No. 10-344

# In the Supreme Court of the United States

**ALONSO ALVINO HERRERA,**

**Petitioner,**

**v.**

**STATE OF OREGON,**

**Respondent.**

**On Petition for Writ of Certiorari to the Oregon Court of Appeals**

## BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION

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## QUESTION PRESENTED

Thirty-eight years ago this Court held, in an Oregon case, that non-unanimous, 11-1 and 10-2 jury verdicts in felony cases do not violate the Sixth Amendment. *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See also Johnson v. Louisiana*, 406 U.S. 356 (1972). Since then, Oregon has relied on *Apodaca* to administer Oregon's seventy-six-year-old constitutional provision that permits less-than-unanimous jury verdicts in felony cases other than murder. Or. Const., Art. I, § 11.

Should this Court overrule *Apodaca* and hold that the Sixth Amendment, as incorporated through the Fourteenth Amendment, requires jury verdicts in state court felony cases to be unanimous?

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## STATEMENT OF THE CASE

### A. Statement of the Facts

Because the underlying facts involving petitioner's crime do not affect the analysis, those facts can be summarized briefly.

Petitioner borrowed a car from a friend to run an errand and failed to return it. (Transcript 37-38). Petitioner was arrested in the car over a week later, after a police officer stopped him for a traffic violation and discovered that the car was reported to be stolen. (Transcript 54-56, 62).

### B. Trial court proceedings

The state charged petitioner with one count of unauthorized use of a vehicle, Or. Rev. Stat. § 164.135, and one count of possession of a stolen vehicle, Or. Rev. Stat. § 819.300. (App. Br. 1,[1] ER-2, Indictment). Article I, section 11, of the Oregon Constitution provides in part:

> in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]

Before trial, petitioner requested that the jury be instructed that: "This being a criminal case, each and every juror must agree on your verdict." (Transcript

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[1] "App. Br." refers to the appellant's brief that petitioner filed in the Oregon Court of Appeals.

23). The trial court refused to give the requested instruction. (App. 5a).

The jury convicted petitioner of the unauthorized-use-of-a-vehicle offense, but the verdict was not unanimous. (App. 6a). Only 10 of the 12 jurors voted to convict on the charge. (*Id*.). The jury acquitted petitioner of the possession-of-a-stolen-vehicle offense, but that verdict was not unanimous either. (*Id*.). Only 11 jurors voted to acquit petitioner on that charge. (*Id*.).

**C. State appellate court proceedings**

Petitioner appealed, contending that the trial court had erred in refusing to give his requested jury instruction. Petitioner relied on *Blakely v. Washington*, 542 U.S. 296 (2004), and specifically drew on the following passage from that opinion:

> This rule [that, generally, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt] reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) * * *.

542 U.S. at 301 (emphasis added). Petitioner argued that *Apodaca* was inconsistent with that sentence

from *Blakely*. (App. 10a (quoting *Blakely*, 542 U.S. at 301 (in turn quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)))).

The Oregon Court of Appeals summarily affirmed, citing its decision in *State v. Cobb*, 224 Or. App. 594, 198 P.3d 978 (2008), *review denied*, 346 Or. 364, 213 P.3d 578 (2009). (App. 1a). In *Cobb*, the Oregon Court of Appeals rejected the claim that *Apodaca* was no longer good law. The court explained that "to the extent that defendant now invokes *Blakely v. Washington*, 542 U.S. 296 (2004), as overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972), *sub silentio*, we have previously rejected that contention. *State v. Bowen*, 215 Or. App. 199, 168 P.3d 1208 (2007), *modified on recons*., 220 Or. App. 380, 185 P.3d 1129 (2008)." *Cobb*, 224 Or. App. at 596-87, 198 P.3d at 979.

Petitioner filed a petition for review to the Oregon Supreme Court, renewing his argument that *Apodaca* was no longer good law in light of the *Blakely* decisions and, in particular, the statement from *Blakely* cited above. (App. 15a-16a). The Oregon Supreme Court denied review. (App. 3a).

## SUMMARY OF ARGUMENT

Petitioner asks this Court to revisit and overrule a decision it rendered thirty-eight years ago, even though this Court repeatedly has cited that decision without reservation (beyond noting the unusual split in the case) and even though Oregon has relied on that decision since 1972. Principles of *stare decisis* counsel that this Court not reconsider *Apodaca* unless petitioner provides a special justification for doing so

and makes a compelling showing that the Court's earlier decision is incorrect. Petitioner fails to do so.

In arguing that *Apodaca* is wrong, petitioner relies on this Court's recent quotations from Blackstone, who commented that the truth of every accusation against a criminal defendant should be confirmed by the unanimous suffrage of twelve of his equals and neighbors. Petitioner contends that *Apodaca* is inconsistent with those recent decisions quoting Blackstone. But there is no inconsistency. Those recent decisions dealt with other issues, and petitioner's reliance on those decisions is misplaced.

Neither does history support overruling the interpretation of the Sixth Amendment that this Court adopted in *Apodaca*. The Sixth Amendment does not explicitly include the right to a unanimous jury verdict, and this Court has held that other settled features of the common-law jury, including the requirement of a 12-person jury (*Williams v. Florida*, 399 U.S. 78 (1970)), are not included in the Sixth Amendment right to a jury the trial. Indeed, the Sixth Amendment was adopted after the Congress rejected an earlier version of the amendment that specifically would have required unanimous verdicts. Although the reason for that rejection is not clear, this Court has held that the more plausible explanation is that Congress intended that omission to have some substantive effect. Petitioner would give it none.

Nothing in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), provides a special justification for overruling *Apodaca*. In *McDonald*, the plurality discussed and applied the rule that incorporated Bill of Rights pro-

tections apply identically to the States and the Federal Government. That rule was well established at the time of *Apodaca*. *McDonald* did not alter the incorporation test and does not provide a compelling basis to reconsider *Apodaca*.

Finally, nothing in the empirical research on jury dynamics compels a conclusion that non-unanimous juries infringe on Sixth Amendment rights. Studies show little disparity in deliberation time between juries required to decide unanimously and those that do not deliberate under that requirement. To the extent there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict. At most, considered as a whole, the empirical research simply illustrates what this Court held in *Apodaca*: States may reasonably differ on the value of requiring unanimity.

In sum, petitioner offers scant basis for this Court to revisit and overturn decades-old precedent. This Court should do what it has done in other recent cases in which the petitioners have contended that the Sixth Amendment requires unanimous jury verdicts in state court criminal cases: deny the petition.[2]

**REASONS FOR DENYING THE PETITION**

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and

[2] *Bowen v. Oregon*, 130 S. Ct 52 (2009) (No. 08-1117); *Howard v. Oregon*, 129 S. Ct. 633 (2008) (No. 08-6449); *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523).

> public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

U.S. Const. amend. VI. In *Apodaca*, this Court specifically upheld Oregon's state constitutional practice that allows juries to decide cases by 10-2 or 11-1 votes as well as unanimously. 406 U.S. 406.

### A. *Stare decisis* requires that petitioner provide a special justification for overruling *Apodaca*.

"Time and again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Railways Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Welch v. Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). *Stare decisis* "'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1996)). "Adherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton*, 502 U.S. at 202.

In light of those considerations, this Court has set the bar very high for overruling its prior decisions: Even in constitutional cases, this Court will not depart from the doctrine of *stare decisis* absent a "spe-

cial justification." *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("even in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'"; internal quotation marks and citations omitted); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification").

Among the "factors in deciding whether to adhere to the principle of *stare decisis*" are "the antiquity of the precedent" and "the reliance interests at stake[.]" *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). As noted, *Apodaca* is thirty-eight years old, and Oregon has relied on it since 1972 to instruct jurors in felony trials that they need not return unanimous verdicts.

"Where a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,' these factors weigh in favor of reconsideration." *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (quoting *Payne*, 501 U.S. at 829-30). The decision in *Apodaca* is unambiguous and easy to apply. Moreover, beyond noting that *Apodaca* "was the result of an unusual division among the Justices," *McDonald*, 130 S. Ct. at 3035 n. 14, the Court has not questioned *Apodaca* and has cited it without reservation. *See Schad v. Arizona*, 501 U.S. 624, 634 n. 5 (1991) ("a state criminal defendant, at least in noncapital cases, has no

federal right to a unanimous jury verdict"); *Burch v. Louisiana*, 441 U.S. 130, 136 (1979) (Court "conclude[d] in 1972 that a jury's verdict need not be unanimous to satisfy constitutional requirements"); *McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, J., dissenting) (noting that the Court has "approved verdicts by less than a unanimous jury," citing *Apodaca*); *Brown v. Louisiana*, 447 U.S. 323, 330-31 (1980) (noting 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," citing *Apodaca*).

Because of the respect that *stare decisis* demands, because *Apodaca* has been settled law for thirty-eight years, and because this Court subsequently has cited *Apodaca's* holding without reservation (other than noting the "unusual" split in the case), this Court should consider overruling it only if petitioner can provide a "special justification" for doing so. He has not done so, and this Court should not grant certiorari.

### B. *Apodaca* is not inconsistent with *Blakely* or *Apprendi*.

In urging this Court to overrule *Apodaca*, petitioner and *amici* rely on this Court's recent decisions in *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which they claim are "inconsistent" or even "irreconcilable" with *Apodaca*. (*See*, *e.g.*, Pet. 11, 23-25; Oregon Professors, 11-12; Oregon Federal Public Defender, 10-11). Throughout this case, petitioner has focused, in particular, on the statement in *Blakely* that the Sixth Amendment requires "that the 'truth of

every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" (App. 10a, App. Br. (quoting *Blakely*, 542 U.S. at 301 (in turn quoting Blackstone, *supra*, at 343))) (emphasis added by petitioner in App. Br.). Apparently, to varying degrees, petitioner and *amici* believe that, when the Court quoted Blackstone in its discussion of when the Sixth Amendment requires factual findings to be made by a jury rather than the court, this Court also intended to interpret the Sixth Amendment to require unanimous jury verdicts in state criminal cases.

But neither *Blakely* nor *Apprendi* dealt with the issue of whether the Sixth Amendment requires unanimous jury verdicts. The issue in *Blakely* and *Apprendi* was whether basing an enhanced sentence on fact-finding by the trial court violated the petitioner's Sixth Amendment right to trial by jury. 542 U.S. at 298; 530 U.S. at 468-69. Thus, when the Court in *Blakely* referred to the "long standing tenet" that the "truth of every accusation" against a defendant should be "confirmed by the unanimous suffrage of twelve of his equals and neighbours," 542 U.S. at 301 (quoting Blackstone), it did so in a strikingly different context, involving issues quite different than the one presented here. *Apodaca* simply is not "inconsistent" with *Blakely* and *Apprendi*.[3]

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[3] Petitioner also contends that this Court "has repeatedly held that the Sixth Amendment mandates jury unanimity for federal convictions." (*See* Pet. 2, referencing Pet. 5). But the three decisions that petitioner cites to support that assertion offer little support for his cause. In *Hawaii*

### C. Petitioner's historical arguments provide no persuasive reason for this Court to revisit the result in *Apodaca*.

Petitioner also argues that *Apodaca* is inconsistent with this Court's historical approach to interpreting the Sixth Amendment jury-trial right. (Pet. 11-12). The text of the Sixth Amendment does not reference a unanimity requirement. But petitioner argues that, under the common law, "[t]he right to a unanimous jury verdict was firmly established when

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*v. Mankichi*, 190 U.S. 197, 211-12 (1903), and *Swain v. Alabama*, 380 U.S. 202, 211 (1965), the references to jury unanimity were *dicta*. In *Mankichi*, the issue was whether the criminal procedures embodied by the Fifth Amendment's Grand Jury Clause and the Sixth Amendment's Jury Trial Clause applied to the Territory of Hawaii at that time, and the Court concluded that they did not. 190 U.S. at 209-18. *Swain* involved an equal-protection challenge to the composition of a jury. 380 U.S. 202. *Andres v. United States*, 333 U.S. 740 (1948), involved a prosecution for a crime committed on federal property. In that case, the Court concluded, rather summarily, that "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply," citing only *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897). *Andres*, 333 U.S. at 748, 748 n. 13. In *American Pub. Co.*, which dealt with the right to jury trial under the Seventh Amendment, the Court specifically noted that "the power of a state to change the rule in respect to unanimity of juries is not before us for consideration." 166 U.S. at 468 (citations omitted). When that issue came before the Court in *Apodaca*, the Court ruled that unanimity is not required under the Sixth Amendment.

the Bill of Rights was framed." (Pet. 11). This Court accepted that reading of history in *Apodaca*: it had been "settled" since "the latter half of the 14th century * * * that a verdict had to be unanimous" to convict someone of a crime, and that requirement "had become an accepted feature of the common-law jury by the 18th century." *Apodaca*, 406 U.S. at 407 n. 2, 408 (footnote omitted). But the fact that a feature of the common-law jury was settled when the Bill of Rights was adopted does not establish that the particular feature was incorporated into the Sixth Amendment.

This Court clearly has rejected petitioner's historical argument and held that not all features of the common-law jury are included in and guaranteed by the Sixth Amendment. Notably, although the 12-person jury also was an accepted feature of the common-law jury at the time of the Founding—and although Blackstone mentions that numerical common-law requirement in the same sentence from his Commentaries that petitioner relies on and that this Court quoted in *Blakely* and *Apprendi*—this Court has held that the Sixth Amendment does not require 12-person juries. *Williams*, 399 U.S. at 86.

The Court reviewed the relevant constitutional history in detail in *Williams*, 399 U.S. at 93-99, and summarized it in *Apodaca*, 406 U.S. at 409. The history underlying the Sixth Amendment "casts considerable doubt on the easy assumption * * * that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Williams*, 399 U.S. at 92. Instead, although the historical record can lead to competing conclu-

sions, the stronger inference is that one of the features of the common-law jury that the Framers did not intend to include in the Sixth Amendment was the requirement of a unanimous jury verdict.

In *Apodaca*, this Court summarized the history of the Sixth Amendment. The Court concluded that "[t]he *most salient fact* in the scanty history of the Sixth Amendment" is that, although "as it was introduced * * *, the proposed Amendment provided for trial 'by an impartial jury of the freeholders of the vicinage, *with the requisite of unanimity for conviction* * * * and other accustomed requisites,'" ultimately the unanimity and "accustomed requisites" provisions were not included. 406 U. S. at 409 (emphases added; citation omitted). Indeed, the conference committee "refused to accept not only the original * * * language but also an alternate suggestion * * * that juries be defined as possessing 'the accustomed requisites.'" *Id.* (citation omitted).

This Court noted in *Apodaca* that, as it had "observed in *Williams*, one can draw conflicting inferences from this legislative history." 406 U. S. at 409.

> One possible inference is that Congress eliminated references to unanimity and to the other "accustomed requisites" of the jury because those requisites were thought already to be implicit in the very concept of jury. *A contrary explanation, which we found in Williams to be the more plausible, is that the deletion was intended to have some substantive effect*.

*Id.* at 409-10 (citing *Williams*, 399 U. S. at 96-97 (emphasis added)).

Thus, contrary to petitioner's claim that the history of the Sixth Amendment supports his argument that that provision includes a right to a unanimous jury verdict in state criminal trials, this Court has concluded that the "more plausible" explanation for the fact that the Amendment does not explicitly include such a right is that the deletion "was intended to have some substantive effect." "[C]ontemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect." *Williams*, 399 U.S. at 97. Petitioner's historical argument conflicts with *Williams* and *Apodaca*, and the conclusions that the Court drew from the historical record in those cases.

In *Apodaca*, this Court also reviewed the reasons why the unanimous jury verdict had become a settled feature of the common law. As this Court observed in *Williams*, 399 U.S. at 89—with regard to the requirement of a 12-person jury—the requirement of a unanimous jury verdict appears to have been a "historical accident" that had its origins in outmoded medieval concepts.

This Court has identified "[a]t least four [possible] explanations * * * for the development of unanimity" at common law. *Apodaca*, 406 U. S. at 407 n. 2. All of them are either outmoded or historical accidents. The first explanation is that "unanimity developed to compensate for the lack of other rules insuring that a

defendant received a fair trial." *Id.* (citations omitted). The "second theory is that unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position; the argument is that when this technique * * * was abandoned, the requirement that one side obtain the votes of all 12 jurors remained." *Id.* (citations omitted).

"A third possibility is that unanimity developed because early juries, unlike juries today, personally had knowledge of the facts of a case," that "the medieval mind assumed there could be only one correct view of the facts," and that if either all or a minority of the jurors "declared the facts erroneously, they might be punished for perjury." *Id.* (citations omitted). "Given a view that minority jurors were guilty of criminal perjury, the development of a practice of unanimity would not be surprising." *Id.* "The final explanation is that jury unanimity arose out of the medieval concept of consent." *Id.* To the medieval mind, the concept of consent "carried with it the idea of * * * unanimity[.]" *Id.* (internal quotation marks and citation omitted). Even in 18th century America, there was "a similar concern that decisions binding on the community be taken unanimously." *Id.* (citation omitted).

Those historical reasons for the common-law requirement of a unanimous jury verdict have little, if any, force now. Instead, "[m]any of the possible historical reasons for the unanimity requirement are ones that are substantially less persuasive now—and

the Court itself has recognized this." Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 Hastings Const. L. Q. 141, 142 (2006). "If unanimity developed at common law 'to compensate for the lack of other rules insuring that a defendant received a fair trial,' American criminal procedure now has many more substantial protections for defendants." Leib, *supra*, at 142 (quoting *Apodaca*, 406 U. S. at 407 n. 2) (footnote omitted). If unanimity "arose out of the practice in the ancient mode of trial by compurgation"—a mode of trial where certain kinds of witnesses essentially became jurors—that practice "has very little relevance to contemporary trials, where we'd never allow a witness on the jury[.]" Leib, *supra,* at 143. "[W]e should have no allegiance to a decision rule that arose out of a jury practice that has so little to do with our own." *Id.* "If the unanimity requirement arose out of the medieval idea that reasonable people cannot disagree and that minority jurors must be lying, we must certainly abandon it in our pluralistic society." *Id.* (footnote omitted). Given the outdated rationales for the common-law requirement of unanimity, reading it into the Sixth Amendment would be to "ascribe a blind formalism to the Framers[.]" *Williams*, 399 U.S. at 103.

Thus, neither the history of the Sixth Amendment nor the reasons for the common-law requirement of jury unanimity provide any "special justification," *Dickerson*, 530 U.S. at 443 (internal quotation marks omitted), to disregard principles of *stare decisis* and overrule *Apodaca*. Instead, as this Court has recognized, *Apodaca*'s treatment of history parallels the Court's treatment of history in *Williams*. *See Burch*,

441 U.S. at 136 (noting that "[a] similar analysis" to that in *Williams* led the Court in *Apodaca* to conclude "that a jury's verdict need not be unanimous to satisfy constitutional requirements, even though unanimity had been the rule at common law"); *Ludwig v. Massachusetts*, 427 U.S. 618, 625 (1976) (a "[s]imilar analysis [to that in *Williams*] led to the holding in *Apodaca* that the jury's verdict need not be unanimous"). Petitioner's argument would require reconsideration not only of *Apodaca* but also the basis for *Williams*. Petitioner is asking this Court to plow ground that it has already covered in detail. The Court should refuse to do so.

### D. *McDonald* did not alter the incorporation test and does not provide a special justification for overruling *Apodaca*.

Petitioner asserts that this Court's recent decision in *McDonald* provides a compelling basis to reconsider and overrule *Apodaca*. (Pet. 5-11). In *McDonald*, 130 S. Ct. 3020, the Court held that the Second Amendment right to keep and bear arms applies to the States under the Fourteenth Amendment. The plurality reached that result under the Due Process Clause. 130 S. Ct. at 3050. Justice Thomas provided the fifth vote in his concurrence. *Id*. at 3058-88 (Thomas J., concurring in part and concurring in judgment). Justice Thomas rejected the view that the right was incorporated under the Due Process Clause, *id*. at 3061-63; but he concluded that it was incorporated under the Fourteenth Amendment's Privileges or Immunities Clause. *Id*. at 3088.

In *McDonald*, the plurality referenced the rule that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 130 S. Ct. at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)). Petitioner asserts this court should overrule *Apodaca* in light of that analysis because, in his concurrence in *Apodaca*, Justice Powell took a different view of incorporation. (Pet. 5-11).

*McDonald* does not provide a special justification to depart from the doctrine of *stare decisis* and overrule *Apodaca*. In *McDonald*, the Court did not alter the incorporation test but instead applied "the [incorporation] standard that is well established in [the Court's] caselaw." 130 S. Ct. at 3026. The rule that incorporated Bill of Rights provisions apply equally to the States and the Federal Government was well established at the time of *Apodaca*. *See McDonald*, 130 S. Ct. at 3035 (plurality opinion) (quoting Court's 1964 *Malloy* decision for rule and citing several other cases from same period). Nothing in the Court's application of that rule in *McDonald* was remarkable, much less provides a compelling basis to reconsider and overrule *Apodaca*.

Yet petitioner asserts that *McDonald* signaled, or at least pointedly suggested, that *Apodaca* is not entitled to deference under the doctrine of *stare decisis*. (Pet. 11, 28-29). The plurality in *McDonald* explained that, "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare de-*

*cisis* counsels otherwise, that guarantee is fully binding on the States[.]" 130 S. Ct. at 3046 (footnote omitted). In its accompanying footnote, the opinion cited the Court's decisions that the Fifth Amendment's Grand Jury Clause and the Seventh Amendment's civil-jury requirement do not apply to the States and explained that those decisions "predate the era of selective incorporation." *Id*. at 3046 n. 30, citing *Hurtado v. California*, 110 U.S. 516 (1884) (indictment) and *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916) (civil jury). Petitioner opines that the plurality "conspicuously omitt[ed] *Apodaca* from the list of cases that might be preserved by *stare decisis*." (Pet. 28-29).

Petitioner misses the point. A change in the law is a recognized argument in favor of reconsidering an earlier decision. *See Alabama v. Smith*, 490 U.S. 794, 803 (1989) (a "later development of * * * constitutional law" is a basis for overruling a prior decision). Indeed, that was the basis for *McDonald*. In *McDonald*, the Court concluded that its prior decisions holding that the Second Amendment was not incorporated against the States did not "preclude" the Court from considering whether the Due Process Clause incorporated the right because the Court's earlier decisions "preceded" the era of selective incorporation. 130 S. Ct. at 3031. In its footnote, the plurality in *McDonald* merely was acknowledging that any similar reconsideration of the *Hurtado* and *Bombolis* holdings—which also "predate the era of selective incorporation"—would be subject to *stare decisis* considerations. In contrast, *Apodaca* was decided during the era of selective incorporation, and the incorporation test has

not changed since that decision. The *McDonald* plurality recognized as much by omitting *Apodaca* from the list of decisions theoretically subject to reconsideration based on a change in the law.[4]

### E. Recent empirical research is not relevant to whether this Court should revisit *Apodaca* and, in all events, provides no persuasive support for petitioner's claim.

Petitioner and *amici* invoke empirical research to demonstrate the wisdom of a unanimity requirement. As discussed above, before this Court revisits *Apodaca*, petitioner must provide a "special justification" for doing so, which would require considerably more than a suggestion that jury unanimity may be "wiser" than non-unanimous juries. As this Court has recognized, "no judicial system could do society's work if it

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[4] Petitioner also is mistaken in asserting that *Sullivan v. Louisiana*, 508 U.S. 275 (1993), undermines *Apodaca*. (Pet. 31). In *Sullivan*, the Court explained that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." 508 U.S. at 278. But in *Johnson v. Louisiana*, and *Apodaca*, the Court rejected the argument that jury unanimity is necessary to give substance to the reasonable-doubt standard. *See Johnson*, 406 U.S. at 358-63 (rejecting argument); *Johnson*, 406 U.S. at 368 (Powell J., concurring) (agreeing and joining opinion); *Apodaca*, 406 U.S. at 412 (plurality opinion) (explaining that the reasonable-doubt requirement is rooted in due process and that *Johnson* rejected argument that non–unanimous verdicts undermine reasonable-doubt standard). *Sullivan* does not provide a special justification to overrule *Apodaca*.

eyed each issue afresh in every case that raised it." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (citing B. Cardozo, *The Nature of the Judicial Process* 149 (1921)). Instead, when this Court re-examines a prior holding, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law[.]" *Id.* at 854.

Recent empirical research demonstrating that a state's decision to permit non-unanimous juries may affect the dynamics of jury deliberations provides no basis to revisit long-standing precedent. The question here—as it was in *Apodaca*—is whether the Sixth Amendment prohibits non-unanimous juries; nothing about that constitutional question has changed in the 38 years since this Court decided *Apodaca*. That petitioner and *amici* can point to some studies suggesting that states *should not* permit non-unanimous juries says nothing about whether the states *cannot* permit non-unanimous juries. States remain free to make policy choices so long as those choices do not infringe upon constitutional protections and liberties. In all events, nothing since *Apodaca*—empirically or experientially—has demonstrated that this Court's decision in *Apodaca* is unworkable or unsound, or suggests that *Apodaca* was based on a fundamentally mistaken, or subsequently discredited, view of jury dynamics.

Petitioner and *amici* rely on conclusions from various studies that jurors who are not required to achieve unanimity evaluate the evidence less thor-

oughly, spend less time deliberating, and take fewer ballots. (*See*, *e.g.*, Pet. 20, 20 n. 4; Oregon Professors, 6-8; Oregon Federal Public Defender, 17). They apparently believe that that evidence undermines this Court's conclusion in *Apodaca* that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. But studies show that little disparity actually exists in the duration of deliberations and—even more critically—that to the extent that there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict.

The "most comprehensive jury study" conducted in the past thirty years has shown a "minimal disparity" between the amount of time that juries spend deliberating when unanimity is required and the amount of time they spend when unanimity is not required. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 488 (1966); Michael H. Glasser, *Comment: Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 Fla. St. U. L. Rev. 659, 672 (1997). That same study also demonstrates that in nine out of ten cases, the result of the first ballot is the same as the verdict. *Id.*; *see also* Dennis J. Devine et al., *Jury Decision Making*: *45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 690 (2001). Thus, to the extent that there is any disparity in the length of deliberation, that time is often spent trying to convince one or two holdouts. And in jurisdictions that require jury unanimity, those holdout jurors often simply succumb to the "pressure for unanimous agreement[.]" Leib, *su-*

*pra*, at 145. Hence, contrary to petitioner's assumptions, a jury unanimity requirement does not necessarily guarantee or promote "open-minded" debate in an ideally deliberative environment; rather, the time spent attempting to achieve unanimity is often spent pressuring and cajoling the few holdouts into acquiescence.

Of greater significance, however, is that the degree and nature of the deliberations is not directly proportional to the accuracy of any verdict. Most experts agree that the accuracy of the ultimate verdict is not contingent upon whether jury unanimity is required. *See* Leib, *supra*, at 144 ("most agree that the outcomes of verdicts do not significantly vary" depending upon whether there exists a unanimity rule or not). Permitting juries to reach non-unanimous verdicts, therefore, does not undermine the ultimate purposes of the jury: to safeguard a defendant against the corrupt or overzealous prosecutor and the biased judge, and to assure a fair and equitable resolution of factual issues. *Apodaca*, 406 U.S. at 410-11; *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498-99 (1931).

Petitioner and *amici* further contend that allowing non-unanimous jury verdicts marginalizes jurors who are members of minority groups. (Pet. 20, 20 n. 4, Oregon Federal Public Defender, 17). They rely on empirical research that, in their view, demonstrates that the non-unanimous jury scheme in effect silences dissenting and minority voices. (*Id.*). But unanimity cannot guarantee mutual tolerance. Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C.

Davis L. Rev. 1169 (1995). That is, unanimity simply does not guarantee that juries will tolerate opposing or minority views or listen to reason and consider the evidence. In reality, whether the minority is likely to speak up or not depends more upon the different personalities of the jurors. Glasser, *supra*, at 674. In fact, it is at least equally likely that the non-unanimous jury system actually encourages the minority to speak up, because they need to convince fewer other jurors to come to their side. *Id.*

In sum, to support overruling a constitutional decision that Oregon has been relying upon for 38 years, petitioner and *amici* must provide something more compelling than some recent analyses of jury behavior. That is particularly true when the proffered showing consists of an incomplete picture of how the non-unanimity requirement affects jury deliberations. Wiser or not, unanimous juries are not a Sixth Amendment mandate. This Court thus need not reconsider the system that Oregon's Constitution requires Oregon to follow and that this Court already has upheld.

## CONCLUSION

In the nearly 40 years that have passed since this Court decided *Apodaca*, nothing has changed. Petitioner asks this Court to grant his petition and reconsider *Apodaca* based on quotations from *Blakely* and *Apprendi* that are taken out of context, history that this Court already has concluded does not support petitioner's argument, incorporation analysis from *McDonald* that was well established when this Court decided *Apodaca*, and empirical research that does

not yield any clear conclusion that unanimous jury verdicts are necessarily preferable, let alone constitutionally required. As it did at least once in 2009 and twice in 2008, note 2, *supra*, this Court should decline the invitation and deny the petition.

Respectfully submitted,

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