

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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EVANGELISTO RAMOS,)

Petitioner,)

v.) No. 18-5924

LOUISIANA,)

Respondent.)

- - - - -

Washington, D.C.

Monday, October 7, 2019

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

APPEARANCES:

JEFFERY L. FISHER, Stanford, California;

on behalf of the Petitioner.

ELIZABETH MURRILL, Solicitor General, Baton Rouge,

Louisiana; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

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

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

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

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

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

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

1 courts.

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

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

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

24 First, that the drafting history of
25 the Sixth Amendment suggests that the framers

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

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

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

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

24 And the rule was the same across all
25 of those states, so the thing that the framers

1 would have taken from the context at the time
2 would have been that it doesn't matter whether
3 you have unanimity in the provision; it requires
4 it either way.

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

7 MR. FISHER: And I think --

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

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

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

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

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

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

24 JUSTICE ALITO: You are asking us to
25 overrule *Apodaca*, so we do have to think about

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

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

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

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

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

1 Fourteenth Amendment doesn't require states to
2 have unanimous verdicts. Instead, they're
3 asking the Court to adopt a new rule of Sixth
4 Amendment law that the Court has never adopted.

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

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

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

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

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

23 MR. FISHER: Yeah, so let me give you
24 three reasons why, even if you take that as a --
25 as a given, stare decisis shouldn't carry the

1 day. And then I'll turn to the facts.

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

7 JUSTICE KAGAN: So could I ask you --

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

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

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

1 JUSTICE KAGAN: Well --

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

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

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

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

1 has not accepted anomalies and where the Court
2 has said that stare decisis is at a very low ebb
3 when it comes to states following the
4 fundamental rules of the road of the Bill of
5 Rights. So I think on that level, it is a
6 different kind of a situation than the ordinary
7 stare decisis case.

8 JUSTICE GINSBURG: Did Timbs recognize
9 that exception?

10 MR. FISHER: Pardon me?

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

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

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

22 JUSTICE KAGAN: What else have you
23 got?

24 MR. FISHER: -- Fourteenth Amendment
25 footing. So let me turn to the -- to I think

1 back to Justice Alito's question, because I
2 think you were asking about convictions.

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

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

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

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

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

23 But do you think -- I mean, I -- I can
24 well envision seeing you up here in a term or
25 two arguing this is a water -- the rule that you

1 are trying to persuade us to accept today is a
2 watershed rule of criminal procedure.

3 Do you think that's a -- a frivolous
4 argument?

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

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

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

1 overruled past cases.

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

6 JUSTICE KAVANAUGH: What about --

7 MR. FISHER: -- incorporation.

8 JUSTICE KAVANAUGH: Sorry.

9 MR. FISHER: No, go ahead.

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

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

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

1 was just a historical accident.

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

8 JUSTICE KAGAN: Do you think --

9 JUSTICE GORSUCH: What -- what --

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

11 JUSTICE GORSUCH: Sorry.

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

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

23 CHIEF JUSTICE ROBERTS: And that's --

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

25 CHIEF JUSTICE ROBERTS: You prefaced

1 that by saying that's a key part of the
2 distinction you are trying to draw?

3 MR. FISHER: Well, maybe it is the
4 very distinction.

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

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

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

24 Now, remember what happens in
25 Louisiana and in Oregon is that a cross-section

1 of the community, somewhat by design, can be
2 left out of and canceled out of those
3 deliberations. And that's very different than a
4 6/0 verdict when it comes to the way things
5 happen in the jury room and the public
6 confidence in that verdict.

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

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

25 Have you got anything else besides

1 these functionalist arguments about the real
2 great importance about unanimity and the
3 relative lack of importance about numbers?

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

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

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

20 I think what the Court said in
21 Williams is that of course there are going to be
22 some features of the common law. Imagine, for
23 example, that the justice -- that the jurors all
24 had to wear a particular color jacket to -- to
25 courtroom. There is going to be certain

1 incidental features of the right to jury trial
2 that don't necessarily have to be read along
3 with the Sixth Amendment.

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

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

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

23 JUSTICE KAGAN: Do you think, Mr.
24 Fisher, that we would also have to overrule
25 Ludwig versus Massachusetts if we overruled

1 Apodaca?

2 If I understand it right, that was
3 another case in which Justice Powell's unusual
4 approach to incorporation ended up being the
5 deciding vote in the case. It was about a
6 two-tiered jury system.

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

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

22 JUSTICE KAGAN: You --

23 JUSTICE GORSUCH: Do you --

24 JUSTICE KAGAN: You -- you started off
25 and then I told you to stop, but I thought I'd

1 give you an opportunity to do it again.

2 I mean, what are we to make of this
3 4-1-4 reasoning of Apodaca and -- and -- and
4 what do you think the rule should be about stare
5 decisis going forward? Do you need a majority?
6 Do you just need a controlling rule? What's --
7 what's the right way to think about that?

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

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

22 The Court did the same thing in
23 Seminole Tribe. And -- and Seminole Tribe is a
24 good example of a case that drew deep divisions
25 within the Court as to what the substantive

1 meaning of the Eleventh Amendment was. But
2 Justice Souter in his dissent said I do not
3 begrudge the majority for considering this issue
4 fresh, because there was no majority of the
5 Court that had proper -- that had previously
6 spoken to it and our votes were all over the
7 map.

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

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

25 I think the one thing that makes this

1 case unusual is you would think that if the
2 party did rely on that prior case they'd at
3 least come up and defend it instead of ask the
4 Court for a different rule.

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

15 JUSTICE ALITO: Can I come back to the
16 -- the math question that was alluded to
17 earlier? I am not myself, I must confess,
18 capable of doing this math, but somebody could.

19 So if you hypothesize a jury pool with
20 a certain percentage of jurors who were inclined
21 to acquit, and you ask is there a greater
22 likelihood of acquittal with a 6-0 verdict than
23 a 10-2 verdict or an 11-1 verdict or if the
24 state decides to have a jury that's bigger than
25 12, a 15-1 -- a 15-person injury, 14-1; 19-1,

1 when we get to the point where the chance of
2 acquittal is -- is in favor of the non-unanimous
3 rule, would that be unconstitutional?

4 MR. FISHER: My rule is that any time
5 the state deviates from unanimity, it is
6 unconstitutional, so even if a state were to go
7 beyond the number of 12. And I think the reason
8 why is because it's a different phenomenon when
9 somebody disagrees in the jury room.

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

18 JUSTICE ALITO: I mean, you really --

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

21 JUSTICE ALITO: You really want to
22 argue that? So if a -- if a petit jury had to
23 be as big as a grand jury and you were
24 representing a criminal defendant, you would
25 rather -- you would say we want -- 6-0 is better

1 for us than 21 to 1?

2 MR. FISHER: Justice Alito, perhaps
3 there'd be a number where that argument would
4 start to be difficult, and I think that -- that
5 what I would tell you is the history and
6 tradition of this country makes it highly
7 unlikely that we're ever going to see a system
8 like that.

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

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

23 JUSTICE KAVANAUGH: Do the racial
24 origins of this rule have an impact on how we
25 think about *stare decisis* in this case?

1 MR. FISHER: I think they do, Justice
2 Kavanaugh. I think --

3 JUSTICE KAVANAUGH: How? How do --
4 how should we factor those in?

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

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

21 JUSTICE ALITO: You really --

22 MR. FISHER: -- think that.

23 JUSTICE ALITO: -- want to make that
24 argument? You made a big deal of it in your
25 brief.

1 I thought you'd -- I thought you would
2 abandon it here today. But if -- if another
3 state were to enact the same statute that
4 Louisiana has tomorrow and did it for all of the
5 legitimate policy reasons that have led such
6 entities as the American Bar Association and the
7 American Law Institute and lots of reputable
8 scholars and the framers of the Constitution of
9 Puerto Rico and the people who made the rule in
10 the United Kingdom, all of which allow
11 non-unanimous juries, if they -- if that was
12 enacted for that reason, that might be
13 constitutional, but this statute is not
14 constitutional and the Oregon statute is not
15 constitutional because of the -- the origin that
16 you a attribute to them?

17 MR. FISHER: No, Justice -- Justice
18 Alito. Let me make sure that I am clear with
19 the Court.

20 We think that purpose perhaps could
21 inform the Court's decision-making, and
22 particularly if you're looking at stare decisis,
23 it could inform whether to stick with an old
24 Fourteenth Amendment rule, but we don't think
25 it's essential to our Sixth Amendment argument.

1 And we think if a state had followed the old ALI
2 recommendation before the Sixth Amendment was
3 incorporated in the states, that I'd be making
4 all -- all the other same arguments I'm making
5 here today.

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

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

23 And as I understood what you were
24 saying, you were saying that this even goes
25 beyond that.

1 MR. FISHER: Right.

2 JUSTICE KAGAN: Could -- could you
3 explain why or is it the same as that or --
4 because I've never liked that argument. So is
5 this just -- is -- is -- is your argument just
6 the same thing?

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

19 I think we have here something
20 entirely different, though. The state is not
21 even making a Fourteenth Amendment argument.
22 They're asking the Court to adopt a rule -- and
23 let me just be clear, the rule that they're
24 asking the Court to adopt is the Sixth Amendment
25 does not require unanimous verdict. Five

1 justices in Apodaca squarely rejected that
2 argument. And the Court, itself, in 14th -- 14
3 other opinions have rejected that argument.

4 JUSTICE GINSBURG: It was unsettled --

5 MR. FISHER: So, Justice Kagan, I
6 think this is different in kind.

7 JUSTICE GINSBURG: It was unsettled
8 until Apodaca. The unanimity question was not
9 settled until Apodaca, right? Well, because
10 four -- four of the justices there thought
11 unanimity was not required; four thought it was.

12 MR. FISHER: My --

13 JUSTICE GINSBURG: So it was Apodaca,
14 the fifth vote being Powell's vote, that said --
15 set the precedent for you to require a unanimity
16 in federal trials.

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

1 Justice White had said in a footnote in Duncan
2 it could do, which is reconsider the old
3 precedents.

4 But even if I didn't have that, I
5 would have the five votes in Apodaca, Justice
6 Ginsburg, and the statements in cases like
7 Richard and Descamps later, where the Court has
8 cited Justice Powell's opinion as the law and
9 said that it settles the Sixth Amendment
10 question.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Ms. Murrill.

14 ORAL ARGUMENT OF ELIZABETH MURRILL
15 ON BEHALF OF THE RESPONDENT

16 MS. MURRILL: Mr. Chief Justice, and
17 may it please the Court:

18 We agree with Petitioner that this
19 case presents two issues: whether the Sixth
20 Amendment requires unanimity and, if so, whether
21 that requirement applies to the states.

22 The Court should decide this case on
23 the first issue because nothing in the text,
24 structure, or history of the Sixth Amendment
25 requires unanimous jury verdicts.

1 Nor has this Court ever held that the
2 framers wholesale adopted the common law. In
3 fact, the Court has expressly rejected that view
4 in *Hurtado* with regard to the Bill of Rights and
5 in *Williams*. Those correct holdings, plus
6 historical evidence that the framers expressly
7 rejected unanimity and the Sixth Amendment, are
8 fatal to Petitioner's request to add back words
9 that the Senate rejected in 1789.

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

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

1 fewer than 12.

2 The beauty of our system, is that
3 people can change the rules. So if they now
4 want to require unanimity, they can do so. They
5 can amend their state laws, as Louisiana
6 recently did, or they can amend the federal
7 Constitution.

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

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

16 You are asking to -- us to reject a
17 rule that five justices adhered to.

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

24 So --

25 JUSTICE GINSBURG: But --

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

2 JUSTICE GINSBURG: -- there were --
3 there were four justices who said unanimity was
4 required. And then there was Justice Powell,
5 who said unanimity is required in federal
6 trials. You are asking us to overturn that
7 position, that unanimity is required in federal
8 trials?

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

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

22 If precedent weighs for anything, what
23 do we do with Andres? What do we do with those
24 14 cases throughout Supreme Court history that
25 seem to treat unanimity as part of the Sixth

1 Amendment?

2 And what do we do as well with Hughes
3 and with Seminole Tribe and a lot of other cases
4 where we have been facing similarly splintered
5 decisions and the Court has come back and
6 addressed the question fresh without considering
7 stare decisis in those cases?

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

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

19 JUSTICE GORSUCH: Well, we're not
20 dealing with a --

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

22 JUSTICE GORSUCH: -- a six-person
23 jury, so we can put that aside. We're -- we're
24 dealing with unanimity. And I -- I don't think
25 you're arguing that the Court did anything

1 improper in Hughes or did anything improper in
2 Seminole Tribe by taking up the question afresh.

3 And I'm just curious why it would be
4 different here and why the state shouldn't be
5 assigned some degree of risk, assuming risk, by
6 proceeding in this area on the reliance of one
7 -- one member of the Court's opinion that is
8 rather, I think fair to say, idiosyncratic?

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

15 So that's -- that's one response that
16 I have to that question.

17 My second response is that I think you
18 can take it up afresh. But -- but I also --
19 this is a non-textual --

20 JUSTICE GORSUCH: I appreciate -- I
21 appreciate that. That's helpful.

22 MS. MURRILL: Yeah.

23 JUSTICE KAGAN: Well, just on that,
24 General Murrill, so, I mean, you don't really
25 want us to take that up afresh, do you? I mean,

1 aren't you -- I'm sort of confused because there
2 is the sentence in your brief that says neither
3 party is asking the Court to accord Justice
4 Powell's solo opinion in Apodaca precedential
5 force.

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

12 MS. MURRILL: Justice Kagan, I -- I
13 think that given the evolution of incorporation
14 theory, we find ourselves in a position where it
15 is even more important to get the text right and
16 to get the history right.

17 So if -- if -- if that means taking
18 that issue up afresh --

19 JUSTICE KAGAN: But, you see --

20 MS. MURRILL: -- then we should do
21 that.

22 JUSTICE KAGAN: -- I think I agree
23 with Justice Alito. You have some strong
24 reliance interests here, but -- but your
25 reliance interests are only relevant in the

1 context of an argument from stare decisis.

2 And I guess I would like to know then
3 how are your reliance interests relevant? What
4 argument from stare decisis are you making?

5 MS. MURRILL: Well, we think that the
6 text and the history do not include a
7 non-unanimous jury verdict. We think that
8 that's a constitutional -- that is a choice that
9 states can make.

10 JUSTICE KAVANAUGH: That's not --

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

17 So we don't -- we don't entirely
18 disavow stare decisis. I mean, we still believe
19 we have enormous reliance interests.

20 JUSTICE KAVANAUGH: You were relying
21 on Justice Powell's opinion in Apodaca. That's
22 the only --

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

24 JUSTICE KAVANAUGH: For stare decisis
25 that must be what you're relying on, combined

1 with the other four that said the states don't
2 have to provide unanimous juries.

3 MS. MURRILL: Well, I think, Justice
4 Kavanaugh, that we're also relying on this
5 Court's opinions in -- in Williams and in
6 Hurtado that said that the Court -- that has
7 never adopted the common law wholesale.

8 I mean, that's --

9 JUSTICE GINSBURG: But you -- you --

10 MS. MURRILL: -- that is I think
11 critical to the analysis.

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

21 MS. MURRILL: Justice Ginsburg, I
22 think the Seventh Amendment is a different
23 question. Its text is different. Its structure
24 --

25 JUSTICE GINSBURG: But just -- just

1 the --

2 MS. MURRILL: -- is different.

3 JUSTICE GINSBURG: -- the answer to my
4 question: Is unanimity required under the
5 Seventh Amendment in civil trials in federal
6 court?

7 MS. MURRILL: I don't believe that it
8 would be required in the Seventh Amendment but I
9 don't think you need to determine that here
10 today.

11 JUSTICE GORSUCH: Well --

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

13 JUSTICE GORSUCH: Well, this Court has
14 held --

15 MS. MURRILL: The issue is the Sixth
16 Amendment.

17 JUSTICE GORSUCH: -- that it --
18 there's a -- there's a holding of the Supreme
19 Court that's over 100 years old so holding. And
20 so no reliance interests for anybody there?

21 MS. MURRILL: Justice Gorsuch, my
22 answer is specifically related to the text and
23 what the text would require. I'm not disputing
24 that there might be precedent that would apply
25 --

1 JUSTICE GORSUCH: Oh, okay.

2 MS. MURRILL: -- in the Seventh
3 Amendment.

4 JUSTICE GORSUCH: All right.

5 MS. MURRILL: I just --

6 JUSTICE GORSUCH: All right. So we
7 don't count precedent in the Seventh Amendment
8 but we do in this area on Justice Powell's
9 opinion.

10 Let's say the Seventh Amendment does
11 require a jury trial. In what universe does it
12 make sense to imagine that the framers of the
13 Constitution would have insisted on a jury trial
14 for civil cases where property is at stake but
15 not in criminal cases where liberty is at stake,
16 and lives?

17 MS. MURRILL: I -- I believe that the
18 structure and the history of both reach --
19 ultimately on the textual answer reach the same
20 result.

21 JUSTICE GORSUCH: All right.

22 MS. MURRILL: I -- I -- I don't think
23 that they would.

24 JUSTICE GORSUCH: You disagree with
25 the Supreme Court's analysis on the Seventh

1 Amendment. I understand that.

2 But spot for me a moment that the
3 Supreme Court might have gotten the Seventh
4 Amendment right. Okay? It may be possible.
5 All right? In -- in what universe would the
6 rule be different for criminal cases?

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

14 And the history tells us that this --
15 that unanimity was rejected for a reason, that
16 there were -- there was a very specific decision
17 that was made to reject unanimity. It was
18 proposed, it was rejected, it was debated, it
19 was discussed, it was a known issue, because
20 four states had --

21 CHIEF JUSTICE ROBERTS: How far --

22 MS. MURRILL: -- actually adopted
23 non-unanimity.

24 CHIEF JUSTICE ROBERTS: How far are
25 you willing to depart from unanimity? Would a

1 7-5 requirement be okay under your theory?

2 MS. MURRILL: Mr. Chief Justice, I
3 think this Court has established some of the
4 outer boundaries already in Williams and in
5 Burch and in Will -- and in Apodaca. So nine,
6 under Apodaca, 9-3 is okay.

7 I would -- I would also remind the
8 Court that Louisiana in reliance on this Court's
9 decision in Apodaca and in Johnson went and at a
10 constitutional convention the year after this --
11 that case was decided, discussed it, expressly
12 relied on it, and increased voting rules to
13 10-2.

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

22 But you're talking about a parade of
23 horrors if we rule against you. How about the
24 parade of horrors if we rule in your favor?
25 How do we decide what's at the essence of the

1 common law jury trial?

2 Would issues like having a fair
3 cross-section of the community and the veneer be
4 in question? We have a case that says that's
5 incorporated. Or what about what we said in
6 Sullivan, that the Sixth Amendment jury right
7 requires a jury verdict of guilty beyond a
8 reasonable doubt?

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

16 MS. MURRILL: And --

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

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

22 JUSTICE SOTOMAYOR: But the debates --

23 MS. MURRILL: So --

24 JUSTICE SOTOMAYOR: -- we have a bunch
25 of people who were in favor of the cuts telling

1 everybody else everybody understands that a
2 unanimous verdict is the standard.

3 So we have part of the constitutional
4 debate. Hamilton himself, who drafted it and
5 took out the right to a unanimous jury,
6 basically said during the -- the discussion it's
7 so self-evident, we don't need to include it.

8 So you're looking at --

9 MS. MURRILL: But --

10 JUSTICE SOTOMAYOR: -- history just in
11 terms of what was taken out, but without the
12 context of the discussion.

13 MS. MURRILL: Not exclusively, Justice
14 Sotomayor. I think we also would agree that due
15 process and -- and equal protection play a role.
16 I mean, we -- we don't have requirements anymore
17 that it's only 12 white male freeholders.

18 JUSTICE SOTOMAYOR: Exactly.

19 MS. MURRILL: So, you know, I think
20 that's an example of how we did not adopt the
21 common law in all of its -- its -- its
22 historical terms. We actually -- Congress
23 adopted some of that language over time. It was
24 not embedded in the Constitution.

25 So we -- we know that there was an

1 historical debate. We know that states had
2 adopted a different rule, and -- and then some
3 of them wrote this rule into their own state
4 constitution. So known debated problem.

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

8 JUSTICE GINSBURG: But it -- but why
9 was it rejected? I mean, one -- one account is
10 it was totally unnecessary. Everybody
11 understood a jury trial meant unanimous
12 agreement.

13 So he took it out because we didn't
14 want to clutter up the Constitution with
15 unnecessary statements. The words "jury trial"
16 themselves mean unanimous verdict.

17 MS. MURRILL: Well, Justice Ginsburg,
18 we did clutter it up with an impartial -- with
19 the word "impartial." And we did clutter it up
20 with a number of other terms.

21 And -- and I don't -- and I think that
22 the history showing that states felt that it was
23 important to write it into some of their
24 constitutions indicates that there certainly was
25 at least a view that -- that it should be

1 written in by some and not -- so I don't think
2 it's a fair reading to -- to assume that that
3 was simply because we would all know that it
4 would be there, especially because they knew
5 that they were writing a document for the
6 future.

7 JUSTICE KAVANAUGH: For the sake of
8 argument, assume that I think the Sixth
9 Amendment requires a unanimous jury. Just for
10 the sake of argument. What are your best
11 arguments, then, for why the right is not
12 incorporated, and relatedly your best arguments
13 for not overruling *Apodaca*, which is read, the
14 -- the opposing counsel says, to have allowed
15 the states to do that?

16 MS. MURRILL: Justice Kavanaugh, they
17 are concededly not very good. I mean, I -- I
18 think that based on *Timbs*, that we recognize
19 that this Court, at least at this point in time,
20 has taken a view of incorporation that says that
21 there's no daylight. So if you find that
22 unanimity is required, I find myself in a far
23 more difficult position --

24 JUSTICE KAGAN: Well, yes --

25 JUSTICE KAVANAUGH: What about --

1 JUSTICE KAGAN: -- and no --

2 MS. MURRILL: -- to make that
3 argument.

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

8 MS. MURRILL: I --

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

22 But you're telling me that Justice
23 Powell's opinion isn't entitled to precedential
24 force, isn't entitled to stare decisis effect.
25 So I don't know what to do with that argument

1 anymore.

2 MS. MURRILL: Justice Kagan, I agree
3 with everything that you said about the reasons
4 why this Court should affirm Apodaca and that it
5 should be given stare decisis effect.

6 I -- I think that we are struggling
7 with the fact that Justice Powell's decision
8 doesn't seem to be the view of the Court and --
9 and that it -- the text and the history also, I
10 -- we strongly and firmly believe, are on our
11 side.

12 JUSTICE ALITO: Well, you're not the
13 only state who has an interest here. And, in
14 fact, there's only one state going forward as of
15 this moment that has an interest in this, and
16 that's Oregon. And Oregon might change its rule
17 or it might not change its rule.

18 But Oregon filed a brief and Oregon
19 doesn't make the arguments you're making.
20 Oregon says it should be made clear what this
21 brief does not do. It does not address the
22 merits of whether Apodaca was correctly decided.

23 MS. MURRILL: I -- and I think that
24 Oregon finds itself in a position where the
25 democratic process has stalled in anticipation

1 of this decision. So they've -- they've written
2 a brief that expressly, I think, emphasizes all
3 of our reliance interests. Puerto Rico has
4 similar reliance interests. There's a long line
5 of cases that dealt with territorials and the
6 right -- and the Constitution's application to
7 territories. They have similar interests too.

8 So we -- we do think that the reliance
9 interests are very, very important.

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

11 MS. MURRILL: We believe that the
12 judgment was correct.

13 JUSTICE ALITO: It is certainly true
14 that we, in recent years, have rejected the
15 two-track idea about incorporation, but the
16 opposite isn't a crazy argument. As recently as
17 McDonald, there were some voices on this Court
18 that it was -- were essentially making that
19 argument with respect to the Second Amendment.

20 And earlier, there were -- it's a very
21 respectable argument. It hasn't won the light
22 -- it -- it hasn't won the day completely, but
23 that's what Apodaca rests on.

24 MS. MURRILL: Well, Justice Alito, if
25 you're telling me that there is a little bit of

1 daylight, then I'll take it. I mean, I -- I
2 think that, you know, we -- but I also believe
3 the history -- that -- that the history shows
4 that unanimity was rejected and that that is the
5 correct view.

6 JUSTICE BREYER: Is --

7 MS. MURRILL: So I -- we are not
8 entirely repudiating the -- the Apodaca
9 judgment. And we do have 50 years of reliance,
10 which is why I emphasize that we have 32,000
11 people who are incarcerated right now at hard
12 labor for serious crimes, and every one of them
13 would be subject -- would be able to file an
14 appeal.

15 JUSTICE BREYER: Do you think 32,000
16 people were non-unanimous?

17 MS. MURRILL: No, no, no, Justice
18 Breyer.

19 JUSTICE BREYER: Or how -- I mean, I
20 can't -- I don't understand why it would apply
21 to people who were unanimously convicted, maybe,
22 but -- but I think the stronger case would be
23 those people convicted by juries that were not
24 unanimous. And how many of those are there?

25 MS. MURRILL: We don't know, because

1 they --

2 JUSTICE BREYER: I mean --

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

4 JUSTICE BREYER: -- have you any idea?

5 Is there -- with all the work gone into this,
6 has anybody got any rough idea of what
7 percentage of those people who are convicted are
8 convicted by non-unanimous juries?

9 MS. MURRILL: There's just no reliable
10 data.

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

12 MS. MURRILL: But I can --

13 JUSTICE BREYER: -- no reliable data,
14 we'd think -- can I fairly think if there had
15 been some data, even if you just take a sample,
16 you would be telling us? And, therefore, the
17 fact that you're telling us that there are a lot
18 of people in jail, which I did know --

19 MS. MURRILL: Well --

20 (Laughter.)

21 JUSTICE BREYER: -- that that suggests
22 something.

23 MS. MURRILL: Well --

24 JUSTICE BREYER: Now, then you say
25 there's you, there's Oregon, that they're

1 waiting. All right. But Puerto Rico is a tough
2 case, actually. There's a Hispanic tradition,
3 and I don't know, you might have to bring up the
4 Insular Cases. You might -- you might have to
5 revise them. You might have -- get into the
6 status question. Puerto Rico is worrying me.

7 So is there -- is there something you
8 want to say about that since you raised it?

9 MS. MURRILL: Well, we have the same
10 tradition, but I -- but the -- the --

11 JUSTICE BREYER: You have the same
12 tradition, but you don't have as a matter of
13 fact the whole system of trials that grows out
14 of the civil tradition. Or is it --

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

17 JUSTICE BREYER: Well, all right, skip
18 that. That wasn't --

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

21 JUSTICE BREYER: I got past the
22 32,000. I now want to know, since you've looked
23 into Puerto Rico, is there a particular problem
24 there if we overturn Apodaca?

25 MS. MURRILL: I believe --

1 JUSTICE BREYER: If we --

2 MS. MURRILL: -- there is.

3 JUSTICE BREYER: I know you believe
4 there is. I just want to know what there is,
5 rather than my making it up.

6 MS. MURRILL: Because the territorial
7 decisions were based on the authority of
8 Congress to write laws that were different for
9 territories notwithstanding the fact that they
10 still came under the protection of the
11 Constitution, I think that there's a problem.

12 So it's the same -- I mean, the issue
13 here is, does the -- the Sixth Amendment require
14 unanimity? And unless you're going to continue
15 a special carveout for the territories, then
16 they have the same question.

17 CHIEF JUSTICE ROBERTS: Is the -- the
18 32,000 -- is the reason you don't know because
19 the jury is not typically polled or -- or what?

20 MS. MURRILL: Because it is not always
21 polled and because the defense -- that is a
22 responsibility of the defense to do that. And
23 even in some cases where it may have been, it
24 may not have been recorded or kept. And so the
25 data -- the -- the case files are -- seem to be

1 very inconsistent on this.

2 We do know that we are already
3 receiving a flood of these cases, as is this
4 Court. We know that -- you know, we filed 25
5 briefs in the Louisiana Supreme Court last
6 Friday. So we have a -- this case -- this is
7 certainly unsettling the cases, but because a
8 number of those people pleaded guilty based on
9 their expectation of potential -- of facing a
10 10-2 verdict, the criminal defense attorneys
11 filed an amicus brief arguing that point.

12 We also have people who would
13 receive -- everyone that went to trial received
14 this jury instruction. So we're not saying they
15 all win. We are saying --

16 JUSTICE BREYER: All right. Maybe
17 I --

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

20 JUSTICE BREYER: I -- I've got the --
21 the reliance point.

22 MS. MURRILL: Okay.

23 JUSTICE BREYER: The -- if I believe,
24 one, contrary to what you say, assume it, I
25 believe that, in fact, the federal right in the

1 constitution does include unanimity in the Sixth
2 Amendment.

3 Then, two, I think that thereafter it
4 was fairly clear in the law that same -- the
5 federal rules apply to states, if we
6 incorporate. But you do have a point if you say
7 there are anomalies in the law. And perhaps we
8 should leave the anomaly alone. And that's
9 where you bring in your reason, the reason being
10 that 32,000 people, et cetera, et cetera. Okay.
11 I've got that structure.

12 Is there any other instance you can
13 think of where, despite a contradiction, which
14 you're allowing under my assumptions to remain,
15 a legal contradiction, the Court says: Okay,
16 because let sleeping dogs lie; otherwise we get
17 serious harm?

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

21 MS. MURRILL: Your Honor, I think that
22 one of the -- the -- the significant lines of
23 jurisprudence that comes to my mind is Rowe. I
24 mean, I -- I, you know, hesitate to bring that
25 into this, but I -- I do think that's an area

1 and I think that any time you have a non-textual
2 right that -- that the Court has relied on,
3 discussed, related to in passing, I mean, or --
4 or quoted in passing over time and changed the
5 incorporation doctrine, that it is that much
6 more important to get the text and the history
7 right.

8 So we think that Apodaca was -- that
9 the judgment in Apodaca was correct. We do have
10 enormous reliance interests --

11 JUSTICE GORSUCH: Counsel, on --

12 MS. MURRILL: -- involved.

13 JUSTICE GORSUCH: -- your reliance
14 interests, you say we should worry about the
15 32,000 people imprisoned. One might wonder
16 whether we should worry about their interests
17 under the Sixth Amendment as well.

18 And then I -- I can't help but wonder,
19 well, should we forever ensconce an incorrect
20 view of the United States Constitution for
21 perpetuity, for all states and all people,
22 denying them a right that we believe was
23 originally given to them because of 32,000
24 criminal convictions in Louisiana?

25 MS. MURRILL: No, Justice Gorsuch.

1 But we don't believe that it was a right that
2 was given to them in the Sixth Amendment.

3 JUSTICE GORSUCH: I understand that.
4 I'm talking about a reliance argument. Doesn't
5 that greatly diminish a single state's claim of
6 reliance with respect to a subset of criminal
7 convictions, when we're talking about a
8 constitution that's supposed to endure?

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

13 But even in a long line of this
14 Court's significant decisions related to
15 criminal law and criminal procedure, the Court
16 has applied them in a forward fashion instead of
17 retroactively. So, I mean, that's a concern for
18 us.

19 JUSTICE KAVANAUGH: Well, if the jury
20 --

21 JUSTICE GINSBURG: But that's --
22 that's not -- the case of retroactivity to
23 convictions that are already final is not before
24 us. It would come before us in a case if you
25 lose this one, but it -- that -- that is not a

1 question that we can properly address here. It
2 hasn't been briefed. It hasn't been decided
3 below.

4 MS. MURRILL: Justice Ginsburg, we
5 certainly do appreciate you not addressing that
6 issue without our opportunity to brief it. I
7 would point out that our law that we just passed
8 makes the law -- it -- it does draw a line and
9 it says that it will apply to all crime, that
10 unanimity will apply to crimes that were
11 committed after January 1st, 2019.

12 So to some extent we are talking about
13 at -- at least some retroactivity, because we've
14 already made a decision to address it going
15 forward.

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

18 So assume that the Sixth Amendment
19 requires unanimity. I know you disagree. And
20 assume that our law ordinarily requires
21 incorporation against the states of rights that
22 apply against the federal government. So assume
23 ordinarily it would be incorporated.

24 Then we get to the Apodaca question.
25 It seems to me there are two practical arguments

1 for overruling Apodaca if you accept that's
2 holding. One is, as Justice Gorsuch says, there
3 are defendants who have been convicted and
4 sentenced to life, 10-2 or 11-1, who otherwise
5 would have not been convicted. So that seems
6 like a serious issue for us to think about in
7 terms of overruling.

8 And the second is that the rule in
9 question here is rooted in a -- in racism, you
10 know, rooted in a desire, apparently, to
11 diminish the voices of black jurors in the late
12 1890s. So do either of those two -- and that
13 doesn't go to the Sixth Amendment. That goes to
14 the stare decisis angle.

15 Do either of those two things -- or I
16 guess I should say why aren't those two things
17 enough to overrule, if you accept the legal
18 premises, which I know you don't, but if you
19 accept those, why aren't those two things
20 enough? Again, unfairness to defendants and
21 rooted in racism.

22 MS. MURRILL: So as -- as to the first
23 question with regard to unfairness to
24 defendants, I just do not see how you can
25 separate this from the six-man jury that -- that

1 was approved of in Williams, which is a six-man
2 jury for all crimes less than capital, and six,
3 granted, unanimous rule but still only six, and
4 Louisiana's rule will -- still requires ten.

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

8 JUSTICE GINSBURG: But Williams held
9 that the number, the number of jurors was not at
10 the heart of the jury trial right. The Court
11 said it was a historical accident. It resembled
12 certain biblical references like 12 apostles, 12
13 tribes of Israel. There was nothing inevitable
14 about the number 12. But there was about the
15 requirement that, whatever the number is, they
16 all agree.

17 MS. MURRILL: Mr. Chief Justice?

18 CHIEF JUSTICE ROBERTS: You may
19 respond.

20 MS. MURRILL: Justice Ginsburg, I -- I
21 think that it was not an historical accident. I
22 would disagree with that -- that description.

23 I think that these two things were
24 married together in every description, the
25 number 12 and unanimous in every description,

1 have always --

2 JUSTICE GINSBURG: But, it's hard --

3 MS. MURRILL: -- been married
4 together.

5 JUSTICE GINSBURG: It's hard to say
6 you disagree when Williams described the number
7 12 as a historical accident. Did you just say
8 Williams was wrong in that respect?

9 MS. MURRILL: I think that
10 characterization of it was dismissive. That's
11 all. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Five minutes, Mr. Fisher.

15 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
16 ON BEHALF OF THE PETITIONER

17 MR. FISHER: Thank you. I'd like to
18 make a couple of quick factual points and then
19 talk about stare decisis and reliance.

20 Justice Breyer, you asked a couple of
21 questions about numbers and facts. So we say in
22 our reply brief, using one of the state's own
23 filings, that there are 36 cases on direct
24 review right now in Louisiana where this issue
25 has been presented.

1 And then even within those 36 is --
2 even within that 36 you're going to have
3 arguments about whether it was adequately
4 preserved and all the rest. And so we think, at
5 least in the direct review level, the numbers
6 are actually quite modest and low.

7 And as the Court has described
8 throughout the -- the last half of the argument,
9 the retroactivity questions can be left for
10 another day and covered by their own reliance
11 doctrines.

12 You also asked about Puerto Rico.

13 In Footnote 10 of our brief, we note
14 that the Court held in Balzac that the right to
15 jury trial does not apply the same way in Puerto
16 Rico as to the states. And so that would be a
17 question about the Insular Cases. You're going
18 to be talking about that next week, perhaps.

19 But it's something that this case
20 doesn't -- doesn't necessarily address.

21 So as to stare decisis and reliance,
22 let me make a couple points about the state's
23 framing of its arguments and then talk about, I
24 think, Justice Kagan, your sort of alternative
25 framing of the arguments.

1 As to the state's framing of the
2 arguments, I think it's helpful to remember why
3 we have the stare decisis in the first place.
4 It's about settled expectations in the law.

5 And what we're asking you today to do
6 are to reaffirm two things the Court has said
7 many, many times over the years. One is the
8 Sixth Amendment requires unanimous verdict.
9 And, second, when an incorporated provision
10 applies to the states, it applies the same way
11 as it does to the federal government.

12 So to write that opinion all you have
13 to do is reaffirm what you said many, many times
14 under the law.

15 It is the state's position that it
16 would create upheaval as to the law. It would
17 raise questions like the one the Chief Justice
18 asked about whether seven to five is okay.

19 The state not only doesn't answer the
20 question in its brief, it provides no weight, no
21 weight to answer the question. And that would
22 just be one of many questions that would arise
23 if you agreed with the state's view.

24 So I think then you are left with the
25 alternative argument, that what about -- what

1 about putting a reliance interest into Apodaca
2 itself? I'm not sure, by the way, that Oregon
3 does that. I think it's also telling that
4 Oregon is not willing to defend. I know it
5 doesn't go the other way like the state does but
6 it certainly isn't willing to defend Justice
7 Powell's reasoning in Apodaca.

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

11 The first is the one that a couple of
12 you mentioned, which is that it's not just --
13 it's not just the interests of the state that
14 have to be taken into account. It's the
15 interests of defendants.

16 And before we take away somebody's
17 liberty over 600 years of common law tradition,
18 and Sixth Amendment tradition, is we demand a
19 unanimous verdict, unanimous consent of a
20 cross-section of the community.

21 And that is important, as the social
22 science brief in this case shows, for accuracy,
23 public confidence, and all the rest. And so
24 those reliance interests, which -- by the way,
25 the state itself is not renouncing unanimous

1 verdicts; it maintains the ability under its law
2 to try anyone going forward for a crime
3 committed before January 1st, 2019, and seek a
4 10-2 verdict. And so that could go on for
5 years, and that ought to be taken into account.

6 Secondly, I think incorporation is
7 just different. I think that's the lesson of
8 the sweep of this Court's cases, is reliance
9 interests are less important when it comes to
10 incorporation because the Bill of Rights
11 themselves are so important. When the Court
12 says something is a fundamental rule under our
13 way of doing criminal justice, the states have
14 to follow that rule the same way as the federal
15 government.

16 And then the last thing I think that
17 makes this case different than an ordinary stare
18 decisis case is the vote in Apodaca. It's not
19 just that it was a 4-1-4 vote, but it's just
20 that -- it's that the other eight justices
21 rejected the decisive reasoning in that case.
22 And I think that makes this almost a universe of
23 one.

24 And if I could push it even further, I
25 would say that if you have any doubts, look at

1 Justice Powell's reasoning. Justice Powell's
2 reasoning in Apodaca itself was based on a
3 refusal to follow precedent. What he said was
4 I'm agreeing with the past dissenters. I know
5 you have this rule from Malloy against Hogan
6 from five years ago that requires the same
7 standards to apply in a federal court as they
8 apply -- in state court as they apply in federal
9 court, but I don't want to follow that rule.

10 He didn't even try to distinguish the
11 Court's old holding. So in a sense Apodaca
12 itself was born of a disregard for stare
13 decisis. And so if you feel strongly about
14 stare decisis as a value, this case is almost
15 singular in its -- in its -- in the compelling
16 reasons right now to -- to overrule Apodaca.

17 JUSTICE ALITO: Since you mentioned
18 Balzac, can I ask you a question about that? So
19 let's imagine this case is decided in your
20 favor, and then a -- a defendant who has been
21 convicted by a non-unanimous verdict in Puerto
22 Rico comes here and he says, look, I am a
23 citizen of the United States, and the only
24 reason why I was able to be convicted by a
25 non-unanimous verdict is -- are these old

1 Insular Cases that reflect attitudes of the day
2 in the -- in the end of the -- after the -- the
3 aftermath of the Spanish American War, and just
4 as you brushed aside Apodaca, you should brush
5 aside the Insular Cases.

6 MR. FISHER: I think I would -- I
7 would say that would be different for all the
8 reasons I just outlined. The Insular Cases were
9 majority decisions from the Court. They were --
10 they were based on a view that has not been
11 disregarded or left behind in the Court's
12 jurisprudence.

13 There may be arguments parties can
14 make under ordinary stare decisis principles,
15 but the last point I would leave you with is
16 this is not an ordinary stare decisis case.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 2:01 p.m., the case was
21 submitted.)

22

23

24

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1	<p>able ^[3] 6:12 52:13 68:24 above-entitled ^[1] 1:13 absolute ^[2] 4:10,11 absolutely ^[1] 14:15 accept ^[5] 14:1 15:11 61:1,17,19 accepted ^[1] 12:1 accident ^[4] 16:1 62:11,21 63:7 accord ^[2] 38:3,7 accorded ^[1] 22:11 account ^[5] 4:20 18:12 47:9 66:14 67:5 accuracy ^[1] 66:22 accurate ^[2] 16:20 17:22 ACLU ^[1] 7:22 acquit ^[1] 24:21 acquittal ^[2] 24:22 25:2 across ^[2] 5:24 17:10 actual ^[1] 37:13 actually ^[7] 6:22 7:1 13:4 43:22 46:22 54:2 64:6 adapted ^[1] 33:14 add ^[1] 33:8 address ^[5] 35:17 50:21 60:1,14 64:20 addressed ^[1] 36:6 addressing ^[1] 60:5 adequately ^[1] 64:3 adhere ^[1] 21:12 adhered ^[1] 34:17 administrable ^[1] 49:14 admission ^[1] 35:20 adopt ^[4] 9:3 30:22,24 46:20 adopted ^[7] 9:4 10:20 33:2 40:7 43:22 46:23 47:2 advanced ^[1] 9:20 adversary ^[1] 57:20 affairs ^[1] 23:10 affirm ^[2] 9:18 50:4 affirmed ^[1] 34:9 afresh ^[5] 35:21 37:2,18,25 38:18 aftermath ^[1] 69:3 ago ^[2] 22:18 68:6 agree ^[7] 16:14 17:10 32:18 38:22 46:14 50:2 62:16 agreed ^[1] 65:23 agreeing ^[1] 68:4 agreement ^[2] 16:18 47:12 agrees ^[1] 4:17 ahead ^[1] 15:9 ALI ^[1] 29:1 ALITO ^[24] 7:24 8:20 9:10,13 13:16,19 14:6,13 23:8,19 24:15 25:18,21 26:2 27:21,23 28:18 29:8 38:23 50:12 51:10,13,24 68:17 Alito's ^[1] 13:1 allow ^[1] 28:10 allowed ^[1] 48:14 allowing ^[1] 57:14 alluded ^[1] 24:16 almost ^[4] 24:8 26:9 67:22 68:14 alone ^[1] 57:8 already ^[5] 13:5 44:4 56:2 59:23 60:14 alternative ^[2] 64:24 65:25</p>	<p>amend ^[2] 34:5,6 amended ^[1] 7:1 Amendment ^[61] 3:24 4:4,7,25 5:5,12 7:6 9:1,4 10:19 11:8 12:14,24 15:18 19:6,9 20:3 21:13 23:1 27:12,18,19 28:24,25 29:2 30:16,21,24 31:21 32:9,20,24 33:7,11 34:14 36:1 38:11 40:14,19,20,22 41:5,8,16 42:3,7,10 43:1,4 45:6 47:6 48:9 51:19 55:13 57:2 58:17 59:2 60:18 61:13 65:8 66:18 American ^[3] 28:6,7 69:3 amicus ^[1] 56:11 analysis ^[4] 10:12,13 40:11 42:25 Andres ^[2] 31:20 35:23 angle ^[1] 61:14 anomalies ^[4] 11:17,20 12:1 57:7 anomaly ^[3] 11:16,18 57:8 another ^[4] 13:3 21:3 28:2 64:10 answer ^[10] 17:15,16,17 18:8 25:15 41:3,22 42:19 65:19,21 answered ^[1] 34:12 anticipate ^[1] 37:14 anticipation ^[1] 50:25 anybody ^[2] 41:20 53:6 anyone's ^[1] 59:10 Apodaca ^[47] 3:18 7:25 8:13,24,25 9:17 12:13 21:1 22:3 31:1,8,9,13,18,19,25 32:5 33:22,23 34:8,12,13 38:4,10 39:21 40:13 44:5,6,9 48:13 50:4,22 51:23 52:8 54:24 58:8,9 60:24 61:1 66:1,7,10 67:18 68:2,11,16 69:4 apostles ^[1] 62:12 apparent ^[1] 17:12 apparently ^[1] 61:10 appeal ^[1] 52:14 APPEARANCES ^[1] 1:17 application ^[1] 51:6 applied ^[1] 59:16 applies ^[4] 12:12 32:21 65:10,10 apply ^[14] 3:14,14 11:3 34:21 41:24 52:20 57:5 60:9,10,22 64:15 68:7,8,8 appreciate ^[3] 37:20,21 60:5 approach ^[1] 21:4 appropriate ^[1] 4:18 approval ^[1] 33:17 approved ^[1] 62:1 arbitrary ^[1] 20:19 area ^[5] 13:3 15:3 37:6 42:8 57:25 aren't ^[5] 35:16,17 38:1 61:16,19 argue ^[2] 6:13 25:22 arguing ^[3] 13:25 36:25 56:11 argument ^[37] 1:14 2:2,5,8 3:4,7 4:3 12:17 14:4 15:12 20:9,10 24:12 26:3 27:24 28:25 29:17 30:4,5,21 31:2,3 32:14 39:1,4 48:8,10 49:3,25 51:16,19,21 59:4 63:15 64:8 65:25 66:8 arguments ^[15] 5:6 18:22 19:1 21:21 29:4 30:17 48:11,12 50:19 60:25 64:3,23,25 65:2 69:13 arise ^[1] 65:22</p>	<p>around ^[1] 54:20 aside ^[4] 36:23 44:15 69:4,5 assigned ^[1] 37:5 Association ^[1] 28:6 assume ^[7] 10:15 48:2,8 56:24 60:18,20,22 assuming ^[1] 37:5 assumptions ^[1] 57:14 attack ^[1] 45:12 attitudes ^[1] 69:1 attorneys ^[1] 56:10 attribute ^[1] 28:16 authorities ^[2] 4:9 16:4 authority ^[1] 55:7 away ^[4] 4:15 6:20 49:6 66:16</p> <hr/> <p style="text-align: center;">B</p> <p>back ^[8] 13:1 14:22 23:18 24:15 33:8 36:5 40:14 44:14 backdrop ^[1] 5:18 Balzac ^[2] 64:14 68:18 Bar ^[1] 28:6 based ^[6] 24:12 48:18 55:7 56:8 68:2 69:10 basically ^[2] 38:9 46:6 Baton ^[1] 1:20 beauty ^[1] 34:2 begrudge ^[1] 23:3 behalf ^[8] 1:19,21 2:4,7,10 3:8 32:15 63:16 behind ^[1] 69:11 believe ^[14] 30:9 35:10 39:18 41:7 42:17 50:10 51:11 52:2 54:25 55:3 56:23,25 58:22 59:1 below ^[2] 3:23 60:3 besides ^[1] 18:25 best ^[5] 6:16,22 14:6 48:10,12 better ^[3] 15:24 25:16,25 between ^[5] 15:13 18:23,23 25:12 30:10 beyond ^[3] 25:7 29:25 45:7 biblical ^[1] 62:12 big ^[2] 25:23 27:24 bigger ^[1] 24:24 Bill ^[5] 3:13 12:4 27:17 33:4 67:10 bit ^[1] 51:25 black ^[1] 61:11 Board ^[4] 8:6,17 13:12 17:11 born ^[1] 68:12 both ^[2] 8:20 42:18 boundaries ^[1] 44:4 brand-new ^[1] 9:12 BREYER ^[19] 52:6,15,18,19 53:2,4,11,13,21,24 54:11,17,21 55:1,3 56:16,20,23 63:20 brief ^[14] 7:4,21,22 27:25 38:2 50:18,21 51:2 56:11 60:6 63:22 64:13 65:20 66:22 briefed ^[1] 60:2 briefs ^[1] 56:5 bring ^[4] 29:13 54:3 57:9,24 brought ^[1] 20:6 brush ^[1] 69:4 brushed ^[1] 69:4</p>
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