No. 10-344

IN THE

Supreme Court of the United States

ALONSO ALVINO HERRERA

Petitioner,

v.

STATE OF OREGON

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF OF *AMICUS CURIAE* PROFESSOR JEFFREY B. ABRAMSON IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Jeffrey B. Abramson is a Professor of Law and Government at the University of Texas. He has written extensively on the Sixth Amendment's jury trial right. Among his other works, his book WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY, which addresses the jury trial right's historical roots and its theoretical and empirical bases, has been widely cited by scholars and courts. Professor Abramson also has served as a court-appointed expert to review racial representation in federal jury pools. Professor Abramson has an interest in seeing that criminal trials proceed in a manner consistent with the Framers' conception of due process.

REASONS FOR GRANTING THE PETITION

In federal criminal proceedings, the Sixth Amendment's Jury Clause requires a unanimous verdict to convict an accused. See*, e.g.*, *Andres* v. *United States*, 333 U.S. 740, 748 (1948); *Apodaca* v. *Oregon*, 406 U.S. at 369 (1972) (Powell, J., concurring) ("In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensible features of federal jury trial." (emphasis omitted)).

The Jury Clause indisputably is incorporated against the States through the Fourteenth Amendment's Due

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[1] The parties have provided written consent to the filing of this brief. Those consents are lodged with this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission.

Process Clause. See, *e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145, 149-50 (1968). The sole question here is whether the Jury Clause is only *partially* incorporated, such that the State of Oregon is free to use a "10-2 rule" that was designed "to make it easier to obtain convictions," *State ex rel. Smith* v. *Sawyer*, 263 Ore. 136, 138 (Ore. 1972), and without which petitioner would not have been convicted. The Court sought to answer this question nearly 40 years ago in *Apodaca*, but the result was a deeply fractured three-way split. Justice Powell's solo concurrence was the controlling opinion. In Justice Powell's view, the Jury Clause requires unanimity in federal criminal proceedings, but the Fourteenth Amendment leaves States free to dispense with the unanimity rule in favor of alternatives that might enable "the guilt or innocence of the accused" to be determined "more expeditiously." *Id.* at 376 (Powell, J., concurring).

Five months ago, this Court squarely repudiated the "subjective" "two-track approach to incorporation" that Justice Powell alone embraced in *Apodaca*. *McDonald* v. *Chicago*, 130 S. Ct. 3020, 3035 & n.14 (2010); see also *id.* at 3048 ("The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle."). The patent conflict between *McDonald*'s and Justice Powell's approaches to incorporation is itself a compelling reason to grant the petition for *certiorari*.

But it is not only *McDonald* that undermines Justice Powell's *Apodaca* opinion. The short shrift Justice Powell gave to the unanimity requirement's intrinsic and instrumental values is inconsistent with several jurisprudential themes that run through this Court's pre- and post-*Apodaca* precedents involving the jury trial right. These precedents, viewed in their totality, strongly suggest that the unanimity rule cannot be discarded

without fundamentally diluting the jury trial right as a whole. Indeed, the empirical evidence that has developed since *Apodaca* discredits Justice Powell's hypothesis that Oregon's 10-2 rule in practice has no appreciable effect on the jury's ability to fulfill its unique constitutional function.

Besides making it numerically easier for the State to obtain a conviction, Oregon's 10-2 rule erodes the quality of the jury's deliberative process by, *inter alia*, enabling a ten-juror majority to render a guilty verdict without allowing well-founded doubts of dissenting jurors to be fully aired. As a consequence, jurors' ability to assess the trial evidence is adversely affected, disproportionately to the detriment of the accused. Furthermore, because the 10-2 rule requires the reasonable doubts of dissenting jurors to be ultimately disregarded, the rule is the functional equivalent of a judge's mid-deliberation removal of a dissenting juror without cause in order to manufacture unanimity, a plainly unconstitutional method of breaking a hung jury. Finally, by allowing the imposition of criminal punishment despite the lack of consensus within the body that the Framers' specifically designated to represent the community, the 10-2 rule undermines the important public legitimacy of guilty verdicts.

These systemic consequences of the 10-2 rule harm both defendants and the institution of the jury itself, which provides another compelling reason to revisit *Apodaca*. The Court should grant the petition and reverse the decision below.

I. OREGON'S 10-2 RULE DILUTES THE JURY TRIAL RIGHT BY UNDERMINING THE ABILITY OF DISSENTING JURORS TO PARTICIPATE IN THE JURY'S DELIBERATIVE PROCESS.

A central theme of this Court's decisions involving the jury trial right is that an essential attribute of "an impartial jury" is that its verdict represents the product of a robust, inclusive, and coercion-free deliberation amongst individuals chosen from a fair cross section of the community. Inherently, Oregon's 10-2 rule conflicts with this constitutional ideal. The rule is not a "valuable innovation[ ]" that merely allows criminal trials to proceed more efficiently without affecting fundamental rights. *Apodaca*, 406 U.S. at 376 (Powell, J., concurring). Instead, the rule is at best the functional equivalent of other mechanisms that this Court has held unconstitutionally impair the jury's deliberative process and, by extension, the defendant's jury trial right.

A. The Court Has Found Unconstitutional Judicial and Legislative Inventions That Compromise the Jury's Deliberative Process in the Manner That Oregon's 10-2 Rule Does.

As the Court stated in *Allen* v. *United States*, 164 U.S. 492 (1896), "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* at 501. The Court has recognized that the jury must be protected from potentially coercive externalities that might unduly influence its deliberative process and thus the verdict itself, even if this means a hung jury will result. For example, the Court has held that, where a trial court "considers the jury [hopelessly] deadlocked," it must be allowed to declare a mistrial because there otherwise would be "a significant risk that a [final] verdict may result from pressures inherent in the situation rather

than the considered judgment of all the jurors." *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978); see also *Renico* v. *Lett*, 130 S. Ct. 1855, 1863 (2010) (quoting *Arizona* v. *Washington* approvingly); *Sanders* v. *Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004) ("The protection of holdout jurors from coercion has been a fundamental part of our federal jurisprudence.").

Oregon's 10-2 rule turns the *Arizona* v. *Washington* approach to deadlocks on its head: Instead of declaring a mistrial so as to prevent a coercion-induced guilty verdict, an Oregon trial judge *instructs* a jury deadlocked 10-2 to return a guilty verdict. From the perspective of the defendant, the 10-2 rule is thus magnitudes worse than unlawful judicial interventions that merely have the *potential* to coerce dissenting jurors to cave to the majority. The rule is the functional equivalent of a *guarantee* that, where there are ten votes in favor of guilt, the two jurors who remain unconvinced will be struck by the trial judge for no other reason than that they stand in the way of a unanimous guilty verdict. While the 10-2 rule formally reflects a different method of disempowering holdout jurors (altering the rule of decision rather than removing them from the jury), its net effect is the exactly the same. Under Oregon's rule, the votes of the dissenting jurors may technically be *counted*; but their votes do not actually *count*.[2]

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[2] Though Oregon's rule also allows the jury to acquit by a vote of 10-2, this should not obscure the fact that it disproportionately operates to defendants' detriment. First, empirical evidence shows that the rule converts would-be deadlocks into convictions far more often than it converts would-be deadlocks into acquittals. See, *e.g.*, Calif. Admin. Office of the Courts, "Final Report of the Blue Ribbon Commission on Jury System Improvement," May 6, 1996, at 72; Harry Kalven & Hans Zeisel, THE AMERICAN JURY 56, 460-62

Viewed in such functional terms, the 10-2 rule is plainly inconsistent with the most basic notions of the right to an impartial jury. Cf. *Sanders*, 357 F.3d at 948 (holding that California state trial court "committed constitutional error when, after learning that the juror was unpersuaded by the government's case, it dismissed the lone holdout juror" without cause). This may help explain why Oregon and Louisiana are the only jurisdictions that have abandoned the historic rule of unanimity. Cf. *Burch* v. *Louisiana*, 441 U.S. 130, 138 (1979) ("We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."). It may also explain why this Court, in cases applying the *Apprendi* rule to state convictions, has sometimes reflexively included the unanimity requirement within the core definition of the jury trial right. See, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004) (describing as a "longstanding tenet[ ] of common-law criminal jurisprudence * * * that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve or his equals and neighbours'" (quoting 4 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769))).

The 10-2 rule does not merely affect *outcomes*; it also likely has a pernicious effect on the manner in which the deliberations unfold. The jurors know at the very *outset* of deliberations that, once 10 votes coalesce, the majority bloc may treat any remaining dissenters as irrelevant and return a verdict forthwith. Just as a parent unilaterally

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(1966). Second, as a practical matter, where the prosecution manages to convince only two of twelve jurors of the defendant's guilt, it is probably unlikely that it will re-try the defendant if the result is a mistrial.

decides when a debate with her child will end, Oregon empowers a ten-juror majority to silence even reasonable dissenters, including dissenters who may have been able to persuade the majority had they had the chance. The 10-2 rule eschews the presumption that jurors are equals and instead puts the majority bloc in charge of deciding when the proceedings will end; "deliberations may continue * * * as an option, not an obligation." Jeffrey Abramson, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 199 (2000). The 10-2 rule is thus fundamentally inconsistent with the jury's foundation as "a deliberative body, charged with the responsibility of exchanging ideas, and with the concomitant practices of arguing and influencing." *United States* v. *Fioravanti*, 412 F.2d 407, 415 (3d Cir. 1969); cf. *Allen*, 164 U.S. at 501-02 ("It cannot be that [a juror] * * * should close his ears to the arguments of men who are equally honest and intelligent as himself."); see also Richard A. Primus, *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1445 (1997) (arguing that the unanimity rule properly "forces decision makers to continue their discussions past the point where a less stringent decision rule would permit the process to end").

In addition to truncating deliberations, Oregon's 10-2 rule allows for the even more troubling possibility that, where two reasonable jurors have highly valid and persuasive reasons for doubting the prosecution's case, there might nevertheless be *no deliberation at all*: If the initial ballot is taken prior to deliberations and reveals ten votes in favor of conviction, the majority may immediately return a verdict without affording the dissenters an opportunity to explain and argue their position. The 10-2 rule thus flies in the face of this Court's recognition that that thorough deliberation is an essential element of the jury trial right because

"prejudices of individuals [are] frequently counterbalanced, and objectivity result[s]." *Ballew* v. *Georgia*, 435 U.S. 223, 232 (1978) (opinion of Blackmun, J.).

This Court has found unconstitutional judicial and legislative inventions designed to avoid hung juries that have far less obvious impacts on the quality of the deliberative process. For example, the Court has held that a trial court may not instruct a deadlocked jury that it "has to reach a decision." *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965). And, in *Ballew*, the Court held that a five-member jury violates the Fourteenth Amendment's Due Process Clause because "progressively smaller juries are less likely to foster effective group deliberation" and more likely to impede the "meaningful * * * participation" of "minorities or other identifiable groups" in the jury process. *Id.* 435 U.S. at 222-23, 236 (opinion of Blackmun, J.).

It is difficult to reconcile Oregon's 10-2 rule with decisions such as *Jenkins* and *Ballew*. Oregon has determined that the ability of dissenting jurors to meaningfully participate in the deliberative process should be completely subordinated to the right of a majority bloc to terminate deliberations and return a verdict once it obtains ten votes. This appears far more offensive to the Framers' vision of the jury trial right than a judicial charge that only *might* coerce a holdout juror to change her vote, or a legislative rule that reduces the number of persons on the jury from six to five. Under the rule of unanimity, "power flows to the persuasive on the jury" and each juror must consider the case from everyone else's point of view in search of the conscience of the community. Each must persuade or be persuaded in turn." Abramson, *supra*, at 183, 205. By contrast, the 10-2 rule renders dissenting jurors completely powerless

if they number fewer than three. The dissenters' are left to the whim of the majority. [3]

Oregon's rule is also in tension with *Ballew*'s concerns regarding the Sixth Amendment's fair cross section requirement. To be sure, the Court has clarified that the requirement does not "require anything beyond the inclusion of all cognizable groups in the venire and the use of a jury numbering at least six persons." *Holland* v. *Illinois*, 493 U.S. 474, 478 (1990) (citations omitted). However, just as a five-member jury is unconstitutional because "the opportunity for *meaningful* * * * representation does decrease with the size of the panels," *Ballew*, 435 U.S. at 237 (opinion of Blackmun, J.) (emphasis added), Oregon's rule similarly diminishes the chances of meaningful participation "of minority groups in the community" because it allows dissenters to be ostracized both from deliberations and the rendering of a verdict.[4] In this regard, it is worth noting that it was not until three years after *Apodaca* that this Court definitively held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a

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[3] To be sure, the unanimity rule provides every member of the jury a sort of "veto power," but this is not analogous to the ten-juror majority's power under the 10-2 rule to render a guilty verdict, which ends the proceedings and triggers the State's right to punish. The end-game of an unbreakable deadlock is a mistrial. If the prosecution wishes to re-try the defendant, it may; if it does, the re-trial will be considered a mere "continuation" of the initial proceedings. See *Yeager* v. *United States*, 129 S. Ct. 2360, 2372 (2009) (Scalia, J., dissenting).

[4] While it is certainly not the case that split juries will always (or even often) break upon "suspect category" lines such as race or gender, they sometimes will.

jury trial." *Taylor* v. *Louisiana*, 419 U.S. 522, 529 (1975). This provides an additional reason for revisiting *Apodaca* and ending its anomalous status in constitutional law.

B. Empirical Evidence Confirms That the 10-2 Rule Adversely Affects the Quality of the Jury's Deliberations and Decision-Making.

Empirical studies confirm the distinct possibility that the 10-2 rule impairs the jury's deliberative and decision-making processes, underscoring the importance of the question presented in Herrera's petition.

In *Apodaca*, Justice Powell conceded that it would be "contrary to basic principles of jury participation" for a majority bloc to "shut off [the] competing views" of dissenting jurors. *Id.*, 406 U.S. at 379 (Powell, J., concurring). But he found "nothing in Oregon's experience to justify the apprehension that juries not bound by the unanimity rule will be more likely" to engage in such tactics. *Ibid.* Justice White expressed a similar view in his own *Apodaca* opinion. *Id.* at 413 (opinion of White, J.).

The assumption that the jury's deliberative process is not influenced by the applicable rule of decision should have been suspect even at the time of *Apodaca*. As anyone familiar with the United States Senate can attest, whether (and how much) the applicable rule of decision protects the rights of those in the minority has substantial impact on the dynamics of a group's deliberative process. Not surprisingly, empirical studies conducted during the nearly four decades since *Apodaca* confirm that this is true of the 10-2 rule's impact on the jury.

Mock jury studies show that juries that are not bound by the unanimity rule show a marked tendency to "stop[ ] * * * deliberation when the required number [of votes are] reached." Charlan Nemeth, *Interactions Between*

Jurors as a Function of Majority v. Unanimity Decision Rules, IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 250 (Lawrence S. Wrightsman et al., eds. 1987); see also Abramson, *supra*, at 199 ("[T]the achievement of the minimum bloc of votes necessary for a verdict is 'psychologically binding' on bloc members."). Psychologist Reid Hastie's research similarly shows that, with respect to juries permitted to return an 8 to 4 verdict, "little occurs after the faction size reaches eight. * * * Deliberation continues for a few minutes, typically less than five"; by contrast, for those juries required to reach unanimity, "approximately 20 percent of deliberation occurs after the largest faction contains eight or more members." Reid Hastie, INSIDE THE JURY 94-98 (1983). Because Oregon's 10-2 rule makes it easier to reach the requisite number of votes as compared to the rule of unanimity, by definition Oregon's rule will result in shorter deliberations in cases where the jury is split, which are precisely the cases where thorough deliberation is the most essential. Cf. *Ballew*, 435 U.S. at 232 (opinion of Blackmun, J.) (agreeing that a "decline" in "effective group deliberation * * * leads to inaccurate factfinding"). This exacerbates the risk of wrongful convictions: "Jury research indicates that shorter deliberation leads to less accurate judgments. * * * [M]ajority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1273 (2000).

The 10-2 rule also affects jurors' style of argument during deliberations. In Hastie's study, "many of the majority rule juries appeared to be quite adversarial, even combative, in contrast to a deliberate, ponderous atmosphere in many of the unanimity rule juries." Hastie, *supra*, at 112. Hastie concluded that jurors deliberating

under a majority-rule system tend to employ "a more forceful, bullying * * * style because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." *Ibid.*; see also Abramson, *supra*, at 203-04 (arguing that the "requirement of unanimity is indispensable to sending the right cue to jurors about what we expect of them," and "contributes to an understanding among jurors that their function is to persuade, not to outvote, one another"). Research also shows that juries that are not bound by the unanimity rule tend to be more "verdict-driven" than "evidence-driven" in their deliberations. See Hastie, *supra*, at 173-74. That is, the jurors spend less time discussing the evidence than they do on cobbling together enough votes to reach a verdict and go home.

This has serious consequences with respect to the quality of the jury's fact-finding: Evidence-driven juries tend to "exhibit a somewhat higher level of reasoning than [those] who do not deliberate," to be "more aware of alternative theories and evidence that did not support their selected verdict, and [to] match evidence to alternative verdict options more systematically." Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 348 (2003). Verdict-driven juries, by contrast, are less likely to question their own views or correct each other's errors. See John Guinther, THE JURY IN AMERICA 81 (1988); cf. also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71, 118-19 (2000) (explaining that majority-rule deliberations often exhibit "group polarization," where individuals simply reinforce their own preconceptions by talking amongst themselves and excluding others with differing points of view).

The net effect is that the 10-2 rule adversely affects the accuracy of verdicts. Discarding the unanimity rule thus impairs an essential safeguard in the doling out of criminal punishment. See Gary J. Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 WASH. U. L. Q. 39, 52 (1977).

Notably, the Oregon data show that the State's experience with the 10-2 rule is entirely consistent with the empirics discussed above. According to a recent study of Oregon state criminal trials, non-unanimous verdicts were reached in at least 41 percent of the 662 cases included in the sample. See Oregon Office of Public Defense Services Appellate Division, "On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission," May 21, 2009, at 3; accord Harry Kalven & Hans Zeisel, THE AMERICAN JURY 460 (1966). By comparison, nationwide studies have estimated that, in jurisdictions using the rule of unanimity (*i.e.*, every jurisdiction but Oregon and Louisiana), juries hang by one or two jurors in only 2 to 3 percent of all tried cases. See William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Juries*, 25 INT'L REV. L. & ECON. 1, 1-2 (2005). There is no reason to believe that Oregon's hung jury rate would be significantly higher than the nationwide average were the State to employ the unanimity rule.[5] Thus, the large delta between the percentage of Oregon trials resulting in 10-2 or 11-1 verdicts and the percentage of trials nationwide that result in 10-2 or 11-1 deadlocks suggests that Oregon juries are routinely rendering split guilty verdicts

[5] It is possible, however, that the 10-2 rule encourages Oregon prosecutors to bring to trial questionable cases that they might not otherwise bring if the rule of unanimity applied.

not only in cases where they would otherwise have hung, but also in cases where additional deliberation would have led to consensus.

To be sure, had the rule of unanimity applied, in some cases the additional deliberation that would have followed would have converted the jury's initial 10-2 or 11-1 split in favor of conviction into a 12-0 guilty verdict. However, the empirical evidence of jury behavior supports the hypotheses that, had the rule of unanimity applied, **(1)** some of these juries would have hung on the basis of the dissenters' conscientiously held doubts about the prosecution's case, and **(2)** even more troubling, some of these juries would have actually *acquitted* the defendant. See Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33, 47 (2003) (finding that, in a sample of cases where the first ballot revealed a strong majority in favor of conviction, juries ultimately acquitted the defendant 12 percent of the time); Kalven & Zeisel, *supra*, at 488 (making a similar finding). There is therefore good reason to believe that Oregon's 10-2 rule is eroding the capacity of Oregon juries to discharge their historic function of guarding against wrongful convictions.

As the Court suspected in *Ballew*, the length and quality of deliberations matter, and the rule of unanimity is far superior to Oregon's 10-2 rule in this respect. The exact heroic portrait offered in the film "12 Angry Men," where one holdout manages to turn an entire jury around, may not be common. But, as Hans and Kalven and Zeisel have shown, the ability of dissenters to gradually persuade fellow jurors that there is reasonable doubt is not merely the stuff of movie fiction.

Under the 10-2 rule, however, a jury split 10 to 2 in favor of conviction on the first ballot may very well return a guilty verdict immediately; the dissenting jurors may

not even get the *chance* to argue their views of the evidence. This demonstrates the larger truth that the persuasive power of those who are initially in the minority depends upon the existence of a rule of decision that compels the majority to engage in deliberation. See Jeffrey Abramson, *Anger at Angry Jurors*, 82 CHI-KENT L. REV 591, 592 (2007). It also underscores that the rule of unanimity provides the defendant critical protections similar to the reasonable doubt requirement and is thus equally fundamental to due process.

II. HUNG JURIES SHOULD NOT BE CONSIDERED WASTEFUL INEFFICIENCY THAT MUST BE ELIMINATED.

Justice Powell's opinion in *Apodaca* was at least partly driven by his view that Oregon's 10-2 rule served the legitimate interest of minimizing "the potential for hung juries occasioned either by bribery or juror irrationality." *Id.*, 406 U.S. at 377 (Powell, J., concurring). While Oregon concededly has a compelling interest in ensuring that jurors acting in bad faith do not jam its machinery of justice, the 10-2 rule is clearly not narrowly tailored to that rare problem. Nor was it ever intended to be. The rule was adopted by referendum in 1934, and it "clearly appears from * * * the Voters' Pamphlet that the amendment was intended to make it easier to obtain convictions." *Sawyer*, 263 Ore. at 138.

Yet, there is no discernible State interest in enabling the prosecution to obtain a conviction where one or two reasonable jurors, acting in good faith and after honest deliberations, still harbor well-founded doubts of the defendant's guilt.[6] Just as it has done in its *Apprendi* line

[6] There already exist mechanisms by which a court may strike jurors who act irrationally or in bad faith. See *Arizona* v.

of cases, the Court should not hesitate to hold that the desire to streamline the imposition of criminal punishment is not an acceptable reason to abandon the Framers' understanding of the jury trial right and the bright-line rule of unanimity. Cf. *Blakely*, 542 U.S. at 313.

The argument that abandoning the rule of unanimity will minimize the inefficiency associated with narrowly hung juries is not only out of step with this Court's Sixth Amendment jurisprudence; it is also based on two erroneous assumptions. First, it wrongly assumes that hung juries are such a significant administrative problem that they warrant the radical "solution" of abandoning the historic rule of unanimity. There is no definitive evidence that they are. A thirty-state survey conducted by the National Center for State Courts found that juries in felony trials hung at a rate of 6.2 percent, with some slightly higher rates in certain California counties. See Valerie P. Hans et al., "Are Hung Juries a Problem? Final Report of the National Center for State Courts to National Institute of Justice," September 30, 2002, at 20. This rate is essentially unchanged from the 5.5 percent rate that

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Washington, 434 U.S. at 509. What is emphatically disallowed is removing jurors simply because they disagree with the prosecution's view of the evidence. See, *e.g.*, *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) ("[I]f the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." (emphasis added)); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) ("[I]f the record evidence discloses *any reasonable possibility* that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." (emphasis added)). Yet this is how the 10-2 rule functionally operates.

Kalven and Zeisel reported in their study of data from the 1950s. See Kalven & Zeisel, *supra*, at 56, 461-62.

Second, the argument assumes that narrowly hung juries are typically the result of the holdouts' irrationality, as opposed to real problems with the trial evidence. Empirical studies refute this assumption. See Kalven & Zeisel, *supra*, at 462-63 (concluding that the "ambiguity of the case * * * must be the primary cause of a hung jury," not "an eccentric juror * * * refus[ing] to play his proper role"); accord Hans, "Are Hung Juries a Problem?" *supra*, at 45, 49.

According to Kalven and Zeisel, "for one or two jurors to hold out to the end," it is typically "necessary that they had companionship at [least at] the beginning of deliberations." Kalven & Zeisel, *supra*, at 462-63. If, on the one hand, the views of a holdout juror are initially shared by others at the beginning of deliberations, this is a good indication that those views are reasonable, because presumably juries rarely (if ever) include multiple "irrational" members. Accordingly, in such circumstances, an eventual 10-2 or 11-1 deadlock cannot be viewed as the product of juror irrationality. If, on the other hand, the holdout is alone in her views from the start yet still manages to resist the majority, she must either have highly valid reasons for her views or be so incredibly irrational as to be preternaturally immune from the inherent pressures of the majority that Kalven and Zeisel observed. If the holdout's resistance owes to the former, it is worthy of respect; if it owes to the latter, this will likely be readily evident to the trial court—irrationality of the incredible variety is presumably difficult to conceal—and thus the holdout may be lawfully removed.

In sum, the typical hung jury is not properly considered an expendable inefficiency in the system.

Rather, it demonstrates that the rule of unanimity is linked with the other constitutional requisites of due process (*e.g.*, the reasonable doubt requirement) that give the jury its historic and essential role of protecting the accused against wrongful convictions and government overreaching. Cf. Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* THE AMERICAN JURY, 2 J. EMPIRICAL LEG. STUD. 171, 185-87 (2005) (concluding that juries have a higher "conviction threshold" than judges).

Perhaps there are some cases in which one or two rogue jurors manage to escape the trial court's detection and hang a jury. But discarding the deeply rooted rule of unanimity is an overbroad, unconstitutional solution to a problem that, at most, occurs highly infrequently. Cf. *McDonald*, 130 S. Ct. at 3047 (holding that Chicago's sweeping ban was invalid even though narrower prohibitions, such as prohibiting felons' gun ownership, are constitutional).

III. THE RULE OF UNANIMITY IS ESSENTIAL TO THE PROTECTION OF THE JURY'S PUBLIC LEGITIMACY.

"One of the key functions of the criminal jury system is to legitimize, in the eyes of the community, the state's use of its coercive powers." Abramson, *supra*, at 202. This helps explain the Court's reluctance to embrace rules that might "impugn the legitimacy" of jury verdicts. *Yeager* v. *United States*, 129 S. Ct. 2360, 2370 (2009). For example, in *Tanner* v. *United States*, 483 U.S. 107 (1987), the Court refused to allow the defendant's request for "post-verdict investigation into juror misconduct" because the "community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post verdict scrutiny of juror conduct." *Id.* at 121.

The concern for legitimacy is also an animating feature of the Court's decisions involving governmental efforts to manipulate the make-up of the jury. See *Miller-El* v. *Dretke*, 545 U.S. 231, 238 (2005) (stating that "a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication" (quotations omitted)); see also *Taylor*, 419 U.S. at 530 ("Community participation in the administration of the criminal law * * * is also critical to public confidence in the fairness of the criminal justice system.").

The special need to ensure the public legitimacy of verdicts also helps explain why the mere *appearance* of unfairness is sometimes treated as grounds for automatic reversal. See, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (vacating, without engaging in harmless error review, defendant's conviction where the judge had a financial interest in a guilty verdict).

The unanimity rule is instrumental in ensuring that jury verdicts retain public legitimacy. Cf. *McDonald*, 130 S. Ct. at 3047-48 (rejecting the argument that "incorporation of a right turns on whether it has intrinsic as opposed to instrumental value"). That may be one reason for the unanimity requirement's historical pedigree. Cf. *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) ("While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real.").

The legitimacy of a jury's verdict depends not just on the content of its decision, but also the process by which it is reached. Cf. Primus, *supra*, at 1427; *Burch*, 441 U.S. at 135 (stating that an "essential feature" of the jury system is the "community participation and shared responsibility that results from that group's determination of guilt or innocence"). Because the jury's deliberations are

secretive, its verdict is the public's proxy for determining what went on in the deliberation room. Where the verdict is unanimous, the public is provided an indirect yet strong assurance that the jury was not marred by schisms along racial, socio-economic, religious, or similar lines. This gives even substantively unpopular verdicts an air of legitimacy. This might be why public confidence in the jury system remains extremely high despite media focus on controversial verdicts. See Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338 tbl.2 (1988) (reporting that public confidence in the jury system is around 90 percent).

By allowing a verdict to be rendered over the dissenting views of two jurors, Oregon's 10-2 rule invites public doubt over the integrity of the deliberative process. If, for example, a jury composed of ten white jurors and two racial minorities returns a 10-2 guilty verdict, the public may speculate that the jury broke upon racial lines and that racial tensions corrupted the deliberative process. If the jury is polled and it turns out (even if just by coincidence) that the racial minority jurors were the dissenters, the public's suspicions will be even more pronounced. The damage that this would do to the public's confidence in the jury system is immeasurable. Cf*. Georgia* v. *McCollum*, 505 U.S. 42, 49 (1992).

This public legitimacy concern is not limited to scenarios in which the jury's verdict may have split on racial or similar lines. Such concerns are triggered whenever the jury fractures on *any* discernible line. The public might hypothesize that the jury's split verdict reflected not so much the evidence as the luck of the draw—had the jury's demographical composition been

even slightly different, so too would the outcome. The unanimity requirement is a prophylactic against this type of post-verdict analysis: the jury's consensus signals that any randomly picked group of twelve reasonable individuals probably would have reached the same unanimous result. Simply put, the rule of unanimity is indispensible to ensuring that the jury's verdict "represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager*, 129 S. Ct. at 2368.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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