whether seven to five is okay.

2 The state not only doesn't answer the
3 question in its brief, it provides no weight, no
4 weight to answer the question. And that would
5 just be one of many questions that would arise
6 if you agreed with the state's view.

7 So I think then you are left with the
8 alternative argument, that what about -- what
9 about putting a reliance interest into Apodaca
10 itself? I'm not sure, by the way, that Oregon
11 does that. I think it's also telling that
12 Oregon is not willing to defend. I know it
13 doesn't go the other way like the state does but
14 it certainly isn't willing to defend Justice
15 Powell's reasoning in Apodaca.

16 But let's imagine that argument were
17 in front of the Court. I think there is three
18 reasons why you would still overrule Apodaca.

19 The first is the one that a couple of
20 you mentioned, which is that it's not just --
21 it's not just the interests of the state that
22 have to be taken into account. It's the
23 interests of defendants.

24 And before we take away somebody's
25 liberty over 600 years of common law tradition,

1 and Sixth Amendment tradition, is we demand a
2 unanimous verdict, unanimous consent of a
3 cross-section of the community.

4 And that is important, as the social
5 science brief in this case shows, for accuracy,
6 public confidence, and all the rest. And so
7 those reliance interests, which -- by the way,
8 the state itself is not renouncing unanimous
9 verdicts; it maintains the ability under its law
10 to try anyone going forward for a crime
11 committed before January 1st, 2019, and seek a
12 10/2 verdict. And so that could go on for
13 years, and that ought to be taken into account.

14 Secondly, I think incorporation is
15 just different. I think that's the lesson of
16 the sweep of this Court's cases, is reliance
17 interests are less important when it comes to
18 incorporation because the Bill of Rights
19 themselves are so important. When the Court
20 says something is a fundamental rule under our
21 way of doing criminal justice, the states have
22 to follow that rule the same way as the federal
23 government.

24 And then the last thing I think that
25 makes this case different than an ordinary stare

1 decisis case is the vote in Apodaca. It's not
2 just that it was a 4/1/4 vote, but it's just
3 that -- it's that the other eight justices
4 rejected the decisive reasoning in that case.
5 And I think that makes this almost a universe of
6 one.

7 And if I could push it even further, I
8 would say that if you have any doubts, look at
9 Justice Powell's reasoning. Justice Powell's
10 reasoning in Apodaca itself was based on a
11 refusal to follow precedent. What he said was
12 I'm agreeing with the past dissenters. I know
13 you have this rule from Malloy against Hogan
14 from five years ago that requires the same
15 standards to apply in a federal court as they
16 apply -- in state court as they apply in federal
17 court, but I don't want to follow that rule.

18 He didn't even try to distinguish the
19 Court's old holding. So in a sense Apodaca
20 itself was born of a disregard for stare
21 decisis. And so if you feel strongly about
22 stare decisis as a value, this case is almost
23 singular in its -- in its -- in the compelling
24 reasons right now to -- to overrule Apodaca.

25 JUSTICE ALITO: Since you mentioned

1 Balzac, can I ask you a question about that? So
2 let's imagine this case is decided in your
3 favor, and then a -- a defendant who has been
4 convicted by a non-unanimous verdict in Puerto
5 Rico comes here and he says, look, I am a
6 citizen of the United States, and the only
7 reason why I was able to be convicted by a
8 non-unanimous verdict is -- are these old
9 Insular Cases that reflect attitudes of the day
10 in the -- in the end of the -- after the -- the
11 aftermath of the Spanish American war, and just
12 as you brushed aside Apodaca, you should brush
13 aside the Insular Cases.

14 MR. FISHER: I think I would -- I
15 would say that would be different for all the
16 reasons I just outlined. The Insular Cases were
17 majority decisions from the Court. They were --
18 they were based on a view that has not been
19 disregarded or left behind in the Court's
20 jurisprudence.

21 There may be arguments parties can
22 make under ordinary stare decisis principles,
23 but the last point I would leave you with is
24 this is not an ordinary stare decisis case.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 The case is submitted.

3 (Whereupon, at 2:01 p.m., the case was
4 submitted.)

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