No. 18-5924

In The
Supreme Court of the United States

EVANGELISTO RAMOS,
*Petitioner*,

v.

STATE OF LOUISIANA,
*Respondent.*

*On Writ of Certiorari to the Louisiana Court of Appeals, Fourth Circuit*

# BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF THE PETITIONER, EVANGELISTO RAMOS


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## INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues.

The Institute is particularly interested in this case because the decision of the Louisiana Court of Appeals violates a criminal defendant's fundamental right to a fair trial. The constitutional violation in this case is particularly egregious since the Petitioner was convicted by a non-unanimous 10-2 vote of the jury and sentenced to life in prison at hard labor without the possibility of parole, and the appellate court recognized that "some of the evidence below may be susceptible of innocent explanation." App. at 14. The fact that two jurors were not convinced of the defendant's guilt beyond a reasonable doubt shows that the "innocent explanation[s]" may well have been correct. The court below nevertheless affirmed on the basis of the Court's 45 year-old decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972). That decision rested on the shakiest of grounds when decided, has been

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[1] The parties have consented to the filing of this brief in communications on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

discredited by the Court's subsequent decisions on the States' incorporation of fundamental constitutional rights, and is inconsistent with the Court's jurisprudence on the right to a unanimous verdict. Amicus the Rutherford Institute submits this brief to emphasize that, in such circumstances, *stare decisis* should not prevent the court from overruling *Apodaca* to vindicate the Petitioner's fundamental right to a fair trial.

## PRELIMINARY STATEMENT

The right to a unanimous jury verdict is firmly rooted in America's history, tradition, and conscience. The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The right to a trial by jury guarantees that an accused will be convicted only when all jurors, the only impartial persons who have the benefit of all of the evidence for and against guilt, conclude that the accused is guilty. *Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury.").

The Court has recognized this unanimity requirement "virtually without dissent" since the 1800s. *Johnson v. Louisiana*, 406 U.S. 366, 369 (1972) (Powell, J., concurring in the judgment in *Apodaca*). Like the right to a jury trial and the right to a speedy trial, the common-law right to a unanimous verdict dates back to the Magna Carta. *Maxwell v. Dow*, 176 U.S. 581, 609-10 (1900) (Harlan, J., dissenting). And like the prohibition against double jeopardy, the right to confront witnesses, and the right to a speedy trial, "every state incorporates some form" of the right to a unanimous verdict. *See Benton v. Maryland*, 395 U.S. 784, 795 (1969). Indeed, 49 of the 50 states now require a unanimous verdict to convict an accused of any crime, and Oregon requires a unanimous verdict to convict persons

accused of first-degree murder. *See* Or. Const. art. I, § 11.

Despite recognizing the long history of the right to a unanimous verdict, and finding that the Sixth Amendment requires unanimity in federal juries, Justice Powell's opinion providing the fifth vote in *Apodaca* effectively held that the right to unanimity is not a fundamental right and thus is not applicable to the states. *See Johnson*, 406 U.S. at 373. Justice Powell's opinion on this issue stood alone. It was not adopted by either the four other justices in the majority or the four justices in the minority. In fact, this opinion was inconsistent with the Court's Sixth Amendment jurisprudence at the time it was rendered. Because this holding is a departure from the Court's incorporation jurisprudence and is inconsistent with the Court's subsequent case law, *stare decisis* should not prevent the Court from overruling *Apodaca* and holding that the Sixth Amendment's right to a unanimous verdict is a fundamental right fully applicable to the states.

## ARGUMENT

### I. *STARE DECISIS* SHOULD NOT PRECLUDE THE COURT FROM OVERTURNING *APODACA*

This is not a case where "five members of a later Court [could] come to agree with earlier dissenters on a difficult legal question." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. ___, ___ (2019) (Breyer, J., dissenting). Rather, this is a case where all of the factors identified by the Court for overruling one of its previous decisions support reversal of a prior decision. The 4-1-4 decision in *Apodaca* rested on the vote of a single justice that was at odds with the other eight members of the Court. That fact alone suggests that *Apodaca* was wrong when it was decided. It also is inconsistent with other decisions of the Court on the right to a unanimous jury verdict and the scope of the incorporation doctrine. Further, in the 47 years since *Apodaca* was decided, the Court's approach to incorporation has shifted. Nor is there any reliance interest of the State that would outweigh the unconstitutional deprivation of a criminal defendant's fundamental right to a fair trial.

In most cases, *stare decisis* "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." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The doctrine does not, however, require the Court to mechanically adhere to its latest decision. *Id.* at 828. "*Stare decisis* is not an inexorable command," *id.*, and does not "compel continued adherence to erroneous precedent." *Hyatt*,

587 U.S. at ___. *Stare decisis* "is 'at its weakest when [the Court] interpret[s] the Constitution because [its] interpretation can be altered only by constitutional amendment.'" *Id.* at ___ (*quoting Agostini v. Felton*, 521 U.S. 203, 235 (1997)); *see also United States v. Gaudin*, 515 U.S. 506, 521 (1995) (the role of *stare decisis* in jurisprudence is reduced "in the case of a procedural rule . . . which does not serve as a guide to lawful behavior."). Thus, "[t]he Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

Although *stare decisis* does not require mechanical adherence to the Court's latest decision, any departure from precedent should be consistent and reflect more than a change in the Court's composition. *See Payne*, 501 U.S. at 828; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 414 (2010) (Stevens, J., concurring and dissenting in part). Thus, the Court has considered four factors when deciding whether to uphold an earlier decision: (1) the quality of the decision's reasoning; (2) its consistency with related decisions; (3) legal developments since the decision; and (4) reliance on the decision. *E.g., Hyatt*, 587 U.S. at ___.

### A. All Four *Stare Decisis* Factors Weigh in Favor of Overruling *Apodaca*.

"A decision . . . which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and

pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution." *Payne*, 501 U.S. at 835 (Scalia, J., concurring). *Apodaca* is such a decision.

The plurality's functional approach to the Bill of Rights, and Justice Powell's holding that the Sixth Amendment does not apply with equal force to the states, did not reflect the reasoned judgment of a majority of the Court. *Apodaca*'s holding was contrary to this nation's longstanding history requiring unanimous juries and the Court's repeated refusal to apply a "watered-down" version of the Bill of Rights to the states. *See Malloy*, 378 U.S. at 10. Accordingly, since *Apodaca*, the Court has held that the Bill of Rights applies equally to federal and state governments and reaffirmed that history controls the mandates of the Bill of Rights. Further, no states subsequently have relied on *Apodaca* to permit non-unanimous verdicts. Thus, all four factors support overruling *Apodaca*.

**1. *Apodaca* is poorly reasoned.**

First, Apodaca's reasoning was unsound from the start, as reflected in the Court's divided plurality opinion. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 63 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) because "[t]he Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court."). In *Apodaca*, eight justices adhered to the Court's precedent and ruled that the Sixth Amendment applies equally to the state and federal governments. *See Apodaca*, 406 U.S. at 406; *id.* at 414 (Stewart, J.,

dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting in *Apodaca*). Yet, Justice Powell's controlling decision did what eight other justices held could not be done: applied differing versions of the Sixth Amendment to the state and federal governments. *Johnson*, 400 U.S. at 371. This result "defied reason." *Payne*, 501 U.S. at 834 (Scalia, J., concurring). *Stare decisis* "is not an imprisonment of reason." *Id.* (citations and quotations omitted).

Further, the *Apodaca* plurality's focus on the functional purpose of a jury trial was misplaced. *See Apodaca*, 406 U.S. at 410. Instead, the Court should have adhered to its precedent and considered the right's "role in the preservation of basic liberties . . . which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy*, 378 U.S. at 5. The *Apodaca* plurality "failed to account for the historical understanding" of the right to a jury trial, *Hyatt*, 587 U.S. at ___, and placed "unwarranted reliance" on the function of that right. *Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)). Such reliance was mistaken and makes *Apodaca*, like *Abood*, "something of an anomaly" in the Court's constitutional jurisprudence. *Janus*, 138 S. Ct. at 2463 (citations and quotations omitted).

### 2. *Apodaca* was inconsistent with the Court's precedents at the time.

*Apodaca* is inconsistent with the Court's incorporation cases, including those that had been

decided when the Court decided *Apodaca*.[2] The Court consistently has refused to apply a "watered-down" version of the Bill of Rights to the states. *Malloy*, 378 U.S. at 10. Instead, the Court repeatedly has held that, when the Fourteenth Amendment makes a provision of the Bill of Rights applicable to the states, that right must be "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (citations and quotations omitted).

The Court has not hesitated to overrule cases applying a narrower version of a right to the states than what is applied to the federal government. For example, in *Malloy*, the Court overruled *Twining v. New Jersey*, 211 U.S. 78 (1908) and found that the privilege against self-incrimination applies equally to the state and federal governments. 378 U.S. 1. The Court reasoned that it is "incongruous" to apply varying standards to citizens' rights "depending on whether the claim was asserted in a state or federal court." *Id.* at 11.

Likewise, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court overruled *Wolf v. Colorado*, 338 U.S. 25 (1949) and held that the Fourth Amendment's exclusionary rule applies with equal force to the states. "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the

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[2] Indeed, when first holding in 1968 that the right to a jury trial applies to the states, the Court acknowledged that the right applies with equal force to state and federal governments. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Mapp*, 367 U.S. at 655. Although the exclusionary rule "is not an individual right but a judicially created rule," the Court nevertheless overruled its precedent to apply the rule to the states. *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

And in *Benton*, the Court held that the prohibition against double jeopardy applies equally to state and federal governments, overruling its holding in *Palko v. Connecticut*, 302 U.S. 319 (1937). 395 U.S. at 794. Further, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court overruled its constitutional precedent, *Betts v. Brady*, 316 U.S. 455 (1942), and held that the right to counsel, which is "immune from federal abridgment" is "equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." 372 U.S. at 341.

The *Apodaca* Court had the benefit of these well-reasoned cases when it decided *Apodaca*. Like the *Betts* Court, "[t]he Court in [*Apodaca*] departed from the sound wisdom" of the Court's precedent. *Id.* at 345. *Apodaca*, like *Betts*, was "an anachronism when handed down" and "should now be overruled." *Id.* (quotations omitted).

### 3. Subsequent legal developments support overruling *Apodaca*.

Since *Apodaca*, the Court has reaffirmed that the Bill of Rights applies with equal force to the state and federal governments, and that the right's place in

our nation's history, not its function in modern society, governs its scope. *McDonald*, 561 U.S. 742.

The Court's post-*Apodaca* precedent has continued to reject the application of a "watered down" version of the Bill of Rights to the states. *Id.* at 786 (citations and quotations omitted). In *McDonald*, the Court reiterated that fundamental provisions of the Bill of Rights "apply with full force to both the Federal Government and the States." *Id.* at 750. In so holding, the Court explained that *Apodaca* "was the result of an unusual division among the Justices" and "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *Id.* at 766 n. 14.

More recently, in *Timbs v. Indiana*, the Court incorporated the Excessive Fines Clause of the Eighth Amendment to the states and held that "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." 139 S. Ct. 682, 687 (2019). Once again, the Court recognized that *Apodaca* is the Court's "sole exception" to this rule. *Id.* at 687 n.1.

Moreover, in both *McDonald* and *Timbs,* the Court outlined the history of the rights at stake to determine whether the rights are fundamental and thus fully applicable to the states. *See McDonald*, 561 U.S. at 775-76; *Timbs*, 139 S. Ct. at 687-89. This approach is supported by the Court's precedent, *see Benton*, 395 U.S. at 795, and yet stands in stark contrast to the *Apodaca* plurality's functional analysis of the right to a unanimous verdict. *Compare Timbs*, 139 S. Ct. at 687-89 (noting that the

prohibition against excessive fines dates back to the Magna Carta and is thus fundamental), *with Apodaca*, 406 U.S. at 410 (noting that the right to a unanimous verdict arose during the Middle Ages, yet holding the right is not fundamental based on "the function served by the jury in contemporary society").

The Court's post-*Apodaca* precedent reaffirms that whether a right is fundamental depends upon that right's history in our scheme of ordered liberty, and further confirms that such rights apply equally to the state and federal governments. Thus, *Apodaca*'s "underpinnings" have been "eroded," *Gaudin*, 515 U.S. at 521, leaving the case "an outlier" among the Court's incorporation cases. *Janus*, 138 S. Ct. at 2482. The Court may properly overrule a decision when it is a "mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992). *Apodaca* is such a decision.

#### 4. Reliance interests do not justify leaving *Apodaca*'s fractured holding in place.

Finally, reliance interests do not justify ignoring the mandates of the Sixth Amendment and allowing *Apodaca* to stand. Reliance interests matter most in property and contract cases. *Payne*, 501 U.S. at 828. Mandating unanimous verdicts will not affect citizens' property rights or undermine the validity of citizens' contracts. Further, Oregon is the only state that still allows conviction by non-unanimous verdicts. Thus, requiring unanimity would cause just one state to change its approach to criminal juries. And a unanimity requirement would not require

Oregon to revise its codes of criminal procedure or evidence.

Even if Louisiana and Oregon may have to retry certain defendants convicted by non-unanimous verdicts if those convictions are on direct review, *Teague v. Lane*, 489 U.S. 288 (1989) such expenses are "case-specific costs . . . not among the reliance interests that would persuade [the Court] to adhere to an incorrect resolution of an important constitutional question." *Hyatt* 587 U.S. at ___. Therefore, reliance interests do not justify continued adherence to the "anomaly" that is *Apodaca*. *Janus*, 138 S. Ct. at 2843.

## CONCLUSION

"[*Apodaca*]'s roots had . . . been cut away years ago." *Benton*, 395 U.S. at 795 (quotations omitted). The Institute thus asks the Court to "only recognize the inevitable," *id.*, and overrule *Apodaca*.

Respectfully submitted,

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