No. 18-5924

In the Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the
Louisiana Court of Appeal, Fourth Circuit

BRIEF OF AMICUS CURIAE STATE OF OREGON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Oregon has relied on the constitutionality of non-unanimous juries for 47 years. Oregon courts have given non-unanimous jury instructions for more than 80 years.

Should this Court overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), which held that the Sixth Amendment does not require the jury to be unanimous in state criminal prosecutions?

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INTERESTS OF AMICUS CURIAE STATE OF OREGON

Forty-seven years ago, this Court held in *Apodaca v. Oregon*, 406 U.S. 404 (1972)—an Oregon case—that non-unanimous 11-1 and 10-2 jury verdicts in state criminal prosecutions do not violate the Sixth Amendment. Since then, Oregon has relied on that decision to permit less-than-unanimous jury verdicts in thousands of felony cases—many hundreds of which are currently pending on direct appeal and all of which are potentially subject to collateral review. Thousands of other cases were tried to non-unanimous verdicts in the decades before *Apodaca*. All of those cases are potentially implicated by a decision to overturn *Apodaca*.

First, it should be made clear what this brief does not do: It does not address the merits of whether *Apodaca* was correctly decided. Nor does this brief contend that a non-unanimous jury rule is preferable to a unanimous jury rule. In fact, there is widespread agreement among the stakeholders in Oregon's criminal justice system that the state's constitution should be amended to require unanimity *prospectively*. During the most recent legislative session, a resolution referring a proposed constitutional amendment requiring jury unanimity to the voters was supported by every major stakeholder—including the Oregon Attorney General,[1] the Oregon State Bar,[2] the Oregon

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[1] Testimony of Aaron Knott, Legislative Director, Oregon Department of Justice, *available at* https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/197041.

District Attorneys Association,[3] and the Oregon Criminal Defense Lawyers Association[4]—and was approved by a 56-0 vote in the state House of Representatives.[5] The resolution did not receive a vote in the Senate before the end of the session. But the policy debate is still underway and is likely to continue.

This brief is, however, about *stare decisis* and the impact that overturning *Apodaca* would have on Oregon. A ruling in this case that the Sixth Amendment requires unanimity in state prosecutions will overturn hundreds if not thousands of past convictions, convictions that Oregon has a legitimate reliance interest in maintaining. The state submits this brief primarily to alert the Court to the disruption that overruling *Apodaca* would cause to its entire criminal justice system, including to the victims and witnesses in each of the felony cases that have been tried to conviction and affirmed in the past eight decades in Oregon.

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[2] Testimony of Vanessa Nordyke, Past President, Oregon State Bar, *available at* https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/196791.

[3] Testimony of Matt Shirtcliff, President, Oregon District Attorneys Association, *available at* https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/196927.

[4] Testimony of Mary Sofia, Legislative Director, Oregon Criminal Defense Lawyers Association, *available at* https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/197310.

[5] *See* Bill File, H.J.R. 10, July 1, 2019, *available at* https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/HJR10.

SUMMARY OF ARGUMENT

The doctrine of *stare decisis* exists to provide stability in the law and to protect those who rely on this Court's decisions. The extent to which Oregon has relied on *Apodaca* cannot be overstated. Oregon courts have given a non-unanimous jury instruction in almost every single felony jury-trial case for the past 47 years. Tens of thousands of jurors have followed those instructions in carrying out their deliberations. If this Court were to overrule *Apodaca*, it would invalidate convictions in hundreds if not thousands of cases. The state's trial, appellate, and post-conviction courts would be flooded with non-unanimity claims to resolve and overwhelmed by the staggering number of cases that would have to retried. Many of those cases would not be able to be retried because of the loss of evidence caused by the passage of time. The state's legitimate reliance on *Apodaca* in structuring its criminal justice system should be an important consideration for the Court.

This Court also should consider how overruling *Apodaca* might destabilize other well-settled areas of the law. Overruling *Apodaca* in a decision holding that the Sixth Amendment incorporates the settled features of a common-law jury would cast serious doubt on *Williams v. Florida*, 399 U.S. 78 (1970), which held that the Sixth Amendment does not incorporate the common-law requirement of a 12-person jury and which permits felony defendants to be tried with as few as six jurors. It would also call into question the continuing validity of *Hurtado v. California*, 110 U.S. 516 (1884), which held that the Fifth Amendment's grand jury requirement is not incorpo-

rated against the states. If the stakes in this case seem low, given that overruling *Apodaca* affects only two states, the grand jury problem is even more immense: more than half the states in the country either require no grand jury or require them only for certain cases.

Stare decisis offers a principled way to consider long-settled reliance on rules involving unincorporated rights. Indeed, in *McDonald v. City of Chicago*, 561 U.S. 742, 784–85, 791 (2010)—a case that petitioner and amici invoke—the plurality stressed the importance of *stare decisis* in deciding whether to overturn prior decisions involving unincorporated rights. This Court should take Oregon's reliance into account in applying the doctrine of *stare decisis* and decline to overturn *Apodaca*.

ARGUMENT

"Overruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Standing by prior decisions is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827–828 (1991)). "It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Id.* In short, *stare decisis* is "a foundation stone of the rule of law." *Id.* (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)).

This Court has set a very high bar for overruling its prior decisions: The Court will not overrule a prior decision, even though it may have been incorrectly decided, absent a "special justification" for doing so. *Kimble*, 135 S. Ct. at 2409; *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Considerations include the reliance interests at stake, the possibility of correction through legislative action, the rule's workability, and the need for stability and consistency in the law. *Kimble*, 135 S. Ct. at 2409–11; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 378–79 (2010) (Roberts, C.J., concurring); *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009); *Payne*, 501 U.S. at 827–28. Reliance interests carry more weight than other factors; when they exist, they make *stare decisis* "superpowered." *Kimble*, 135 S. Ct. at 2410.

Reliance interests should play a central role in the analysis of this case. Oregon and Louisiana have based almost 50 years of felony prosecutions on the *Apodaca* rule. Overruling *Apodaca* would require the retrial of hundreds if not thousands of cases, and thus would profoundly disrupt the criminal justice systems in both states. It also would destabilize this Court's case law in other areas. *Apodaca* is a workable exception to this Court's incorporation law that is not impeding the development of any other area of law. But overruling *Apodaca* would immediately call into question other longstanding decisions, including precedent allowing criminal juries of fewer than 12 members and precedent holding that the Fifth Amendment's Grand Jury Clause does not apply to the States.

A. This Court should take into account Oregon's strong reliance interest on the ruling in *Apodaca*.

1. Oregon has relied on *Apodaca* in structuring its criminal justice system around non-unanimous verdicts.

For more than 80 years, Oregon has allowed non-unanimous jury verdicts in non-murder felony criminal cases. Petitioner and certain amici emphasize in their briefs that discriminatory animus was the primary motivation for the constitutional amendment that gave rise to the rule. The Oregon Attorney General wants it to be abundantly clear that the position of her state is that discriminatory views of any kind are not a valid justification for a non-unanimity rule or any other legal principle.

But a broader examination of the historical context of the rule's adoption is called for. Oregon began considering the non-unanimous jury rule at a time when other states had adopted non-unanimous rules and major legal institutions supported the change. In 1930, just four years before Oregon adopted the rule, the American Law Institute completed a proposed code of criminal procedure and recommended that states adopt it. ALI, Report on Code of Criminal Procedure 1 (1930). The Code's purpose was to "provide an effective administration of the criminal law with adequate protection to the substantial rights of the accused." *Id.* at 2. As part of its proposals, the ALI recommended that states adopt a provision making unanimity required in capital cases but permitting five-sixths of the jury to convict in all other cases. ALI, Code of Criminal Procedure § 355. At the time,

five states "depart[ed] from the common law rule requiring a verdict by a unanimous jury in all cases[.]" ALI, Code of Criminal Procedure, Commentary 1027 (citing constitutional provisions from Idaho, Montana, Oklahoma, and Texas permitting less-than-unanimous verdicts in misdemeanor cases and the constitutional provision from Louisiana permitting less-than-unanimous verdicts in cases in which the punishment must be hard labor).

In 1934, Oregonians voted to amend the Oregon constitution to allow for non-unanimous jury verdicts. Or. Laws 1935, at 5 (enacted by Ballot Measure 302-33 (1934)). The stated reason was to save judicial resources and deter jury nullification: Proponents "reasoned that requiring jury unanimity in criminal cases had led to unnecessary economic and social costs in the form of retrials, congested trial dockets, and compromise verdicts reached to avoid the necessity of a retrial." *State v. Pipkin*, 316 P.3d 255, 264 (Or. 2013). The idea was that even if one or two jurors were inclined to ignore the evidence or the court's instructions as to the law, those jurors would not be able to prevent a supermajority of jurors from reaching a just verdict.

In the years after Oregon adopted its non-unanimous rule, major legal institutions continued to support the practice. In 1968, taking a position that it now repudiates, the American Bar Association recommended that states allow non-unanimous jury verdicts. American Bar Association, *Project on Standards for Criminal Justice, Trial By Jury* § 1.1 (1968). The American Bar Association reasoned that the use of majority verdicts in all jurisdictions would

result in 1,400 fewer hung juries per year and that, although the non-unanimous rule leads to slightly shorter deliberation, that likely would have no influence on the outcome in the large majority of cases. *Id.* at 26–27.[6]

It was against that backdrop that this Court upheld the non-unanimity rule in 1972 in *Apodaca*, reasoning that the question of jury unanimity was one of policy to be answered by the states, not the constitution. And for almost fifty years, Oregon and Louisiana have relied on *Apodaca* to order and administer their criminal justice systems.

Petitioner is therefore mistaken that Oregon and Louisiana lack any "legitimate" reliance interest in convictions obtained from non-unanimous juries. Pet. Br. 45. In *Apodaca*, the issue of Oregon's non-unanimous jury verdict practice was squarely presented to this Court and this Court upheld the practice. Oregon and Louisiana were entitled to take this

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[6] Amicus Innocence Project argues that there is a correlation between non-unanimous juries and wrongful convictions, stressing that Louisiana has one of the worst in the nation in wrongful convictions per capita. Innocence Project Br. at 6. But Oregon (19 exonerations) has had a much different experience than Louisiana (63 exonerations) and has a much lower rate per capita than, for example, Illinois (303 exonerations) and New York (281 exonerations), which are two states that require unanimity. The National Registry of Exonerations (Map), *available at* https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited July 24, 2019). Wrongful convictions are a serious problem for any criminal justice system, one that warrants extraordinary efforts to avoid. But non-unanimous juries do not appear to be a significant causal factor.

Court at its word that the practice was constitutional. "[R]eliance 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; emphasis in original), *overruled by South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (2018).

This is not an instance in which the reliance interests were diminished because the Court had signaled that a decision was at risk of being overruled. *See, e.g.*, *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2484–85 (2018) (repeated prior notice). That was precisely what happened in the *Quill* line of cases. In *Quill*, this Court adhered to *National Bellas Hess Inc. v. Department of Revenue*, 386 U.S. 753 (1967)—precedent that it disagreed with—because of the reliance interests, but in doing so the Court conveyed its misgivings. By the time it revisited the matter in *Wayfair*, "other solutions [had] take[n] effect." *Quill*, 504 U.S. at 319. States had reordered their affairs and the reliance interest was significantly reduced. The Court then overruled *National Bellas Hess* and in doing so relied on its decision from *Quill* in which the Court had foreshadowed that possibility.

By contrast, this Court has not expressed grave doubts about *Apodaca* over the years and has consistently cited that decision as part of the constellation of principles informing jury practice. *See, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 510 n.2 (1995) (describing the *Apodaca* holding and applying its implications to a case involving the elements of a crime); *Schad v. Arizona*, 501 U.S. 624, 634 n.5 (1991) (noting that "[a] state criminal defendant, at least in non-

capital cases, has no federal right to a unanimous jury verdict"); *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting) (applying the reasoning of *Apodaca* to a challenge to the fair-cross-section requirement of Sixth Amendment); *McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, J., dissenting) (observing that the Court has "approved verdicts by less than a unanimous jury" and citing *Apodaca*); *Brown v. Louisiana*, 447 U.S. 323, 330–31 (1980) (observing that the Court has held that "the constitutional guarantee of trial by jury" does not prescribe "the exact proportion of the jury that must concur in the verdict" and citing *Apodaca*); *Burch v. Louisiana*, 441 U.S. 130, 136 (1979) (noting that the Court "conclude[d] in 1972 that a jury's verdict need not be unanimous to satisfy constitutional requirements"); *Ludwig v. Massachusetts*, 427 U.S. 618, 625 (1976) (describing *Apodaca* and applying its reasoning to a related jury-right issue).

To be sure, the *McDonald* plurality noted that the result in *Apodaca* was "the result of an unusual division among the Justices," 561 U.S. at 766 n.14 (plurality op.). But even there, the plurality did not express concerns about the non-unanimity rule itself or suggest that it should not be relied upon. Quite the opposite, the plurality recognized the legitimate reliance interests at stake in this area by stressing how *stare decisis* may counsel adhering to prior decisions in this area *regardless* of their correctness. *See id.* at 784–85 (plurality op.) ("[I]f a Bill of Rights guarantee is fundamental from an American perspective, then, *unless stare decisis counsels otherwise*, that guarantee is fully binding on the States"; emphasis added).

Had this Court clearly signaled that *Apodaca* was at serious risk of being overturned after all these years, Oregon would have been on notice, its reliance interests would have been reduced, and that risk would have become part of the policy debate that it is underway and unresolved. This Court has not given that notice and has repeatedly denied certiorari on this issue over the years.[7]

The Court has explained that *stare decisis* considerations have less force for constitutional cases where "'correction through legislative action is practically impossible.'" *Payne*, 501 U.S. at 828. But correction through another branch of government is not practically impossible here. Louisiana has already legislatively overturned its non-unanimity rule prospectively, and there is widespread agreement among the major stakeholders to do the same in Oregon. Any decision by this Court signaling that *Apodaca* is at risk would become an important part of the policy debate in Oregon.

2. Overruling *Apodaca* would invalidate many hundreds and potentially thousands and thousands of convictions.

Oregon's reliance on *Apodaca* deserves consideration because of the serious disruption to Oregon's criminal justice system that would result from overruling *Apodaca*. Such a ruling would automatically require retrial in many hundreds, if not thousands, of

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[7] *See, e.g.*, *Barbour v. Louisiana*, 562 U.S. 1217 (2011); *Herrera v. Oregon*, 562 U.S. 1135 (2011); *Bowen v. Oregon*, 558 U.S. 815 (2009).

cases on direct review. If this Court treated jury unanimity as a watershed procedural rule to be applied retroactively on collateral review or concluded that merely instructing juries that they could reach non-unanimous verdicts was structural error, the number of affected cases that would have to be retried would swell to thousands. And in many cases, particularly the older cases, retrial will likely be impossible because of the impact that the passage of time will have on the prosecution's case as witnesses disappear, memories fade, and evidence is lost. *See Peyton v. Rowe*, 391 U.S. 54, 62 (1968) ("The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.") (quoting *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967)).

Direct Review. The most certain implication of a decision overruling *Apodaca* would be for cases for which the final judgment has not been issued. A "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

In Oregon, that number easily may eclipse a thousand cases. In the wake of this Court's decision to grant certiorari in this case, criminal defendants have filed *Ramos* claims in several hundred cases. But given the time lag between trial and appeal, and the time it will take this Court to issue any decision in this case, that number could easily exceed a thousand cases, including cases currently being tried in the tri-

al courts. Most of those cases likely will include non-unanimous verdicts. In 2018 alone, for example, there were 673 felony jury trials in Oregon, and studies suggest that as many as two-thirds of those cases would have had a non-unanimous verdict. Oregon Judicial Department, *Cases Tried Analysis—Manner of Disposition* 1 (2018), *available at* https://www.courts.oregon.gov/about/Documents/2018CasesTriedAnalysis-MannerofDisposition.pdf (last visited July 24, 2019); Oregon Office of Public Defense Services Appellate Division, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon* 4 (2009), *available at* https://www.oregon.gov/opds/commission/reports/PDSCReportNonUnanJuries.pdf (last visited July 24, 2019) (finding 65.5 percent of felony cases between 2007 and 2008 where the jury was polled had a non-unanimous verdict on at least one count).

The amici States suggest that some of those convictions will be insulated from challenge by preservation rules. New York Br. 28–29. But like this Court, Oregon appellate courts correct plain error. *See, e.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018) (holding that ordinary guideline errors are plain error in federal cases); *see also State v. Serrano*, 324 P.3d 1274, 1280 (Or. 2014) (describing plain error as legal error apparent on the face of the record). In the wake of the grant of certiorari in this case, Oregon appellate courts have already been deluged with claims arguing that, if this Court overrules *Apodaca*, then giving non-unanimous jury instructions and accepting non-unanimous verdicts constitute plain errors.

The potential disruption is not limited to cases in which the record establishes that the jury's verdict was non-unanimous. Defendants are arguing that an instruction allowing for non-unanimous verdicts is a structural error that requires reversal for *all* convictions, even for those for which the jury was not polled or those for which the jury *was* unanimous. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-08 (2017) (discussing structural-error doctrine). Although the issue of structural error is not presented in this case, that issue would immediately leap to the forefront if this Court were to overturn *Apodaca*. And even if the courts ultimately were to reverse only in cases where the record affirmatively reflected a non-unanimous verdict, that subset of cases still would include, at the very least, hundreds of convictions.

The burden of retrying cases does not fall solely on the state; it is a burden that victims and survivors of the crimes also shoulder. In Oregon, a crime victim has constitutional and statutory rights in criminal proceedings. *See* Or. Const., Art. I, § 42(1)(a), (f); Or. Rev. Stat. § 137.013. The story of retrying these cases does not begin and end with the difficulties that the state will face in attempting reprosecution or the burden on the courts. It must also account for the sheer number of victims and their families who would be retraumatized by having their offenders' convictions reversed and having to start the lengthy trial process all over from the beginning, after finally achieving finality.

Petitioner argues that the "need for a certain number of retrials" in two states should not dissuade this Court from overruling *Apodaca*. Pet. Br. 46. Pe-

titioner vastly understates the potential disruption unless by "certain number" he means many hundreds and potentially thousands. For Oregon, at least, the prospect of invalidating hundreds if not thousands of convictions far exceeds anything the state court system has faced as a result of past sea changes in criminal procedure. This Court's Sixth Amendment decisions involving sentencing and confrontation—*Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Crawford v. Washington*, 541 U.S. 36 (2004)—sent tidal waves through Oregon's appellate system. A decision overturning *Apodaca* would be tantamount to a tsunami. The Court should take into account the chaos that overruling *Apodaca* would have on Oregon's and Louisiana's criminal justice systems, particularly because those states have simply continued a practice that this Court expressly authorized 47 years ago.

Collateral Challenges. Nor would potential retrials be necessarily limited only to those cases that have not proceeded to a final judgment on direct appeal. In Oregon, criminal defendants can also seek post-conviction relief based on new rules of constitutional law, even years after the conviction is final. *See White v. Premo,* 443 P.3d 597, 603 (Or. 2019) (allowing petition challenging 24-year old murder conviction based on *Miller v. Alabama,* 567 U.S. 460 (2012)); *Chavez v. State of Oregon,* 438 P.3d 381, 383 (Or. 2019) (claim of ineffective assistance under *Padilla v. Kentucky,* 559 U.S. 356 (2010)). Thus, if this Court now rules that a criminal defendant is entitled to a unanimous jury verdict, that holding may result in post-conviction petitions to challenge more than 40 years' worth of otherwise final convictions, during

which time juries were uniformly instructed that their verdicts did not need to be unanimous.

Post-conviction petitioners face a high bar to obtaining relief based on new rules of constitutional law. As a matter of federal law, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality op.). But *Teague* recognizes two exceptions, one of which encompasses new "'watershed rules of criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016)). A decision overturning *Apodaca* would undoubtedly be a "new rule" for purposes of collateral review. *See Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."). The only question would be whether it was a watershed rule of criminal procedure. It is not, because unanimity is not a rule that "'without which the likelihood of an accurate conviction is seriously diminished.'" *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004) (emphasis omitted). If this Court reverses *Apodaca*, it should be careful in articulating its holding to avoid suggesting that it is.[8]

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[8] Although the amici States treat it as a foregone conclusion that a decision overruling *Apodaca* would not apply retroactively (New York Br. 28), their confidence may be overstated. *See Brown*, 447 U.S. at 331 (plurality opinion in pre-*Teague* decision holding that the rule from *Burch*—which invalidated non-unanimous six juror verdicts—applied retroactively to all cases).

The point is that the retroactivity question inevitably hangs over any decision to reverse *Apodaca*. And any uncertainty in the interim is yet another cost that should weigh in the balance. The cost will manifest in the hundreds and hundreds of cases on direct appeal that will require the litigation of non-unanimity claims. It will manifest in the hundreds, if not thousands, of petitions for post-conviction and federal habeas relief that will be filed. *See, e.g.*, *Hall v. Myrick*, No. 18-9297 (filed May 16, 2019) (petition for *certiorari* requesting that this Court hold an unpreserved non-unanimous jury claim in a federal habeas corpus case). And it will manifest in the inevitable delay of finality to crime victims and other interested parties that those petitions and appeals will create.

3. *Stare decisis* exists in part to protect the type of reliance interests at stake and to prevent the profound disruption that overruling *Apodaca* would cause.

Decisions by this Court have enormous direct and indirect consequences that ripple throughout the country. Overruling a decision governing how a state may administer the jury-trial requirement in cases that include a felony charge is the type of pervasive decision that, by its nature, has enormous, far-reaching implications. Yet even though the Court "has immense power to initiate legal change, [it has] limited tools to manage it," especially the disruption that occurs when the Court abruptly overturns longstanding decisions. Randy J. Kozel, *Precedent and Reliance*, 62 Emory L.J. 1459, 1487 (2013).

That has not always been the case. When this Court had to determine the effects of some of its most important incorporation decisions, it applied a framework that expressly considered reliance. *See, e.g.*, *Stovall v. Denno*, 388 U.S. 293, 297 (1967) (concluding that, in determining the effect of a new rule, this Court should consider reliance interests and the effects retroactive application might have on the administration of justice). The Court mitigated the disruption by making some new constitutional rules apply only prospectively.

Consider, for example, *DeStefano v. Woods*, 392 U.S. 631 (1968). *DeStefano* held that the rule from *Duncan v. Louisiana*, 391 U.S. 145 (1968), which incorporated the jury-trial right against the states, would apply only to trials that began after *Duncan*'s date of decision. *Id.* at 633. The Court emphasized that "the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now according the Sixth Amendment guarantee." *Id.* at 634.

The same was true in *Johnson v. New Jersey*, 384 U.S. 719, 720 (1966), where this Court held that the rules from *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), would apply only to cases in which trials began after the date of decision. This Court reasoned that retroactive application of the rules to all cases on direct review would "seriously disrupt the administration of our criminal laws" by requiring "the retrial or release of numerous prisoners found guilty by trustworthy evi-

dence in conformity with previously announced constitutional standards." *Id.* at 731. In those cases, this Court's analysis specifically included consideration of the reliance of the states and the impact on the administration of justice of a retroactive application of the exclusionary rule.

But this Court subsequently adopted a more rigid set of retroactivity rules that significantly limit its ability to manage the fallout from one of its decisions. A decision immediately, and automatically, applies to *all* cases for which the appellate judgment has not yet been issued. *See Griffith*, 479 U.S. at 328. Standing alone, that is a large number of cases, because of the time lag between a trial and the resolution of the appeal. For example, in Oregon, there are cases being held pending the decision in this case that date back to at least 2016. *See, e.g.*, *State v. Dennison*, No. S066369 (Or. May 23, 2019) (ordering that appeal filed in October 2016 be held in abeyance until a decision in this case). And, as discussed, a more limited subset of this Court's decisions apply retroactively to cases on collateral review. *See Teague*, 489 U.S. at 310–14. The result is that any time this court overrules a longstanding constitutional decision, there is a serious risk of disruption that the Court cannot mitigate.

Stare decisis is a legitimate—and, after *Griffith*, potentially the only—tool for avoiding that damage. Reliance interests lie at the core of the doctrine, and *stare decisis* principles can prevent consequences that would otherwise sow massive immediate chaos in Oregon trial, appellate, and post-conviction courts. Petitioner counters that *Apodaca* must be overruled be-

cause *Apodaca* was wrong and his jury-trial right was violated. But the analysis has always been more nuanced than that when it comes to the state's reliance interests in criminal proceedings. Under this Court's retroactivity rules, many constitutional rules are not applied retroactively to defendants on collateral review, in part to prevent the disruption that would occur by applying new rules to cases that were litigated under the old rules. In a similar vein, it is appropriate for the Court to take into account, as part of the *stare decisis* analysis, the serious and immediate disruption that would occur by overruling *Apodaca*.

4. Oregon's reliance is not diminished because *Apodaca* involved a rule of procedure.

Nor is the state's reliance interest less weighty because jury unanimity is arguably a "rule of procedure." This Court has sometimes considered reliance interests less weighty in cases involving procedural or evidentiary rules. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (overruling a case involving the sequence of steps in qualified-immunity analysis); *Payne*, 501 U.S. at 827–28 (overruling cases prohibiting the admission of victim impact evidence in capital cases). The Court has reasoned that procedural or evidentiary rules generally do not "affect the way in which parties order their affairs" or "upset settled expectations on anyone's part." *Pearson*, 555 U.S. at 233,

That observation, although perhaps generally true, does not apply here. Oregon's detrimental reliance on *Apodaca* is self-evident. The rule allowing for non-unanimous jury verdicts *did* affect the way that Oregon ordered its criminal justice system and would

upset hundreds, if not thousands, of convictions. In that sense, it is more like the *Miranda* rule, which this Court characterized as "embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson*, 530 U.S. at 443. For those reasons, even if it is a "procedural rule," the non-unanimity rule cannot be casually lumped together with the kinds of procedural rules that can be overruled without causing serious disruption. Rather, a decision to overturn *Apodaca* would overwhelm the State of Oregon's criminal justice system. Oregon has prosecuted felonies under the non-unanimous jury rule for over 80 years. Procedural or not, that amounts to profound reliance.

B. The rule from *Apodaca* is workable and consistent with other areas of law.

Another consideration in the *stare decisis* analysis is workability, including the impact that overruling *Apodaca* would have on this Court's case law. Overturning precedent may be justified when it has engendered confusion, involves an incorrect principle that must be extended and applied in other cases, or generally impedes the development of the law. *See Pearson*, 555 U.S. at 235 (noting that a case should be overruled if it has "defied consistent application by lower courts"); *Payne*, 501 U.S. at 849 (Marshall, J., dissenting) (acknowledging that a case may need to be overruled if it is a "'detriment to coherence and consistency in the law'"); *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring) (observing that a case should be reconsidered "when its rationale threatens to upend our settled jurisprudence in related areas of law").

Apodaca has not proved to be unworkable. And overruling it would immediately cast doubt on this Court's holding that the Sixth Amendment does not incorporate the common-law requirement that juries consist of 12 members and would undermine this Court's longstanding decisions involving other unincorporated jural rights—specifically decisions involving the Fifth Amendment's grand jury right and the Seventh Amendment's jury-trial right.

1. Although *Apodaca* was a divided opinion, the decision is not unworkable.

Apodaca was a divided opinion, but that does not strip it of precedential effect under the doctrine of *stare decisis*. Pet. Br. 39. This Court frequently issues divided opinions that announce the law and resolve disputes, often in seminal cases. *See, e.g.*, *National Federation of Independent Business v. Sebelius* ("*NFIB*"), 567 U.S. 519 (2012); *McDonald*, 561 U.S. at 791; *United States v. Booker*, 543 U.S. 220 (2005); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Just last Term, this Court issued a divided opinion on the scope of the exigency exception to the warrant requirement for blood draws. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (plurality op.) (holding that a warrantless blood test is almost always permissible when a person taken to the hospital on probable cause of committing a drunk-driving offense); *id.* at 2540 (Thomas, J., concurring) (concluding that warrantless blood test is always permissible in that circumstance). The doctrine of *stare decisis* applies to divided opinions just as it does to undivided ones.

To be sure, the divided nature of a decision may create workability problems that favor overruling it rather that attempting to apply and extend it in resolving other issues. *See Hughes v. United States*, 138 S. Ct. 1765, 1774–75 (2018) (observing that a previous decision had created "uncertainty"); *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) (noting that a previous decision "ha[d] created confusion among the lower courts that ha[d] sought to understand and apply the deeply fractured decision"). But those workability concerns arise in the context of applying *stare decisis*; they do not render the doctrine itself inapplicable. *See Montejo*, 556 U.S. at 792 (overruling prior non-plurality decision that was "unworkable" instead of applying it, which would have required the Court "to expand significantly the holding").

Nor does it matter that *Apodaca* turned on a fifth vote that hinged on a position accepted by none of the rest of the Court. That fact is unremarkable, for this Court often produces divided opinions that turn on a single vote but that yield workable rules of law.

Take *McDonald*, which established that the Second Amendment right to keep and bear arms applies to the States under the Fourteenth Amendment. The four-justice plurality rejected the argument that that right is protected by the Privileges or Immunities Clause but concluded that it is incorporated against the States under the Due Process Clause. 561 U.S. at 754–91. Justice Thomas provided the fifth vote in a concurrence that rejected the plurality's conclusion that the right is incorporated under the Due Process Clause but concluded that it applies under Privileges

or Immunities Clause. *Id.* at 805–59 (Thomas, J., concurring in part and dissenting in part). Four dissenting justices would have held that the right is not incorporated under either clause. *Id.* at 858–912 (Stevens, J., dissenting); *Id.* at 912–42 (Breyer, J., dissenting; joined by two justices). *McDonald* thus "rested on the vote of a single justice that was at odds with the other eight members of the Court." Rutherford Institute Br. 5. Yet that fact would not deprive that decision of the protections of *stare decisis* and instead would be a workability consideration in applying that doctrine.

The holding from *Apodaca* is workable and straightforward to apply: States may enter judgments of conviction based on non-unanimous jury verdicts in felony prosecutions. It does not involve a fuzzy standard or engender borderline cases difficult for lower courts to resolve. And it has not "created confusion among the lower courts that have sought to understand and apply the deeply fractured decision." *Seminole Tribe of Florida*, 517 U.S. at 64.

Moreover, *Apodaca* has not impeded this Court's ability to reach and resolve other jury-trial issues. Since *Apodaca* in 1972, the Court has resolved a number of jury-trial issues, and, in doing so, it has repeatedly cited *Apodaca* without reservation or criticism. *See supra* at 9–10. More to the point, nothing in *Apodaca* prevented the Court from reaching the correctly result in those cases. *See Schad*, 501 U.S. at 634 n.5 (observing that the only issue was "what level of verdict specificity is constitutionally necessary" and viewing jury unanimity as a separate question). Forty-seven years of experience with *Apodaca* teaches

that that decision is not impeding the development and resolution of this Court's case law involving jury-trial issues.

Nor does *Apodaca* risk "unsettl[ing]" this Court's incorporation jurisprudence. Pet. Br. 47. History already proves that concern to be unfounded. At worst, *Apodaca* constitutes an outlier within incorporation doctrine. But this Court has already addressed that "problem"—first in *McDonald* and then in *Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019)—by explaining that *Apodaca* is an isolated exception that does not cast any doubt on the general rule that incorporated rights apply equally against the federal government and the States. *Timbs*, 139 S. Ct. at 687 n.1 (observing that "[t]he sole exception [to its incorporation doctrine] is [the Court's] holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings" and quoting *McDonald*); *McDonald*, 561 U.S. at 766 n.14 (noting that "[*Apodaca*'s] ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation"). In other words, *Apodaca* is a historical exception to a general rule that does no damage to the incorporation doctrine itself. After *McDonald* and *Timbs*, no litigant should expect to be able to argue based on *Apodaca* that any other incorporated rights apply differently to the federal and state governments. In short, although the decision in *Apodaca* was divided, it has not proven unworkable.[9]

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[9] Petitioner also argues that *stare decisis* does not weigh in favor of adhering to *Apodaca* because Justice Powell's incorporation analysis conflicted with the law at the time and con-

2. Overruling *Apodaca* would unsettle, not stabilize, this Court's case law.

Consistency and stability are central justifications for *stare decisis*. Those factors weigh against overruling *Apodaca*, which would destabilize—not stabilize—this Court's case law by immediately casting doubt on its decisions involving jury size and other unincorporated rights.

a. Jury size

If this Court were to overrule *Apodaca*, it would destabilize well-settled law on fewer-than-12-member juries. It was well established at common law that a jury must consist of 12 members. But in *Williams* this Court rejected the argument that the common-law practices determined the content of the Sixth Amendment's jury-trial right and held that states could use six-member juries in felony cases. *Id.* at 103. After *Williams*, the use of fewer than 12 jurors in criminal cases became widespread: "A total of 11 states currently use juries composed of fewer than 12 jurors in felony and misdemeanor trials" and "[a]n additional 29 states allow juries of fewer than 12 in misdemeanor cases[.]" Barbara Luppi & Francesco Parisi, *Jury Size and the Hung-Jury Paradox*, 42 J. Legal Stud. 399, 402 (2013) (citing 2004 statistics).

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flicts with the law now. Pet. Br. 40–43. Those are just alternative ways of arguing that *Apodaca* is wrong. That is not, and has never been, a special justification to overrule a decades-old precedent. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (observing that "any departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'").

There has been a steady chorus of calls over the years for this Court to overturn *Williams* and return to the common-law rule. *See, e.g.*, Alisa Smith & Michael H. Saks, *The Case for Overturning* Williams v. Florida *and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441 (2008); Robert H. Miller, *Six of One is Not A Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621 (1998); David F. Walbert, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of* Williams v. Florida, 22 Case W. Res. L. Rev. 529 (1971). And although the American Bar Association used to support the use of fewer than 12 jurors (American Bar Association, *Project on Standards for Criminal Justice, Trial By Jury* § 1.1(b) (1968)), the ABA has changed its position on that issue as well and now contends that defendants should have the right to a 12-person jury for felony and non-petty misdemeanors. American Bar Association, *Criminal Justice Section Standards*, § 15-11(b) (2018). But heeding that call would cause enormous disruption in the states that have relied on *Williams* in structuring their criminal justice systems.

The historical sources informing the rule of 12 and the unanimity rule are substantially identical. Indeed, one could mount a challenge to *Williams* by taking much of the briefing in this case and substituting *Williams* for *Apodaca* and "the rule of 12" for unanimity. The plurality in *Apodaca* relied heavily on *Williams*. It reasoned, as did the Court in *Williams*, that the Sixth Amendment's drafting history did not indicate a clear intent to enshrine common-law practices in the jury-trial right. *Apodaca*, 406 U.S. at 409–10

(plurality op.). And it determined that it must consider "other than purely historical considerations" to resolve the constitutional question. *Id.* at 410.

A decision overturning *Apodaca* would likely cast doubt on some or all of the analysis from *Williams*. Furthermore, a holding that the Sixth Amendment requires unanimity would provide obvious fodder for the argument that allowing a practice that requires *only* the unanimous agreement of *six* jurors to convict—on its face and as a simple matter of math—is constitutionally inferior to the common-law requirement that there must be the unanimous agreement of 12 jurors to convict. In short, overruling *Apodaca* would expose and "unsettle" potentially fragile case law involving whether the Sixth Amendment permits fewer than 12 jurors in criminal cases.[10]

b. Grand juries and civil juries

Overruling *Apodaca*, after all of these years and despite the reliance interests involved, would also inevitably call into question the status of other unincorporated rights. "With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." *Timbs*, 139 S. Ct. at

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[10] The ABA—which supported non-unanimous jury verdicts until it reversed itself—seeks to assure the Court that *Williams* would not be at risk because the *Williams* Court deemed the number 12 a "historical accident." ABA Br. 7. But the same is true of jury unanimity. *See Apodaca*, 406 U.S. at 407 n.2 (plurality op.) (explaining that the common-law requirement of jury unanimity was an artifact of bizarre medieval assumptions and practices).

687. "A Bill of Rights protection is incorporated * * * if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" *Id.* "[A] provision of the Bill of the Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States." *McDonald*, 561 U.S. at 791 (footnote omitted). But the *McDonald* plurality announced an exception to that rule: "[u]nless considerations of *stare decisis* counsel otherwise." *Id.* And in announcing that exception this Court pointed toward two particular unincorporated rights that would unfurl chaos if they were incorporated against the States.

The most compelling example is the Fifth Amendment's Grand Jury Clause. In *Hurtado*, this Court held that the Grand Jury Clause does not apply to the States. "As a result of *Hurtado*, most States do not require a grand jury indictment in all felony cases, and many have no grand juries." *McDonald*, 561 U.S. at 784 n. 30. Another example is the right to a civil jury trial. In *Minneapolis & St Louis R. Co. v. Bombolis*, 241 U.S. 211, 217–18 (1916), this Court held that the Seventh Amendment's civil jury-trial right does not apply to the states. "As a result of *Bombolis*, cases that would otherwise fall within the Seventh Amendment are now tried without a jury in state small claims court." *McDonald*, 561 U.S. at 784 n. 30.

To account for *Hurtado* and *Bombolis*, the *McDonald* plurality expressly noted that decisions about the incorporation of the grand jury right and the civil jury-trial right "long predate the era of selective incor-

poration." *Id.* at 765 n.13. But it also specifically referred to those decisions when it admonished that "unless *stare decisis* counsels otherwise," fundamental rights are fully binding on states. *Id.* at 784 n.30. In other words, however wrong *Hurtado* or *Bombolis* may seem as incorporation cases, they pose no problem, partly because it is so easy to identify them as the exceptions. The implication is that this Court need not overrule every case out of step with the modern understanding of incorporation *only* because it is out of step. And that reasoning only makes sense: As this Court noted, because "most States do not require a grand jury indictment in all felony cases, and many have no grand juries," the reliance interests in *Hurtado* are boundless.

If this Court overruled *Apodaca* in this case, it would immediately destabilize the law by casting serious doubt on *Hurtado* and *Bombolis*. It would signal that the states' reliance interests carry little weight and immediately "cause one to wonder which [incorporation] cases the Court will overrule next." *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer J, dissenting). This Court can quiet those doubts by setting up a framework for balancing incorporation against reliance interests. *Stare decisis* must be central to that framework. By adhering to *Apodaca* on *stare decisis* grounds, this Court leaves itself legitimate options for future cases where States' reliance interests are even greater.[11]

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[11] Overruling *Apodaca* also would call into question the continuing vitality of *Ludwig*, 427 U.S. 618, which upheld the "two-tier" system of first trying a defendant without a jury and then, if convicted, allowing the defendant to have a de novo jury

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Overruling *Apodaca* would cause practical disruption and doctrinal instability that this Court has few ways to mitigate. Almost immediately, Oregon and Louisiana courts would be overwhelmed with retrials and appellate litigation over the meaning of the ruling. And not long after, this Court likely would be pressed to reconsider *Williams* and the unincorporated grand jury right, doctrines that may implicate reliance interests dwarfing those at issue here. The disruption and instability caused by the sudden incorporation of unincorporated rights deserves careful consideration in the *stare decisis* analysis.

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trial. The fifth vote for that result was Justice Powell, who joined the opinion on the understanding that it was "consistent with [his] view that the right to a jury trial afforded by the Fourteenth Amendment is not identical to that guaranteed by the Sixth Amendment." 427 U.S. at 632. (Powell, J., concurring). "[M]any" states have used a two-tier system. *Colten v. Kentucky*, 407 U.S. 104, 112, 112 n.4 (1972).

CONCLUSION

This Court should affirm the judgment of the Louisiana Court of Appeal.

Respectfully submitted,

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