No. 18-5924

In the Supreme Court of the United States

EVANGELISTO RAMOS,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF LOUISIANA,
FOURTH CIRCUIT

AMICUS CURIAE BRIEF FROM PROMINENT CURRENT AND FORMER STATE EXECUTIVE AND JUDICIAL OFFICERS, LAW PROFESSORS, AND THE OCDLA, IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Constitutional Provisions

Legislative Materials

Other Authorities

Statement Of Interest[1]

Individual *amici curiae* include former governors, Justices and Judges of the Oregon Supreme Court and Court of Appeals, and deans of Oregon law schools. Each is committed to an Oregon justice system that operates fairly and protects the rights of all. We are joined by the Oregon Criminal Defense Lawyers Association, whose mission is to ensure that those facing criminal charges in Oregon receive effective legal representation and just outcomes.

Collectively, our varied experiences in the state criminal justice system have persuaded us that Oregon took a wrong turn nearly eight decades ago when we abandoned the requirement that jury verdicts in felony cases be unanimous. Non-unanimous verdicts are not nearly as reliable as unanimous ones and often result from deliberations that are far less thorough than verdicts that must be unanimous. *Amici* believe that the history and function of the Sixth Amendment right to unanimous verdicts must apply fully in the state courts, as this Court found for the Second Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and for the Eighth Amendment in *Timbs v. Indiana*, 139 S. Ct. 682 (2019). *Amici* hope to assist the Court in understanding the history of Oregon's non-unanimous

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity other than *amici* made a monetary contribution specifically for the preparation or submission of this brief.

provision and its effect on Oregon's defendants, jurors, citizens in general, and the rule of law.

Statement Of Consent Of The Parties

Counsel for both parties, Petitioner Evangelisto Ramos and Respondent the State of Louisiana, have been given notice of the intent to file this brief in support of the Petitioner, and have given written consent to this filing.

Summary Of Argument

Oregon historically required unanimous jury verdicts for felony convictions until 1934, when, in response to isolated jury verdicts, convictions for felonies other than murder were permitted by a jury vote of ten to two. The public record demonstrates that the erosion of full Sixth Amendment rights was driven by the desire for easier convictions and by animus toward southern European immigrants. The implementation of non-unanimous juries has resulted in a large number of felony convictions being decided by non-unanimous juries. Consequently, Oregon juries inevitability discount minority opinions and views throughout the deliberation process. Return to the Sixth Amendment's constitutional norm of unanimous juries will strengthen confidence in the results of jury trials while assuring full participation of all jurors in an important rite of American democracy. *Amici* urge this Court to fully incorporate the fundamental Sixth Amendment guarantee of a unanimous verdict.

Argument

The Oregon Non-Unanimous Jury Experience Supports This Court's Recognition That Only Convictions Supported By Unanimous Jury Verdicts Meet The Essential Requirements Of The Sixth Amendment's Right To Jury Trial.

Amici welcome this Court's decision to determine whether the unanimity requirement of the Sixth Amendment jury right, which has long governed federal criminal trials, applies fully to the states. Oregon long observed this rule after becoming a state, but became one of only two states to permit non-unanimous verdicts decades ago in reaction to verdicts in controversial cases. Our deviation from the unanimity requirement negated the long-standing Anglo-American requirement of unanimity in a manner that made convictions easier and was inspired by anti-immigrant prejudice. The results have been convictions based on deliberations that devalue minority jurors' views and undermine confidence in results. This brief outlines the roots of Oregon's rejection of jury unanimity in response to public disappointment in isolated jury verdicts, and the long-term damage from non-unanimity in the quality of deliberations and results as well as the alienation of minority jurors.

A. Oregon conformed to the Sixth Amendment's unanimity requirement until high-publicity trials led to an attempt to ease the standard for conviction in 1934.

When Oregon joined the Union in 1859, the state constitution required unanimous juries. Article I, section 11, of the Oregon Constitution read in relevant part, "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed," echoing the language of the Sixth Amendment to United States Constitution. For the next 73 years, Oregon treated that constitutional provision as requiring unanimous jury verdicts, just as this Court treated the Sixth Amendment jury provision.

Other aspects of Oregon's constitution do not fare well. A clause of the state's new constitution included a provision that stated, "No free Negro, or Mulatto, not residing in this state at the time of the adoption of this constitution, shall come, reside, or be within this state, or hold any real estate, or make any contracts, or maintain any suit therein." Article I, section 35, Oregon Constitution (1857). After the Civil War, the state "went its own way in attempting to prohibit full citizenship and equality." City of Portland Bureau of Planning, *History of Portland's African American Community (1805-to the Present)* (1993) at 7

(hereinafter *History*).[2] For example, cities and counties were allowed to pass "sundown laws" that created curfews for all African-Americans, and the legislature enacted an annual five-dollar poll tax on "every Negro, Chinaman (Hawaiian) and Mulatto" in the state. *Id.*

Although there were still racial exclusion laws on the books, the first two decades of the twentieth century saw a small but vibrant African-American community develop in Portland, including physicians, police officers, male and female attorneys, and entrepreneurs. *History* at 24-25, 33-34.

However, unlike the origin of non-unanimous juries in Louisiana in Reconstruction Era racial politics, Oregon's jury unanimity continued through the turn of the century. As of 1906, African-Americans "were allowed to vote and serve as jurors." *Id.* at 29. Schools, restaurants, and theaters were integrated to a certain extent, and, although there were some residential restrictions, African-Americans in most cases "could buy or rent homes wherever they wanted." *Id.*

But during the 1920s, competition for jobs and for housing led to increased discrimination against minorities. The Ku Klux Klan appeared in Oregon in 1921 and had 14,000 members by the following year. Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous*

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[2] At: https://www.oregon.gov/oprd/HCD/OHC/docs/multnomah_portland_AlbinahistoryofafricanAmerican community.pdf).

Criminal Jury Verdicts in Louisiana (La. State University Press, 2015), at 39.[3] African-Americans and Asians were systematically excluded from buying or renting housing in "White" neighborhoods. *History* at 29-30. The Great Depression further exacerbated discrimination. *Id.* at 54. Service industry jobs went to white men and women rather than to African-Americans. *Id.* Black-owned businesses collapsed as their patrons lost their jobs. *Id.* Unions refused to allow African- Americans to join. *Id.* at 29. Tensions grew between labor organizations and management, culminating in a lengthy and sometimes violent dockworker strike that paralyzed shipping along the entire West Coast. "Government Help Asked in Strike," *Morning Oregonian* at 12 (May 12, 1934); *Jim Crow's Last Stand* at 40.

At the same time, Oregon's population went through several cycles of immigration. Although Jews and Catholics had been present since Oregon's founding, they began to arrive in greater numbers in accord with waves of immigration from Europe at the dawn of the twentieth century. *See generally* William Toll, *Fraternalism and Community Structure on the*

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[3] *See* Joe Streckert, "Echoes of the Klan," *Portland Mercury* (Nov. 15, 2017) ("The first thing the Klan did was fuse religious bigotry with racial bigotry," says [Linda] Gordon. "While they never stopped attacking African Americans, they added Catholics and Jews to the enemies list."); *see also* Linda Gordon, *The Second Coming of the KKK: The Ku Klux Klan and the American Political Tradition* (Liveright Publishing Company, 2017).

Urban Frontier: The Jews of Portland, Oregon: A Case Study, 47 PAC. HIST. REV. 369 (1978) (describing Jewish immigration to Portland increasing beginning in 1890). Against this backdrop, Oregon reconsidered its approach to criminal jury verdicts. The genesis of Oregon's constitutional amendment to allow non-unanimous jury verdicts is not as straightforward as that of Louisiana, where in 1898 the goal was to eliminate "the mass of corrupt and illiterate voters" who had increased the voting rolls during Reconstruction. John Simerman and Gordon Russell, "In Louisiana's split-verdict rule, White supremacist roots maintain links to racist past." *The Advocate*, April 7, 2018. Rather, Oregon's constitutional amendment appears to have arisen after a series of several high-profile cases with racial and religious undertones.

1. The Massie-Fortescue case.

In 1932, Oregon's leading newspaper, then called the *Morning Oregonian*, covered the "Massie-Fortescue" case in Hawaii. Joseph Kahahawai, a native Hawaiian man was accused of assaulting Mrs. Massie, the wife of a naval officer in Hawaii, but was not convicted because the jury could not reach an agreement. "Threat of Boycott Appears in Hawaii," *Morning Oregonian* at 2, May 3, 1932 (noting that the Senate responded by passing without debate "a bill to prevent two successive jury disagreements in Hawaiian criminal cases from operating as an acquittal"). Massie's husband, mother, and two other naval officers kidnapped Kahahawai

and lynched him. "Four Released in Hawaii," *Morning Oregonian* at 3, January 31, 1932. All four were prosecuted for murder. After 28 hours of deliberation, the jurors were reportedly 10-2 for acquittal. "Jury Deadlocked in Hawaiian Case," *Morning Oregonian* at 1, April 29, 1932. They were ultimately convicted of manslaughter with "recommendations for leniency." "Honor Lynchers Declared Guilty," *Morning Oregonian* at 1, 4, April 30, 1932.[4]

The editors wrote that, had the trial taken place on the mainland, the defendants probably would have been acquitted: "American laxness in enforcing the law-particularly where the heart of the jury is moved-is notorious the world over. We are worse than the Frenchmen for sobbing in the courts and are paying for it with crowded penitentiaries and the most astounding crime record on earth." "The Massie-Fortescue Solution," *Morning Oregonian* at 8, May 6, 1932. The following day, in an editorial, the *Morning Oregonian* commended the "sense of duty" of the white jurors on the jury:

> The Oregonian by no means condemned the jury in the Massie-Fortescue case. It called attention to the sense of duty shown by the white persons on the jury in bringing in a verdict of guilty against their fellow white

[4] Although each was sentenced to 10 years in prison, their sentences were all commuted to one hour in custody. "Governor Frees Hawaii Quartet," *Morning Oregonian* at 1, May 5, 1932.

> men, as contrasted with the lack of responsibility shown by native and mixed-blooded people in freeing the assaulters of Mrs. Massie. We certainly do not wish the white people to sink to the native views on crime and punishment, but the natives must be aroused by some means to a realization of what jury duty means.

Morning Oregonian at 6, May 7, 1932.

2. State v. Silverman

Oregon found its own sensational case eleven months later in a "gangland" double murder. Frank Kodat, the owner of a speakeasy, was shot on the morning of April 21, 1933. *State v. Silverman*, 148 Or. 296, 297, 36 P.2d 342, 343 (1934). The suspected shooter was James Walker, who had recently been released from prison, and who was engaged in an affair with Kodat's former girlfriend, Edith McClain. "Violence Feared by Gang's Victim," *Morning Oregonian* at 1, 3, April 24, 1933. Abe Levine, the bartender at Kodat's speakeasy, went looking for Walker along with two of Kodat's friends, Jacob and Maurice Silverman. *Jim Crow's Last Stand* at 39-40. The next morning, the bodies of James Walker and Edith McClain were discovered, executed in apparent retaliation for the shooting of Kodat. "Gangsters Slay 2 Near Portland," *Morning Oregonian* at 1, April 23, 1933.

Jacob Silverman, who was a Jewish hotel proprietor, was arrested and prosecuted for the murders of Walker and McClain. *Jim Crow's Last Stand* at 40. The jurors deliberated for nearly 17 hours, asking several questions, before convicting Silverman of manslaughter rather than murder. "Silverman Guilty of Manslaughter," *Morning Oregonian* at 1, November 17, 1933. The next day, the *Morning Oregonian* reported that the jury had split on both first-degree and second-degree murder charges, with one or two jurors repeatedly holding out on the second-degree murder charge. "Sentence Comes Today," *Morning Oregonian* at 3, November 18, 1933. On the twelfth ballot, the jury reached a compromise verdict of manslaughter. *Id*.

For Oregon newspapers, the *Silverman* verdict became another example of juries run amok. One week after the verdict, the *Morning Oregonian* published an editorial:

> Objections have been especially pointed in the Silverman case, since it has been alleged, and apparently with authority, that a few hours after the case went to the jury, the vote stood eleven for conviction on second degree charges and one opposed. The one opposition vote is said to have remained unchanged during the remaining eighteen hours that the jury was out, finally forcing the compromise verdict of manslaughter. Obviously, *Silverman* was not guilty of manslaughter. Either he murdered Walker or he was not involved. But the eleven

> who stood for second degree either had to give way, or the state had to pay the expenses of a second trial following disagreement.
>
> This newspaper's opinion is that the increased urbanization of American life, the natural boredom of human beings with rights once won at great cost, and the *vast immigration into America from southern and eastern Europe, of people untrained in the jury system*, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory.

Morning Oregonian at 8, November 25, 1933 (emphasis added). The editorial went on to opine that, "[u]ltimately, conviction will have to be made possible with less than a unanimous vote of the twelve jurors." *Id*.

3. The end of unanimity

Within a week of the *Silverman* verdict, efforts were underway to end jury unanimity requirements. On November 24, 1933, the Oregon Senate introduced Senate Joint Resolution 4, which would amend the Oregon Constitution to require the agreement of only ten jurors to reach a verdict in all criminal prosecutions except that of first-degree murder. *State of Oregon Journals of the Senate and House, Second Special Session of the Thirty-Seventh Legislative Assembly* 21, 52 (1933). As soon as the legislature passed the resolution referring the constitutional

amendment to the voters on December 9, 1933, the *Morning Oregonian* urged Oregon voters to adopt it:

> If, after the elapse of five months, the people of Oregon are still as indignant over the miscarriage of criminal justice as they are today, it is probable that this state will adopt the plan of permitting ten members of a criminal jury to return a verdict, in all except capital cases.
>
> The late legislature, though full of lawyers, as all legislatures are, and consequently a bit slow to act on court reform, nevertheless was sufficiently influenced by the wave of public indignation to refer to the people, for decision at the special election in May, a measure authorizing the jury change. It merely so happened that the *Silverman* case in Oregon and the epidemic of lynchings elsewhere came at exactly the right time to bring unprecedented pressure to bear upon the legislature. Now it becomes a matter for the voters to decide for themselves.

"Jury Reform Up to Voters," *Morning Oregonian* at 6, December 11, 1933.

In March 1934, two months before the election, the *Morning Oregonian* again advised the voters to adopt the constitutional amendment, noting that, "[w]ithin the week, in the circuit court of Multnomah County, an assault case dragged along for three days, only to

result in a hung jury. And it is reported that the jury stood at 10 to two. Had the proposed amendment been in effect a verdict would have been reached, and the county saved the expense of a retrial." "Verdicts by Ten," *Morning Oregonian* at 8, March 27, 1934. The newspaper argued that the requirement of jury unanimity was a vestige of the days in which jurors were essentially fact witnesses and that ending the unanimity requirement would benefit everyone. *Id*.

In the weeks before the May 1934 special election, a massive dockworker strike brought both crime and immigrants back to the forefront of voters' minds, particularly as it grew violent when strike breakers were brought in. *See* "Battle Flares on Waterfront," *Morning Oregonian* at 1, May 11, 1934; Aiello, *Jim Crow's Last Stand* at 40 (explaining that "white Protestants associated Jewishness with labor unions and communism" and that the strike "stok[ed] fears about poverty, crime, and labor unions."). The strike paralyzed shipping up and down the entire West Coast. "Government Help Asked in Strike," *Morning Oregonian* at 12, May 12, 1934.

Against this backdrop, Oregon voters went to the polls to determine the question of jury unanimity. The Oregon voters' pamphlet contained one statement in support submitted by three legislators which included:

> The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement. The amendment has been endorsed by the district

> attorney's association of this state and is approved by the commission appointed by the governor to make recommendations amending criminal procedure.
>
> Disagreements not only place the taxpayers to the expense of retrial which may again result in another disagreement, but congest the trial docket of the courts.
>
> The amendment provides that a jury of ten may return a verdict save and except in first degree murder. A notable incident of one Juror controlling the verdict is found in the case of *State v. Silverman* recently tried in Columbia county. In this case 11 jurors were for a verdict of murder in the second degree. One juror was for acquittal. To prevent disagreement 11 jurors compromised with the one juror by returning a verdict of manslaughter. This they were compelled to do to prevent large costs of retrial.

Official Voters' Pamphlet, Special Election, May 18, 1934, at 7. The only statement against the amendment argued that it would not accomplish the desired results. *Id.* at 8.

The voters passed the constitutional amendment, which the *Morning Oregonian* linked directly to the desired result in a single case:

> The *Silverman* case was only one of several that in recent years have affronted the public sense of justice. In that instance one juror prevented the remaining eleven jurors from bringing in a verdict of guilty of murder in the second degree, and forced a compromise verdict of manslaughter.

"The Ten-Juror Law," *Morning Oregonian* at 8, May 21, 1934. The *Oregon Daily Journal* described its passage as a victory for law-abiding citizens, also referencing the desired result in a single case:

> Enforce all law, is a plainly implied mandate by the people in last Friday's Oregon election.
>
> An example is the overwhelming vote for the 10-juror amendment. It was proposed by the district attorneys of Oregon as a means of preventing one or two jurors from making jury verdicts a matter of the choice of one or two jurors. There, for instance, was the double murder near Scappoose, where a man and a woman taken for a ride out of Portland were shot to death and their bodies tossed carelessly into a canyon gulch.
>
> That [*Silverman*] case was decided by a one-man jury. Eleven of the jurors stood for conviction, but the one juror held out for manslaughter and hung the jury. In case after case of the kind, justice has been cheated and

> guilty men have escaped through prejudice or the crookedness of one man.

"In Rising Wrath," *Oregon Daily Journal* at 6, May 21, 1934. Although the ten-juror verdict faced constitutional challenges after 1935, it persists in Oregon to this day. *E.g.*, *State v. Gann*, 254 Or. 549, 565, 463 P.2d 570, 577 (1969).

B. The consequences of Oregon's non-unanimous jury rule include denying jurors meaningful participation in deliberations and less reliable verdicts.

The non-unanimous jury rule allows conviction despite the reasonable doubts of one or two jurors. This Court has recognized the systemic importance of jurors' participation in the deliberative process leading to a verdict. *See J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 145 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system."); *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."). The non-unanimous jury rule works against that cause by focusing jurors away from their duty of evidence evaluation and by eliminating

minority juror voices, which often are those of a racial or ethnic minority.

1. Verdict-driven deliberations v. evidence-driven deliberations

A signature feature of non-unanimous juries is a truncated, verdict-driven deliberation that eliminates meaningful participation by some jurors. Angela A. Allen-Bell, *How The Narrative about Louisiana's Nonunanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 MERCER L. REV. 585, 607 (2016). That is in contrast to the evidence-driven deliberations of juries required to be unanimous in their verdicts. Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L. J. 593, 602 (1987). Evidence-driven juries "will start by discussing and comparing views on the evidence," while verdict-driven juries stop deliberations when they reach a consensus. Aliza Kaplan & Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts In Criminal Cases Undermine The Credibility Of Our Justice System*, 95 OR L. REV. 1, 34 (2016). The verdict-driven jury that undergoes comparatively less deliberation than the evidence-based jury is less likely to reach an accurate verdict. *Id.* at 34.

2. The non-unanimous jury rule eases the path to conviction

The Oregon Supreme Court has recognized that the purpose of Oregon's non-unanimous jury rule is "to make it easier to obtain convictions." *State ex rel. Smith v. Sawyer*, 263 Or. 136, 138, 501 P.2d 792 (1972). And indeed it has. A 2009 report, which reviewed felony jury verdicts of indigent defendants appealing their cases in 2007 and 2008, found that 65.5 percent of felony cases where the jury was polled had non-unanimous verdicts. Oregon Office of Public Defense Services Appellate Division, *On the Frequency of Nonunanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission* at 4 (May 21, 2009).[5]

A non-unanimous verdict weakens the reliability of a conviction. Deliberations are cut off prematurely based on majority reliance on the rule that ten votes is close enough, leaving minority jurors' doubts unresolved. Non-unanimity "demonstrates the existence of reasonable doubt that could not be explained during the deliberation of twelve vetted jurors and shows that the government has failed to meet its burden of proof." Kaplan, at 29. Jurors who voiced their experiences as those who voted not guilty when trial courts accepted non-unanimous guilty

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[5] At: http// www.oregon.gov/OPDS/docs/Reports/ PDSCReport NonUnanJuries.pdf

verdicts consistently expressed lack of confidence in the justice system.

Beyond the practical fact that twelve is greater than ten or eleven, non-unanimous jury verdicts are also less reliable than unanimous verdicts because they lack the "most wide-ranging discussions-ones that address and persuade every juror." Commentary 4 to the American Bar Association, Criminal Justice Standards on Trial by Jury (1996). Notably, Oregon requires unanimous verdicts in first-degree and capital murder cases. Or. Const. art I, § 11. The recognition that, in the most serious cases, unanimity is required suggests that Oregon recognizes that unanimous verdicts result in greater reliability and chooses against weakening the reasonable doubt standard in the most serious cases.

3. Observations of jurors who have participated in non-unanimous deliberations

Amici have identified several jurors that have participated in jury service and sat on juries that reached non-unanimous verdicts in criminal cases. Each describes their experience as demoralizing. These jurors' comments demonstrate the real and systemic harms from abandoning the Founders' conception of trial by jury:[6]

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[6] All juror declarations referenced in this brief are included in the Appendix of the *Amicus* in appropriate format. Original signed declarations are held by Professor Aliza Kaplan. They were obtained by contacting jurors who participated in cases

> I kept trying to point out that there wasn't enough evidence, that other people had to have the same questions I had. . . .
>
> But instead I got attacked for pointing out these things. . . .
>
> We had been deliberating for a while, and it was close to 5 pm, and everyone wanted to go home. And people kept saying that they weren't getting paid for this, lets just go, lets vote again and get this over with. All we need is 10. And we voted again and one of the [three] hold outs had switched to guilty, and that was that.
>
> I feel very demoralized about how this deliberation occurred. Most of the jurors did not follow the instructions that were read to us, they just wanted to be done with it, they wanted to vote with their feelings and not based on the facts presented to us, and because they could ignore the 2 of us that disagreed with us, they did.

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with known non-unanimous verdicts. The cases were identified through an inquiry to Oregon criminal defense attorneys.

Declaration of Felipa Fales, *State v. Strebendt*, No. 18CR27375 (Or. Cir. Ct. March 2019),[7] (one of two jurors who voted not guilty), at AA-3 to AA-4.

> Some of us decided to trade our votes in order to reach 10 on at least some of the counts. We agreed to vote guilty on 3 of the counts, if the jurors vocally voting guilty would change their vote to not guilty on other counts. This was ultimately how we reached 10-2 verdict on 3 counts. I remember feeling extremely uncomfortable about what had happened.

Declaration of Kerry Harrington, *State v. Chitwood*, No. 15CR48036, (Or. Cir. Ct. 2017),[8] (one of two jurors who voted not guilty), at AA-10 to AA-11.

> I even made the comment to other jurors that if they wanted me to stop talking because they only needed their 10 votes I would. Needing only 10 jurors forces some jurors to be silenced in the deliberation process and removes diversity of thought, especially for those jurors from an underrepresented class of people on the jury panel.

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[7] In *State v. Strebendt* a jury in Lane County, Oregon, found the defendant guilty of second-degree sexual abuse by a 10-2 verdict.

[8] In *State v. Chitwood*, a Douglas County, Oregon, jury found the defendant guilty of multiple counts of sexual abuse, sodomy, and sexual penetration by 10-2 verdicts.

Declaration of Jaclyn R. Moore, *State v. Strebendt*, *supra* (one of two jurors who voted not guilty), at AA-18 to AA-19.

As evidenced by the jurors' declarations, the effect of the verdict-driven system is to remove meaningful participation of jurors from the justice system. The jurors' statements also expressed concerns that other jurors based their conclusions on personal feelings rather than the evidence, and that hold-out jurors changed their votes to guilty based only on the desire of the group to finish deliberations. The non-unanimous jury rule causes jurors' roles as factfinders to be replaced with trading of votes in exchange for escaping jury duty as quickly as possible.

C. Disenfranchisement of jurors through non-unanimity falls most heavily on jurors who are racial or ethnic minorities.

A result of a verdict-driven jury seeking quick consensus is that juries' majority-opinion holders focus on pressuring a sufficient amount of minority-opinion holders to join the majority rather than fully considering the minority opinions. The non-unanimous jury's effect on the minority of juror votes exacerbates the underrepresentation of racial and ethnic minorities in the jury system. The combined effect of disenfranchising minority voters who are also minorities in the community deprives defendants of the right to a jury that represents a cross-section of their community.

Consider that, according to the last census, Oregon is 87.5 percent white and 12.4 percent non-white.[9] Excluding two of twelve jurors excludes 16.6 percent of the jury. Simple math indicates that a non-unanimous jury rule can effectively silence minorities in the jury system if that jury was drawn from an average cross-section of the community. But those numbers do not consider that racial and ethnic minorities are disproportionately underrepresented in Oregon juries. Or. Judicial Dep't, Office of the State Court Administrator, *The Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System* (May 1994) (hereafter 1994 Report),[10] Oregon Supreme Court Chief Justice Edwin Peterson established a task force on racial and ethnic issues in Oregon's judicial system in 1994. Case Parks, *Oregon State Bar Diversity: Racial Bias Report 'true today just as it was in 1994,' Chief Justice says*, *The Oregonian* (Jan 14, 2015).[11] The report stated that "[a] consensus exists that 'American jury systems tend to over represent white, middle-aged, suburban, middle-class people and under represent other groups.'" *1994 Report* at 74. And it acknowledged that "[t]oo few minorities are called for jury duty, and even fewer minorities actually

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[9] July 1, 2015, census, available at: http://www.census.gov/quickfacts/table/PST045215/41.

[10] At: http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/rac_eth_tfr.pdf.

[11] At: http://www.oregonlive.com/portland/index.ssf/2015/01/oregon_state_bar_diversity_Rac.html.

serve on Oregon juries" and that "[p]eremptory challenges * * * are used solely because of the race or ethnic background of prospective jurors." *Id.* Even when those racial and ethnic minority members are not excluded as jurors, a majority of jurors can still easily dismiss the votes of minority jurors should they vote against conviction.

One example of a racial minority jury member's voice being eliminated is found in the case of *State v. Williams*, 297 Or. App. 16, __ P.3d __ (Or. App. 2019). There, the defendant was an African-American man accused of sodomizing a white victim. *Id.*, 297 Or. App. at 17. The state charged defendant with two counts of Sodomy in the First Degree. *Id.* The jury acquitted defendant on one count, and convicted defendant on the other count based on a 10-2 verdict. *Id.* At sentencing, the only African-American juror stated that she was one of the two not-guilty votes and opined that the conviction was unfair. *Id.*

Later, the two jurors who voted to acquit Mr. Williams divulged that the jury was verdict-driven, focusing on obtaining a consensus while refusing to consider the evidence or the opinions of the jurors in the minority. *State v. Williams*, No. 15CR58698 (Or. Cir. Ct. Dec 15, 2016), Defense Ex 110, 111; *see also* Declaration of Richelle Baldock, AA-1 to AA-3; Declaration of Cashnita Spencer, AA-20 to AA-25. The jury started deliberations with a split vote-eight jurors believed that the defendant was guilty, three believed that he was innocent, and one was undecided. *Id.* At the end of the day, the court clerk informed the jury

that they must return the following day if they could not reach a verdict. *Id*. After that, the jurors overtly advocated for one of the hold-outs to switch to a guilty vote in order to avoid another day of deliberations. *Id*. One of the three not-guilty voters decided to switch her vote after voicing her concern that she could not return the next day and could not stay late because of her childcare arrangement. *Id*.

Two of the jurors who maintained their not-guilty votes explained the feeling of knowing that her vote and that of the only African-American juror did not count:

> When we reached 10 voting guilty, and we went out into the courtroom and the judge read our verdict, it was the worst feeling in the world. It was heart wrenching to see this man get convicted after what I had just seen take place in the jury room; particularly because my voice and the other juror's voice who had voted not guilty, were ignored, and that that was allowed.

Declaration of Richele Baldock, *State v. Williams*, *supra*(one of two jurors who voted not guilty), at AA-2.

> The opinions of myself [the only African-American juror] and my fellow juror were not taken seriously because they did not matter to reach a conviction.

Cashnita Spencer declaration, *State v. Williams*, *supra* (the only African-American juror and one of two jurors who voted not guilty), at AA-24.

D. In easing the path to conviction, the non-unanimous jury rule disproportionately impacts minority defendants.

The easier convictions of non-unanimous verdicts occur at a disparate rate for minority criminal defendants. Juries consistently underrepresent minorities, and even juries that include one or two minorities effectively can become all-white juries through application of the non-unanimous jury rule. The disparate impact on minority defendants is evident in the fact that "all-white jury pools convict black defendants . . . . 16 percentage points[] more often than white defendants." Shamena Anwar *et al.*, *The Impact of Jury Race in Criminal Trials*, 127 QUARTERLY J. OF ECON. 1017, 1046-47 (2012). Research supports this, consistently indicating that jurors are biased in favor of those who are like them. *See* Kaplan, at 33 (summarizing research); Jerry Kang *et al.*, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

"Implicit bias" is "attitudes or stereotypes that affect our understanding, decisionmaking, or behavior, without our even realizing it." Kang, at 1126. It is generally accepted among social scientists that people unconsciously adopt societal stereotypes. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J.

345, 363 (2017). A study on jurors that compared racially diverse juries with all-white juries found that racially diverse juries "had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer uncorrected statements, and greater discussion of race-related topics." Kang at 1180 (explaining juror study by Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Informational and Motivational Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)). The advantages from more diverse juries may be explained by the effect of counteracting "implicit bias." Such bias extends to how jurors remember evidence introduced at trial. For example, white participants of one study "had an easier time successfully recalling aggressive facts when the actor was African American compared to when the actor was Caucasian." Levinson, at 345-46.

The implicit bias of the predominantly white juries, especially when considering that any potential minority views may be ignored under the non-unanimous jury rule, is particularly concerning when applied to minority defendants, who are overrepresented in the criminal justice system. The MacArthur Foundation's report on race in the criminal justice system in Multnomah County, Oregon, where Portland is located, revealed that, compared to whites, African-American people are overrepresented in every phase of the county's criminal justice system. Safety and Justice Challenge, *Racial and Ethnic Disparities*

and the Relative Rate Index (RRI) 7 (2016).[12] The report's findings included that African-American people are 4.2 times more likely to have their cases referred to the District Attorney, and they are seven times more likely to be sentenced to prison. *Id.*

The result of implicit biases within a non-unanimous jury system magnifies disparate impacts of the criminal justice system on minorities. Racial bias degrades all aspects of the justice system. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) ("racial bias [in a jury is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice"); *J. E. B.*, 511 U.S. at 146 ("When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized."); *Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude Black persons from juries undermine public confidence in the fairness of our system of justice.").

E. The non-unanimous jury rule makes wrongful convictions more likely.

Wrongful convictions by non-unanimous juries are real and preventable. Although imperfections in the system can result in conviction of innocents, those imperfections are exacerbated by not requiring jury

[12] At: https://multco.us/file/48681/download.

unanimity, as reflected by the exonerees in both Oregon and Louisiana who were convicted by non-unanimous juries. *See* Kaplan, at 37-38 (documenting Oregon and Louisiana exoneration cases).

In Oregon, a non-unanimous jury convicted Pamela Reser in 1999 of 17 counts of first-degree rape, eight counts of sodomy, and four counts of first-degree sexual abuse, based on allegations made by her children. She received a 116-year prison sentence. Several years later, after her children recanted and passed polygraph tests, the state and defendant filed a joint motion for a new trial. The trial court then dismissed the charges on the state's motion, and she was released. *Pamela Sue Reser*, The National Registry of Exonerations.[13]

In 1999, the state indicted Bradley Holbrook for two counts of sexual abuse. A 2001 trial resulted in a mistrial because the jury was unable to reach a verdict. The state re-indicted defendant on three counts of sexual abuse. The state based its case on inconsistent allegations of the complaining child and testimony of a child therapist and a physician. In 2002, at his second trial, a jury acquitted defendant of two counts of sexual abuse but found him guilty of one based on an 11-1 verdict. After several appeal and post-conviction relief proceedings, and after having

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[13] At: http://www.law.umich.edu/special/exoneration/Pages/ casedetail.aspx?caseid=3571.

served his entire mandatory prison sentence of six years and three months, the Oregon Court of Appeals vacated his conviction and ordered a new trial in 2017. And on May 31, 2018, the trial court dismissed the case against Holbrook on the state's motion. *Bradley Holbrook*, The National Registry of Exonerations.[14]

In 2017, an Oregon jury convicted Joshua Horner of 15 counts of rape, sexual assault, and other sex offenses. The convictions were based on non-unanimous verdicts for all but one. During trial, the complainant alleged for the first time in her testimony that Horner had shot their family dog to death in front of her. But she failed to remember many details that she had originally alleged about the assaults. In 2018, on appeal, the state joined in a motion for a new trial based on the trial court's exclusion of defendant's exculpatory evidence. During that time, the former family dog was found alive and living with its new owners, as defendant had always claimed. The state moved to dismiss the charges, which the trial court granted. *Joshua Horner*, The National Registry of Exonerations.[15]

Other innocent people likely remain convicted by non-unanimous jury verdicts, but their convictions are

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[14] At: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5348.

[15] At: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5375.

intact because it is extremely difficult to overturn a conviction based on a claim of innocence. *See* Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, 2012) (finding that, of 250 of the first DNA exonerees, 90 percent of those who challenged their convictions in court prior to DNA testing failed).

F. Oregon's deviation from jury unanimity as an essential protection of the Sixth Amendment undermines confidence in Oregon's criminal justice system.

Many and diverse Oregon voices call for an end to non-unanimous juries, including Oregon's defense bar and its county and state prosecutors. The Oregon Criminal Defense Lawyers Association recently explained that requiring jury unanimity "will ensure that fundamental and necessary rights of the accused-to receive a fair trial where prosecutors must prove their case beyond a reasonable doubt and jurors fully and fairly deliberate before returning a verdict-are required in Oregon." *Public Hearing on H.J.R. 10 Before the H. Comm. On Rules*, 80th Leg. (Or. May 6, 2019) (statement of Mary A. Sofia, Legislative Director, Oregon Criminal Defense Lawyers Association). The Oregon District Attorneys Association (ODAA) had historically opposed ending the practice. Now, however, nearly all of Oregon's prosecutors and the ODAA support ending the state's non-unanimous jury verdicts. The Oregon Attorney General's office has explained that Oregon's non-unanimous jury rule exacerbates racial disparities

"endemic across Oregon's criminal justice system" because "allowing a conviction with less than unanimity can easily exclude minority voices." *Id.* (statement of Aaron Knott, Legislative Director, Oregon Department of Justice). The ODAA supports adding the unanimity requirement to align Oregon with the rest of the states and the federal system.[16] It also recognizes that "unanimity is another important safeguard against both wrongful convictions and wrongful acquittals." *Id.* (statement of Baker County District Attorney Matt Shirtcliff, President, Oregon District Attorneys Association).

Moreover, the media that once called for the deviation from the traditional Sixth Amendment right to jury trial protections has reversed course by repeatedly raising concerns that the non-unanimous jury scheme degrades Oregon's justice system. For example:

- "Editorial: High court could defuse jury issue," *Corvallis Gazette-Times* (March 25, 2019) (recognizing that *The Oregonian* recanted its 1933 editorial position in support of the non-unanimous jury rule);

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[16] In November, 2018, three of the 36 district attorneys in Oregon wrote an editorial opposing ending non-unanimous jury verdicts. Josh Marquis, William B. Porter, Steve Leriche, *Opinion: We trust Oregonians with non-unanimous juries*, *The Oregonian/Oregonlive*, (Nov. 17, 2018).

- "Lawmakers Hear Broad Support For Scrapping Oregon's Nonunanimous Juries," *Oregon Public Broadcasting* (May 6, 2019);

- "Nonunanimous juries need to be eliminated," *Corvallis Gazette-Times* (March 28, 2019);

- "Editorial: Fixing a flaw in Oregon's jury system," *Albany Democrat-Herald* (Nov. 12, 2018);

- "Re-examine split juries," *Eugene Register-Guard* (Oct. 7, 2017);

- "Addressing Oregon's legacy of injustice," *Medford Mail Tribune* (Sept. 10, 2017);

- "Editorial: Jury rule still stains state constitution," *Corvallis Gazette-Times* (Feb. 7, 2018);

- "Legislators should seek repeal of Oregon's outlier jury law: Editorial," *The Oregonian* (Feb. 3, 2018);

- "Editorial: Unanimous jury ballot measure has merit," *Corvallis Gazette-Times* (Jan. 17, 2018);

- Conrad Wilson, *Oregon DAs To Back Campaign Against Nonunanimous Juries*, Oregon Public Broadcasting (Jan. 10, 2018);

- "Justice requires a tougher standard than 'guilty enough:' Editorial," The Oregonian (Sept. 17, 2017).

Oregon's jurors have confirmed that the non-unanimous jury rule degrades the justice system, expressing their disillusion with their service as a result of the rule:

> I lost faith in the criminal justice system based on how the 10 jurors came to find the defendant guilty in this case. That was not a just trial.

Baldock Declaration, *State v. Williams*, *supra*, at AA-2.

> If everyone had to actually be counted, I don't think we would have been able to reach a guilty verdict, with 12 of us all agreeing.

Fales Declaration, *State v. Strebendt*, *supra* (one of two jurors who voted not guilty), at AA-3.

> [I]t is my strongly held belief that as a jury we were not fair and impartial due to the limitation of having to only have 10 jurors vers[us] a unanimous decision . . . .

Moore Declaration, *State v. Strebendt*, *supra*, at AA-19.

> I do not think we would have reached a guilty verdict on any counts if we had been required to have 12 jurors agree.

Harrington Declaration, *State v. Chitwood*, *supra*, at AA-11.

> Had a unanimous jury been required, then Mr. Williams would not have been convicted because based on the facts of the case as presented in court, I would never have voted him guilty.

Spencer Declaration, *State v. Williams*, *supra*, at AA-24 to AA-25.

Simply put, Oregon's overriding interest in a fair and effective criminal justice system will be furthered by the Court's recognition of the traditional Sixth Amendment unanimity requirement, which Oregon embraced prior to 1934. The Fourteenth Amendment's due process clause should incorporate the full protection of the Sixth Amendment's right to a jury trial, which will strengthen confidence in the state's justice system while protecting defendant rights and the role of jurors as essential vectors of democratic values.

Conclusion

For the reasons stated above, *Amici* urge this Court to fully incorporate the fundamental Sixth Amendment guarantee of a unanimous verdict.

Respectfully submitted this 16th day of June, 2019.

/s/Jeff Ellis
Jeff Ellis
Attorney at Law
Oregon Capital Resource Counsel
621 SW Morrison Street, Ste 1025
Portland, OR 97205
Counsel for Amici Curiae

APPENDIX

DECLARATION

I, Richele Baldock, hereby declare, under penalty of perjury, the following to be true:

I served on a jury in a felony case in Multnomah County, Portland, Oregon, in 2019. The case involved two counts of Sodomy.

On one of the counts, all of the jurors agreed the defendant was guilty.

On the second count, however, I was one of two jurors who did not believe the defendant was guilty.

Before our deliberations, we took a count and there were three of us who were voting not guilty. But after almost a week of trial, we were all tired. I remember being told that if we did not reach a verdict, which was 10 jurors agreeing, then we would have to come back the next day. A few of the jury members said that they had children, and they weren't being paid to be there, and they couldn't come back another day. And I think this is what caused one of the three of us to change their mind, because they switched to guilty and then we had a verdict.

I did not fully grasp that only 10 of us had to agree. I was shocked to learn that that was all it took.

I remember trying to talk to the jurors about the doubts I had. I felt like one juror in particular was trying to peer pressure me into changing my mind. She asked me to explain why I did not think the defendant was guilty. I responded that I had doubts - and I explained some of my doubts to the juror, but I could tell she wasn't really listening to what I had to say.

I'll never forget that at one point, one juror said that they had a terrible sexual incident occur to them, and because of that, they could not let this defendant go free. I was stunned that this juror who was clearly biased was on the jury, and talking about things that we weren't supposed to talk about openly as we were trying to deliberate.

When we reached 10 voting guilty, and we went out into the courtroom and the judge read our verdict, it was the worst feeling in the world. It was heart wrenching to see this man get convicted after what I had just seen take place in the jury room; particularly because my voice and the other juror's voice who had voted not guilty, were ignored, and that that was allowed.

I've lost faith in the criminal justice system based on how the 10 jurors came to find the defendant guilty in this case. That was not a just trial.

5-12-19	Richele Baldock
Date	Printed Name
	/ s/ Richele Baldock
	Signature

DECLARATION

I, Felipa Fales, hereby declare, under penalty of perjury, the following to be true:

I served on a jury in a felony case in Lane County, Eugene, Oregon, in March 2019. The case involved one count of Sex Abuse in the Second Degree.

I was shocked to learn about non-unanimous verdict. I had no clue that as the law.

I was discouraged about my experience serving on a that resulted in a 10 to 2 non-unanimous verdict of guilty.

From the moment we began deliberating, we took a poll of where everyone was standing. That vote came out 9 to 3, with 3 of us voting not guilty. The whole time in the jury room, the attitude of most of the jurors then became "how can we got one of those 3 to join us and have 10 voting guilty so we can get out of here?"

If everyone had to be actually counted, I do not think we would have been able to reach a guilty verdict, with 12 of all agreeing. I just had too many doubts. There was too much that was unanswered, that I had questions about, for me to vote guilty. And I think the other hold out juror felt the same.

I tried to point out that there was not enough evidence, and that other people had to have the same questions I had. I further argued that if we had questions, then

the state didn't do their job, and we couldn't find the defendant guilty. We were supposed to talk about the case, what had been presented to us in court, and I kept trying to get others to agree with me.

But instead I got attacked for pointing out those things.

One juror said she was 100% convinced the defendant was guilty because of these assumptions she had made about the defendant, not because of the facts that had been presented to us. Her and another juror kept bringing up the testimony of a state's witness who had been completely discredited. I tried to point out the holes in the witness's story, in the state's case, but these people didn't want to hear it. They ignored it.

We had been deliberating for a while, and it was close to 5 pm, and everyone wanted to go home. People kept saying that they weren't getting paid for this, they just wanted to go, they wanted to vote again and get their service over with. They kept saying " all we need is 10."

And we voted again and one of the hold outs had switched to guilty, and that was that.

I feel very demoralized about how this deliberation occurred. Most of the jurors did not follow the instructions that were read to us. They just wanted to be done with their service and deliberations. They wanted to vote with their feelings and nor based on the

facts presented to us, and because they could ignore the 2 of us that disagreed with us, they did.

5/14/19	FELIPA FALES
Date	Printed Name
	s/ Fales
	Signature

DECLARATION

I, Todd Fehrenbacher, hereby declare, under penalty of perjury the following to be true:

I served on a jury in a felony case in Deschutes, County, Bend, Oregon, in 2018. The case involved multiple counts of sexual abuse.

My experience on this jury was horrifying.

The trial had gone on for 3 or 4 days. When we went to the jury room to deliberate, we took a vote to see where everyone was standing. At that point, it was six voting guilty and six voting not guilty. So, we had to deliberate. The deliberations, if they can even be called that, that I witnessed in that jury room soured me on the whole experience.

I made it very clear to the rest of the jury that I was not changing my mind from not guilty, unless someone could explain to me how there was sufficient evidence in this case. The law instructed to us said that if the state had not presented enough evidence, then we could not vote guilty. I was not convinced beyond a shadow of a doubt, and so I could not find this man guilty of what he was accused of. One other juror agreed with what I had said and stated that he also had serious doubts. There were at least two of us who were not going to change our minds unless there was some evidence we were missing or forgetting.

Jurors started bringing up things that had nothing to do with the evidence we had seen in trial and the law the judge had instructed to us. A few jurors wanted to talk about what had happened to them as children, and why that meant they had to vote guilty. Some wanted to talk about other issues relating to the defendant that also were not part of the case.

I was frustrated that these few jurors seemed to be voting with their feelings, and not with what had been presented to us in court, as we had been told to do and as the law said we had to do. We ended up deliberating almost two whole days. On at least three occasions, the judge called us into the courtroom to see if we had reached a verdict. Each time, we informed the judge that we had not, that we were still deadlocked. The judge instructed us that if we continued deadlocked like this, then they were going to have to decide the jury was hung and declare a mistrial. But the judge didn't want to do that at that point, so they kept sending us back to deliberate more.

Jurors started talking about other things they had going on in their lives, and how because of these things, they just wanted the trial to be over. One juror had a dentist appointment; another needed to pick their child up from school. I reiterated that I was not changing my vote and would not convict this defendant because the state had not proven their case, and that I would stay there 10 days if I had to.

Before the second day was over, enough hold-outs changed their votes to guilty so that we reached l0 jurors voting guilty.

I could not believe what the jurors took into consideration to reach 10 voting guilty. And I was frustrated that so many people involved in this trial just wanted to reach the minimum when the defendant's future and life was at stake.

I do not believe we would have reached a verdict had we been required to be unanimous in our vote. If the law had required us to have 12 jurors all agreeing on guilt, we would not have made that mark, and the judge would have called a mistrial.

05/14/19
Date

Todd Fehrenbacher
Printed Name

s/ Todd Fehrenbacher
Signature

DECLARATION

I, Kerry Harrington, hereby declare, under penalty of perjury, the following to be true:

I served on a jury in a felony case in Douglas County, Roseburg, Oregon, in 2017. The case involved many counts of sex abuse, sodomy, and sexual penetration.

After three or four days of trial, on a Friday the trial ended and we were sent to the jury room to deliberate. I was immediately struck with and bothered by the fact that many of the jurors were acting like it was their job to present their own side of things. The jurors were talking about how they felt about the case and the trial, not what was actually presented to us. l specifically remember one juror saying that the case would not have gone through grand jury if there was no crime committed.

I tried to interject and remind the jurors of our job to deliberate the case presented to us.

But I sensed that the jury instructions were not taken to heart. I tried to point out multiple times that we were not supposed to deliberate based on our we felt, but what was presented to us in court; but my voice was not heard.

There were some strong personalities on the jury. It definitely shut down a few of us.

A couple of the jury members were wives of police officers, and I got the feeling that they did not want to do what we had been asked to do, which was look at the facts presented to us and apply the law that had been read to us by the judge. Instead these jurors presented their own case and if we didn't agree with their view, they made us feel really uncomfortable.

A particular sticking point for many of the jurors was the fact that we had been in trial all week, and we were deliberating on a Friday. Jurors expressed openly that they did not want to come back on Monday to deliberate more. And I admit, we were tired.

The vocal jurors did not out-right threaten or yell at the jurors voting not guilty, but they did sort of bully us to get what they wanted.

We polled ourselves many times. Each time, we did not have 10 jurors voting guilty. I got the impression that the vocal jurors who wanted to find the defendant guilty were hoping that the hold outs would change their vote if we kept polling.

We talked about unanimous verdicts, that we did not have all be together. I remember jurors saying that only 80% of us had to agree and then we would be done.

After many polls, it seemed like we were at an impasse. 10 votes seemed out of reach, and we were all exhausted.

At that point I believe many of us gave in and decided to change our minds. Some of us decided to trade our votes in order to reach 10 on at least some of the counts. We agreed to vote guilty on 3 of the counts, if the jurors vocally voting guilty would change their vote to not guilty on other counts.

This was ultimately how we reached 10-2 verdict on three counts. I remember feeling extremely uncomfortable about what had happened.

I felt so strongly about what had happened in the jury room that I wrote a letter to the judge. I did not feel that it was right that a person had been convicted because of juror fatigue and a few vocal jurors, instead of the evidence that had been presented in the courtroom.

I do not think we would have reached a guilty verdict on any counts if we had been requited to have 12 jurors agree.

6/6/19
Date

Kerry Harrington
Printed Name

s/ Kerry Harrington
Signature

DECLARATION

I, Victoria Moffet, hereby declare, under penalty of perjury, the following to be true:

I was the defense attorney in a felony case in Baker County, Oregon, in June 2009.

I have no particular recollection of the jury selection process or of any of the juror's names because it occurred 10 years ago. I do, however, specifically remember an interaction with a juror after the trial, because I have never been approached by a juror after a verdict has been rendered.

I recall being approached at my car after the verdict. The juror specifically told me the jury's vote was 9-3 until the judge gave them the deadlocked jury instruction, over my objection, and the majority convinced one of the three holdouts to flip.

The juror who spoke to me was very upset and wanted me to know that he and the other two jurors held out as long as they could and were instrumental in creating the "hung jury" that necessitated the deadlock instruction. He actually apologized that the jury had convicted my client.

I thanked him for his information and his service.

5/14/19	VICTORIA K. MOFFET
Date	Printed Name
	s/ Victoria K. Moffet
	Signature

DECLARATION

I, Jaclyn R. Moore, hereby declare, under penalty of perjury, the following to be true:

I served on a jury in a felony case in Lane County, Eugene, Oregon, in March 2019. The charge was one count of Sex Abuse in the Second Degree.

Before my jury service, I unaware of the State of Oregon's law pertaining to felony charge that only 10 jurors are required to agree in order to convict. The first time I learned of this was during the Judge's instructions to the jury.

During the beginning of deliberations, as jury we decided to anonymously poll for a preliminary verdict. The results were nine jurors for a guilty verdict and three for a not guilty verdict. The poll reflected the legal standard of 10 jurors was not met. This meant we needed to begin the process of deliberating the facts, evidence, law and jury instructions presented to us in the case.

Unfortunately, there was an immediate understanding that the majority of jurors, most who were upfront they voted guilty, felt that being detained in deliberations for any longer was unfair. In fact, several juror members declared we only needed one more vote of guilty and we would be able to be done with our public service. There was no consideration about unanimity. There was also not any initial consideration to review the facts, evidence, laws or

instructions. The majority of the jury panel just desired to do the fastest thing and get over with it.

The trial, including jury selection, ran for one week. There was a brief break over a weekend including a Monday for us to return to the court on the following Tuesday. All of us jurors had to place our personal daily lives on hold. In fact, my own birthday fell in the middle of this week and a family vacation had to be canceled. We were all tired, and wished to return to our normal daily lives. However, the defendant's life and liberty were at stake, and I had heard and took very seriously what the judge instructed us to do: to deliberate the facts and the law.

Despite our duty, a very vocal minority, about three of the jurors who voted guilty, were intent on convicting the defendant, and sought out to do so. This included using terminology and arguments to spark fear amongst the rest of the jury panel.

These jurors seemed convinced that the defendant must have done something wrong; otherwise, according to these jurors, why was the defendant on trial?

As a jury, we did not consult the law. We did not consult the facts or evidence. Three of the most vocal jurors desired to direct the conversation solely to other outside biases, and testimony/evidence the Judge had specifically instructed us to disregard.

We the jury heard testimony from the prosecutor's rebuttal witness, who was not the victim of the current charges brought, but alleged that the defendant had committed the same crime they were currently on trial for in this case to them. The defendant also had a previous conviction for negligent homicide. The Judge reminded us we were not to take past crimes or testimony of past crimes into consideration, we were supposed to disregard it. The Judge specifically instructed us to not use this evidence for the purpose of drawing the inference that because the defendant was convicted of a previous crime the defendant may be guilty of the crime charged in this case. The Judge also instructed us that the defendant was not charged with committing any crime other than the single count of Sexual Abuse in the Second Degree. But these three vocal jurors kept bringing this testimony and the defendant's prior conviction up as evidence of the defendant's guilt. Their rational was that if the defendant had done the crime before, then they must have done it this time and they will do it again if we do not find them guilty.

I diligently tried to point out that the defendant had brought their past conviction to light at trial, by waiving their 5th amendment rights and testifying. The defendant was open and honest about their past conviction of negligent homicide, and the court clarified that the defendant had served their punishment for that crime. The defendant also testified that they had no prior convictions or charges for any other sexual abuse claims, other than the one the defendant was currently on trial for.

With the exception of the three very vocal jurors, the majority of jurors were beginning to see the need to review all facts, evidence, law and instructions and delay an absolute conclusion of verdict. That is, until one of the three loudest jurors reminded the jury that the defendant served as a former marine sniper, and the defendant knew our faces, where we worked and potentially where we lived and could likely come kill us. The juror stated we, as the jury, should be in fear of our own lives. I am unsure where their rational came from, as the defendant's past convicted crime was explained to be of an accidental nature. Perhaps out of fear of losing ground on their standpoint of finding the defendant guilty – the juror decided to take drastic measures to convince the last person to vote guilty. Regardless, after this statement the concern in the room shifted to being finished with jury service as it was nearing the end of the day and an overall desire of not wanting to be near the defendant for any more length of time. Once fear of our lives was suggested, no longer was there a way for jurors to safely speak to other jurors or even suggest reviewing the evidence presented before us. This visibly shook some of the jurors in the room. People wanted to leave, so we took another vote, and this time it was 10-2 guilty.

I was made presiding juror by a unanimous vote from the entire jury panel prior at the start of our deliberations. I remember asking the jurors if I, as the presiding juror who was signing my name, should be in fear of my life because I was signing the verdict. I received several head nods and confirmations from five juror members.

So that was it.

I was shocked by what I had seen take place in the jury room. The people who disagreed with the majority were completely discounted by the three loud jurors. I could not believe that all of us did not have to reach a unanimous verdict or even work to agree on the result. As a jury we were charged with upholding the law by reviewing the evidence presented to us, as a collective. But we did not do this in the least. The law and jury instructions were ignored completely for prejudice, fear, biases and the desire to be done with the process.

We did not consult the instructions again. We did not talk about the facts of the case, in particular the witness who had testified that they were present during the act in question, and that it had not happened.

I was truly surprised by the group think in the jury room. When the law says you only need 10 jurors in order to convict, and 10 people get persuaded enough to agree, it just makes it so much easier for a juror to say guilty. To say guilty and get the jury service over with.

I think only needing 10 jurors also effected the standard we used. I think the other jurors were using a preponderance standard, or more than enough to be guilty, instead of the standard we had been instructed to use, which is beyond a reasonable doubt. I kept trying to bring up these reasons we had to doubt, the evidence the state had not provided to us, but the

others did not care. I even made the comment to other jurors that if they wanted me to stop talking because they only needed their 10 votes I would. Needing only 10 jurors forces some jurors to be silenced in the deliberation process and removes diversity of thought, especially for those jurors from an underrepresented class of people on the jury panel.

If we had been instructed that we had to all come together and agree on our decision, I think it would have forced us to review the evidence and the law, to actually deliberate about the trial we had seen. But we did not, because we only needed 10 to find the defendant guilty. As a result, it is my strongly held belief that as a jury we were not fair and impartial due to the limitation of having to only have 10 jurors verse a unanimous decision and now there are very serious consequences against the life and liberty of the defendant.

5/14/2019
Date

Jaclynn R. Moore
Printed Name

s/ JA Moore
Signature

State of Oregon, County of Lane, Notary declaration:

5/14/2019
Date

Gina Brigitte Hobie
Printed Name

s/ Gina Brigitte Hobie
Signature

DECLARATION OF CASHNITA SPENCER

I, CASHNITA SPENCER, under penalty of perjury, declare the following to be true, to the best of my information, recollection, and belief:

1.

I was called to serve on a jury on July 5th 2016 in Multnomah County. I was selected as a juror on Case # 15CR58698, State of Oregon vs. Olan Jermaine Williams. Mr. Williams was charged with two counts of Sodomy in the First Degree.

2.

When I was selected as part of the jury pool and upon entering the grand jury courtroom, I realized that of the 36 people in the room, I was the only person of color— other than the defendant, Mr. Williams.

3.

During voir dire, the prosecutor asked the jury questions about their feelings about victims of sexual assault, rape, and homosexuality. The defense attorney directed all of his questions to one potential juror, who was a prosecutor. His line of questioning focused on the standards of reasonable doubt. I recall responding to the 7 written questions, but I don't recall if I was asked any direct questions by the state's attorney or the defense attorney. .

4.

I was selected as one of thirteen jurors, including an alternate. The jury consisted of three white men and nine women, six of whom were white, two of whom I am uncertain about their

ethnicity but may have been Asian or Pacific Islander, , and myself, an African-American woman. During the trial, after the prosecutor made the State's case, the defense attorney failed to provide a defense for Mr. Williams. He called no witnesses, asked questions that seemed irrelevant to the case, and as I recall, barely cross-examined anyone during the State's case.

5.

After the end of the case, the judge dismissed the alternate juror and gave us our instructions. At that point we learned that a unanimous jury was not required to reach a decision – that only ten jurors needed to agree.

6.

It was just before lunch on the third day of the trial when we began deliberations. We started with Count 2 which was the count focused on whether Mr. Williams had anally penetrated Mr. Collard. We discussed the facts for approximately 15 minutes and then took a vote. All the jurors unanimously agreed that Mr. Williams was not guilty on this count.

7.

We then began discussing the facts about Count 1. It was close to time to break for lunch so we decided to see where we were on Count 1, which involved oral penetration. Three of us voted that he was not guilty, a fourth person was unsure and the remaining eight voted guilty.

8.

During the lunch break, I decided to eat on my own on a bench near an empty courtroom away from the group. I was mindful of the instructions given by the judge and was concerned that any conversations with anyone outside of the jury room, perceived or real, could lead to a mistrial. As the only person of color on the jury, I did not want to do anything that might get me into trouble. Some members of the group left the jury room together, had lunch elsewhere, and returned to the jury room together. When the group returned to the jury room following lunch, the woman who was unsure stated that her decision at that point forward was guilty. Therefore, after lunch there were three jurors voting not guilty and nine jurors voting guilty.

9.

Once we returned to deliberating,. two women in particular were loud and dominated the discussion. One focused on the existence of campus rape and made the argument that it persists because people do not believe victims. Her friend had been raped at a college

party and she continued to use that in defense of her guilty decision. She accused me of being part of the problem because I would not vote guilty. Another woman was very aggressive to those of us voting not guilty. She stood on the couch in a position that placed her above the rest of us who were seated, pointed her fingers at us as she spoke, and accused the defendant of being a "big fat liar," which she wrote under his name on the whiteboard in the room. She and two of the male jurors were adamant that Mr. Williams was guilty because no straight male would make the story up. One of the male jurors indicated that the victim could not have consented because of his intoxicated state. There was confusion on what constituted consent under the law. We requested clarification from the clerk about the definition of consent which was not helpful.

10.

At around 3.30pm to 4.00pm the clerk returned to our room and asked how we were doing. We said we were not there yet and he reminded us that we needed to reach 10-2. He then told us that we would need to return the next day and suggested that we figure out a time to start in the morning which we agreed would be 9:00am.

11.

At this point, the atmosphere in the room changed. One of the other two women who was in the not guilty group appeared irritated and stated that she could not

keep doing this because she had young children at home. The two aggressive women turned their attention to her. When she realized that she could change her vote and not return the following day, she promptly made her decision to do so. Thus, Mr. Williams was convicted with a 10-2 majority.

12.

When people ask me whether race played into this conviction, I say indirectly, yes. This law has a foundation rooted in silencing the voice of the racial minority and this is what played in to Mr. Williams' conviction. I do not know if any of the jurors had any preconceived prejudices or biases against people of color that made them vote guilty. Race was not discussed in our deliberations. At the end of the day, what I do know is that the only reason Mr. Williams was convicted was because someone did not want to return the next day to continue deliberating. Jury duty, and the enormity of responsibility that it encompasses, was considered an inconvenience. In a felony trial, where the burden of proof is "beyond a reasonable doubt", a conviction should have no doubters. I consider his conviction a complete failure in civic duty by my fellow juror. Furthermore, the opinions of myself and my fellow dissenting juror were not taken seriously because they did not matter to reach a conviction. The voice of the minority was silenced as the law intended.

13.

Had a unanimous jury been required, then Mr. Williams would not have been convicted because based on the facts of the case as presented in court, I would never have voted him guilty.

14.

After the case, I felt sick and devastated. A man's life was destroyed based upon one woman's theory that "something must have happened," another's refusal to take her duty to deliberate seriously, and a system that denies dissenting opinions a voice in determining innocence or guilt.

DATED this 15th day of May 2019.

/s/ Cashnita Spencer

JOINING AS *AMICI CURIAE*

Kate Brown
Governor of Oregon 2015-present

John A. Kitzhaber
Governor of Oregon 1995-2003, 2011-2015

Theodore R. Kulongoski
Governor of Oregon 2003-2011
Associate Justice, Oregon Supreme Court 1997-2001
Oregon Attorney General 1993-1997

Barbara K. Roberts
Governor of Oregon 1991-1995

Richard C. Baldwin
Senior Justice
Associate Justice, Oregon Supreme Court 2013-2017

Paul J. De Muniz
Senior Justice
Chief Justice, Oregon Supreme Court 2006-2012
Associate Justice, Oregon Supreme Court 2001-2006
Judge, Oregon Court of Appeals 1990-2000

Robert D. Durham
Senior Justice
Associate Justice, Oregon Supreme Court 1994-2012
Judge, Oregon Court of Appeals 1991-1994

Susan M. Leeson
Senior Justice
Associate Justice, Oregon Supreme Court 1998-2003
Judge, Oregon Court of Appeals 1992-1998

Edwin J. Peterson
Senior Justice
Chief Justice, Oregon Supreme Court 1983-1991
Associate Justice, Oregon Supreme Court 1979-1983

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Judge, Oregon Court of Appeals 2001-2014
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