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 OREGON CRIMINAL-LAW AND CRIMINAL-PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

BRIEF OF CRIMINAL LAW AND CRIMINAL PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37.2, the undersigned seek leave to file as *amici curiae* on the Petition for Writ of *Certiorari* on whether the provision of Oregon law that permits a felony conviction based upon a nonunanimous verdict violates the Sixth Amendment right to trial by jury as applied to the states through the Due-Process Clause of the Fourteenth Amendment. Each of these *amici curiae* is a full-time law professor at an accredited law school in the State of Oregon who teaches courses and/or regularly publishes academic writings in the fields of criminal law and/or criminal procedure:

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[1] Counsel for all parties received timely notice, pursuant to Supreme Court Rule 37.2 (a), at least ten days prior to the filing of this brief, and all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel undersigned states that no counsel for any party authored this brief in whole or in part and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

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Amici submit this brief to bring to the foreground of this case the scholarly consensus within the legal academic community in Oregon (1) that *Apodaca v. Oregon,* 406 U.S. 404 (1972), was wrongly decided and (2) that the empirical evidence gathered in Oregon to date strongly suggests that permitting nonunanimous verdicts of guilt violates the Sixth-Amendment right to trial by jury.

SUMMARY OF ARGUMENT

Empirical evidence, not available at the time that *Apodaca* was decided, now overwhelmingly suggests that the requirement of jury unanimity for a guilty verdict plays a similar role as the requirement of proof beyond a reasonable doubt in protecting against wrongful convictions. *See* Richard A. Primus,

When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries, 18 CARDOZO L. REV. 1417 (1997).

Apodaca is an anachronism. In the past decade, this Court has seen significant changes in three doctrinal areas of its jurisprudence, all of which suggest that the time has come to overrule *Apodaca*. In *Apprendi v. New Jersey,* 530 U.S. 466, 498 (2000), and its progeny, this Court has recently suggested that the right to trial by jury includes a long-standing right to a conviction solely by a unanimous jury. Last term, in *Graham v. Florida,* 130 S. Ct. 2011 (2010), this Court reiterated that the determination of what process was due to a criminal defendant necessitates a consideration of society's standards, as expressed in legislative enactments and state practice to determine the national consensus regarding the practice at issue, undercutting this Court's decision in *Apodaca* to uphold a practice of questionable constitutionality that was then, and continues to be, the anomalous practice in only two of the fifty-two American jurisdictions. Also last term, in *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010), this Court held that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment'" (internal citation omitted), undercutting the central holding of the plurality opinion in *Apodaca* that a

defendant's right to a unanimous verdict applied in federal court only.[2] Any one of this Court's recent decisions, let alone the three of them standing in conjunction, dictate that this Court grant *certiorari,* overturn *Apodaca,* and hold that the Sixth-Amendment right to trial by jury, as applicable to the states via the Fourteenth Amendment, prohibits a verdict of guilt found by a less-than-unanimous jury.

ARGUMENT

Almost forty years ago, a fractured plurality of this Court, focusing upon "the function served by the jury in contemporary society," held that the Fourteenth Amendment did not prohibit the states from securing felony convictions with less-than-unanimous verdicts. *Apodaca,* 406 U.S. at 410. Subsequent legal developments, empirical data, and the ongoing national consensus in favor of unanimity call into question the validity of this decision. Today, almost forty years later, Oregon remains one of only two states that permit felony conviction by less than a unanimous vote of the trial jury.

[2] This argument is briefed fully in Mr. Herrera's Petition. *See* Petition for Writ of *Certiorari, Herrera v. Oregon,* No. 10-344, at 5-11.

I. Post-*Apodaca* Empirical Evidence Calls Into Question the Court's Reasoning Behind Its Holding That the Right to a Unanimous Verdict Is Not So Fundamental That It Must Apply to the States via the Fourteenth Amendment.

This Court, in *Apodaca* and its companion case, *Johnson v. Louisiana,* 406 U.S. 356 (1972), addressed two interrelated issues: (1) whether the Sixth-Amendment right to trial by jury included a right to unanimity and (2) if so, whether that constitutional requirement applied to the States via the Due-Process Clause of the Fourteenth Amendment. In *Apodaca,* five justices answered the first issue affirmatively, and only four answered the second negatively (four of the remaining five justices assumed that the answer to the second inquiry was yes, but did not decide the issue because they answered the first in the negative; only one justice decided the issue in the negative). Nonetheless, because there was not a majority of the Court in agreement on both questions, the resulting holding permitted the State of Oregon to continue to accept nonunanimous verdicts of guilt in felony cases. This holding was dictated by Justice Powell's fifth vote, in which he concurred in the judgment of the plurality. Justice Powell agreed that the Sixth Amendment required a unanimous jury verdict to convict in a federal criminal trial, *see Johnson,* 406 U.S. at 371 (Powell, J., concurring in judgment), but rejected the plurality's finding that this right to a unanimous verdict was

applicable to the states via the Fourteenth Amendment. *See id.* at 369.

In reaching this conclusion, Justice Powell explicitly based his finding on the lack of empirical evidence ("no reason to believe") to demonstrate "that a unanimous decision of 12 jurors [was] more likely to serve the high purpose of a jury trial, or [was] entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 375. The majority in *Johnson* concluded that, to overturn a legislative judgment that unanimity was not essential to a reasoned jury verdict, it would need "some basis for doing so other than unsupported assumptions." *Id.* at 361-62.

The Court's concern in 1972 with the lack of empirical basis for the unanimity challenges in *Apodaca* and *Johnson* is no longer valid. A plethora of empirical evidence is now available suggesting that permitting nonunanimous verdicts of guilt negatively affects the jury's deliberation process and the accuracy of its findings. Nearly forty years of empirical research on jury decisionmaking since *Apodaca* was decided demonstrates conclusively that unanimous juries are more careful, thorough, and accurate. *See* JOHN GUINTHER, THE JURY IN AMERICA 81 (1988); REID HASTIE, *ET AL.,* INSIDE THE JURY 108 (1983) (finding that mock juries that were required to reach a unanimous verdict deliberated more thoroughly and spent more time discussing the evidence); James H. Davis, *et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds*

Majority Rules, 32 J. PERSONALITY & SOC. PSYCHOL. 1 (1975) (finding that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach a verdict with a two-thirds vote); Dennis J. Devine, *et al., Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 PSYCHOL. & PUB. POL'Y & L. 622, 629 (2001) (providing a comprehensive review of the empirical research on jury decisionmaking published between 1955 and 1999 and concluding that permitting nonunanimous verdicts of guilt have a significant effect when the prosecution's case is "not particularly weak or strong"); Shari Diamond, *et al., Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury,* 100 NW. U. L. REV. 201 (2006) (documenting that real juries that were told that they did not have to reach unanimity were less concerned about deliberation, refused to consider the merits of the minority view, were more likely to hold a formal vote count within ten minutes of the beginning of "deliberations," and continued to vote often until they reached the required majority vote for a verdict); Valerie P. Hans, *The Power of Twelve: the Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 2, 23 (2001) (finding that dissenting jurors on mock juries participated less and were viewed by majority jurors as less persuasive when unanimity was not required); Norbert Kerr, *et al., Guilt Beyond a Reasonable Doubt, Effects of Conceptual Definition and Assigned Rule on the Judgment of Mock Juries,* 34 J. PERSONALITY & SOC. PSYCH. 282 (1976) (finding that dissenting jurors

operating under a majority decision rule were less likely than dissenting jurors operating under a unanimity rule to argue with majority jurors during deliberations); Charles Nemeth, *Interactions Between Jurors as a Function of Majority v. Unanimity Decision Rules,* 7 J. APPLIED SOC. PSYCH. 38 (1977) (finding that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach a verdict with a majority vote); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?,* 6 S. CAL. INTERDISC. L. J. 1, 40-41 (1997); Kim Taylor Thompson, *Empty Votes in Jury Deliberations,* 113 HARV. L. REV. 1261 (2000) (documenting that, when unanimity is not required, dissenting jurors tend to be disenfranchised, verdicts tend to be less accurate, and public confidence in the fairness of resulting verdicts tends to be undermined). Most pertinently for the present challenge, these studies have documented that unanimity rules, standing alone, can shape the jury's verdict. *See, e.g.,* HASTIE, ET AL., *supra,* at 96-98 (documenting that, in almost one-third of the unanimous juries that they monitored, the verdict initially supported by a supermajority of the jurors was different than the verdict ultimately delivered after deliberations).

Since *Apodaca,* nonunanimous verdicts of guilt have been common in Oregon. A recent analysis of two years of felony jury-trial records by the Appellate Division of the Oregon Office of Public Defense Services indicated that nearly two thirds of the juries

who were polled reached a nonunanimous verdict on at least one count. *See* Appellate Division, Office of Public Defense Services, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon* (May 21, 2009), available at http://courts.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf; *see, e.g., State v. Cobb,* 198 P.3d 978, 979 (Or. App. 2008); *State v. Jones,* 196 P.3d 97, 104 (Or. App. 2008); *State v. Smith,* 195 P.3d 435, 436 (Or. App. 2008); *State v. Perkins,* 188 P.3d 482, 484 (Or. App. 2008); *Simpson v. Coursey,* 197 P.3d 68, 71 (Or. App. 2008); *Wyatt v. Czerniak,* 195 P.3d 912, 916 (Or. App. 2008); *State v. Cave,* 195 P.3d 446, 448 (Or. App. 2008); *State v. Miller,* 176 P.3d 425 (Or. App. 2008); *State v. Moller,* 174 P.3d 1063, 1064 (Or. App. 2007); *State v. Phillips,* 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman,* 174 P.3d 598, 601 (Or. App. 2007); *State v. Rennels,* 162 P.3d 1006, 1008 n.2 (Or. App. 2007); *State v. O'Donnell,* 85 P.3d 323, 326 (Or. App. 2004).

Hung juries are rare in the overwhelming majority of jurisdictions that require unanimity. *See* Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,* 40 MICH. J. L. REFORM 569, 582-83 (2007) (documenting that approximately two percent of federal trials and four-to-six percent of state trials nationwide end in hung juries); *see also* Thompson, *supra,* at 1287 n.50.

This Court, in assessing the contours of the right to trial by jury as it regards jury size, has indicated the importance of empirical evidence. *See Ballew v. Georgia,* 435 U.S. 223, 231 n.10 (1978) (noting that

social-science data on jury size "provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment"). The frequency of nonunanimous verdicts in Oregon and the infrequency of hung juries in other jurisdictions combine to suggest that jurors deliberate meaningfully to reach consensus when unanimity is required, but that they cease deliberations when a supermajority is reached when unanimity is not required. An abundance of scholarly literature documents the same. In light of the empirical data amassed since *Apodaca* was decided, this Court should reconsider its holding that the right to a unanimous jury verdict is not so fundamental that it applies to the states.

II. This Court's Post-*Apodaca* Sixth-Amendment Jurisprudence Calls Into Question the Doctrinal Holding That the Right to a Unanimous Verdict Is Not So Fundamental That It Must Apply to the States via the Fourteenth Amendment.

Since *Apodaca,* this Court has rejected the premise of the plurality opinion that the reasonable-doubt standard was not tied to the Sixth-Amendment right to trial by jury, clarifying that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993) (holding that Sullivan's right to trial by jury was denied because his jury was

improperly instructed about the meaning of a reasonable doubt).

More importantly, in a recent line of cases, this Court has made clear that "the longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment codifies include the guarantee that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbors.'" *Blakely v. Washington,* 542 U.S. 296, 301 (2004) (emphasis added) (internal citation omitted). *See Apprendi,* 530 U.S. at 498 (Scalia, J., concurring) (explaining that the accusations against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*"); *see also Cunningham v. California,* 127 S. Ct. 856, 863-64 (2007) (incorporating the Sixth-Amendment requirement of proof of any fact that exposes a defendant to a greater potential sentence be found by a jury beyond a reasonable doubt, established in *Apprendi,* to the states); *cf. Ring v. Arizona,* 536 U.S. 584 (2002). In *Ring,* this Court explained that the holding in *Apprendi* was irreconcilable with its earlier decision in *Walton v. Arizona,* 497 U.S. 639 (1990). *See Ring,* 536 U.S. at 609-10 (concluding that this Court's "Sixth Amendment jurisprudence [could] not be home to both" *Apprendi* and *Walton*).[3]

[3] For a thorough discussion of why *stare decisis* concerns do not justify preserving *Apodaca,* see Petitioner's Brief, No. 10-344, at 27-33.

Apodaca is, quite simply, an anachronism. The holding in *Apodaca,* permitting the State of Oregon to continue to accept nonunanimous verdicts of guilt in felony cases, is irreconcilable with the recent pronouncements of *Apprendi* and its progeny. Like this Court did to *Walton* in *Ring,* this Court should revisit and overturn *Apodaca* in the case *sub judice*.

III. Since *Apodaca,* the National Consensus in Favor of Unanimous Verdicts Has Continued.

This Court has explained, in other contexts, that the "crucial guideposts" of what process is due to criminal defendants are the "history, legal traditions, and practices" of our Nation. *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (finding that the asserted right to assisted suicide was not a fundamental liberty interest protected by the Due-Process Clause of the Fourteenth Amendment in part because there was no national consensus in protecting it). "The clearest and most reliable objective of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989). *See Graham,* 130 S. Ct. at 2022; *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2650 (2009); *Roper v. Simmons,* 543 U.S. 551, 563 (2005); *Atkins v. Virginia,* 536 U.S. 304, 312 (2002); *Coker v. Georgia,* 433 U.S. 584, 593 (1977).

This Court's most recent case defining Eighth-Amendment standards (as applied to the States via

the Due-Process Clause of the Fourteenth Amendment) was *Graham,* in which the Court applied its categorical approach to the Cruel-and-Unusual-Punishment Clause for the first time in a context outside of imposition of the death penalty. *See id.* at 2022. The Court should use the present case to accord significant respect to national consensus and interpret the jury trial guarantee, "like other expansive language in the Constitution, . . . according to its text, by considering history, tradition, and precedent, and with due regard for its purpose in the constitutional design." *Roper,* 543 U.S. at 560.

This Court has previously looked to the practices of the states in determining the minimum number of jurors required by the Sixth-Amendment right trial by jury:

> It appears that of those States that utilize six-member juries in trials of non-petty offenses, only two, including Louisiana, also allow non-unanimous verdicts. 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.

Burch v. Louisiana, 441 U.S. 130, 138 (1979) (internal citations omitted).

In the almost forty years since this Court decided *Apodaca,* no States have heeded its siren call to permit nonunanimous verdicts in felony cases. On the contrary, a consensus against their use remains, and

Oregon remains one of only two states that permit a defendant to be convicted of a felony by a less-than-unanimous verdict. *See* Diamond, *et al., supra,* at 203.

This Court has also recently noted, in the context of the right to effective assistance of counsel, that it has long referred to the American Bar Association ("ABA") Standards "as guides to determining what is reasonable." *Rompilla v. Beard,* 545 U.S. 374, 387 (2005) (internal quotations omitted). The ABA Standards, on which Justice Powell relied in his concurring opinion in *Apodaca,* have been amended since *Apodaca* was decided to require unanimity in all criminal jury trials. *See* ABA Standard Relating to Trial Courts 2.10 (1976) ("The verdict of the jury [in criminal cases] should be unanimous.") (abrogating ABA Standard for Criminal Justice, Trial by Jury 1.1 (d) (1968) (approving of "less-than-unanimous verdicts, without regard to the consent of the parties")); ABA Principles for Juries & Jury Trials 4 (B) (August 2005) ("A unanimous decision should be required in all criminal cases heard by a jury."). The Commentary to Trial-Court Standard 2.10 concludes: "If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, the[ ] qualifications [in Criminal Justice Standard 1.1 (d) for less-than-unanimous verdicts] appear to be both unnecessary and unwarranted by our legal traditions." The Comment to Jury Principle 4 states:

> At least as early as the fourteenth century it was agreed that jury verdicts should be unanimous. . . . The historical preference for unanimous juries reflects society's strong desire for accurate verdicts based on thoughtful and thorough deliberations by a panel representative of the community. Implicit in this preference is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions – ones that address and persuade every juror.

Commentary to ABA Jury Principle 4 (internal citations omitted).

CONCLUSION

This case requires this Court to answer a fundamental question of criminal procedure: what is a hung jury? Is it an anomaly, a breakdown in the system, a failure of *voir dire* and jury selection to eliminate one or two individual jurors whose personal biases preclude their ability to reach a reasonable conclusion based on the evidence, the result of instructional error or confusion? *See, e.g., Johnson,* 406 U.S. at 377 (Powell, J., concurring in judgment) (positing that permitting nonunanimous verdicts could minimize the potential for "hung juries occasioned either by bribery or juror irrationality"); Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous*

Jury Verdicts, 46 KAN. L. REV. 933, 935 (1998) (contending that those who vote "not guilty" are unreasonable, hold-out jurors, simply seeking to hang the jury). Or is it a referendum on the weight of the evidence presented by the prosecution, an indication that, in the particular case *sub judice,* reasonable minds could disagree on the existence of a reasonable doubt, a tool to stimulate meaningful deliberation, a bulwark against wrongful conviction? *See Apodaca,* 406 U.S. at 403 (Brennan, J., dissenting) ("The doubts of a single juror are . . . evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt."); Thompson, *supra,* at 1317 (documenting that juries rarely hang because of one or two obstinate jurors). *Apodaca* only makes sense if a hung jury is the former. Because, if a hung jury is a natural, necessary, and desired byproduct of a system of lay participation in fact finding, then this Court should not permit a serious criminal conviction that is not based upon the unanimous finding of guilt by all twelve jurors. Nonetheless, the empirical evidence suggests that a hung jury is the latter. *See* Devine, *et al., supra,* at 690-707 (documenting that, when a jury is unable to reach a unanimous verdict, it is usually because the jurors began deliberations significantly divided in their views of the case and not because of a lone, irrational dissenter); Diamond, *supra,* at 205, 220, 229-30 (documenting that "hold-out" jurors in nonunanimous civil juries and mock criminal juries were not irrational or eccentric but rather viewed the judge's instructions and recalled the testimony in much the same way as the majority

jurors and frequently shared the same assessment of the case as the trial judge); Thompson, *supra,* at 1317 (finding that juries rarely hang because of one or two obstinate, "holdout" jurors).

As then-Judge Kennedy so eloquently expounded: "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

For the reasons presented herein, *amici curiae* join Mr. Herrera in asking this Court to grant *certiorari,* overrule *Apodaca,* and hold that the practice of depriving an individual of his or her liberty on the basis of a nonunanimous verdict of guilt violates the rights to trial by jury and due process protected by the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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