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- My name is Aliza Kaplan, and I am a law professor and Director of the Criminal Justice Reform Clinic (CJRC) at Lewis & Clark Law School in Portland. The CJRC provides hands-on legal experience to law students in various areas of Oregon's criminal justice system. The issue of nonunanimous juries has been a priority of the CJRC over the last few years.
- Personally, and with my CJRC students and colleagues, I have authored and co-authored numerous articles and legal briefs on the issue of nonunanimous juries in both Oregon and Louisiana.
- I am here in support of House Joint Resolution 10. In my testimony today, I will explain the historical context of nonunanimous juries in Oregon, how the nonunanimous jury provision undermines our criminal justice system, and U.S. Supreme Court jurisprudence as it relates to this issue.

Background

- Oregon Ballot No. 302-03, Oregon's nonunanimous jury provision, was passed in 1934, at a time in Oregon where "[r]acism, religious bigotry, and anti-immigrant sentiments were deeply entrenched in the laws, culture, and social life."[1]
- In the late 1920s and early 1930s, Oregon was caught in a deep recession where factors such as "[w]artime stress, emphasis on patriotism, distrust of German-Americans, eugenics campaigns . . . and anti-Catholic bigotry created fertile ground"[2] for over 200,000 Ku Klux Klan ("KKK") members.[3]
- Interestingly, because Article 1 § 35 of the Oregon Constitution prevented African Americans from settling or owning property within the state until 1927,[4] the KKK was free to focus almost exclusively on immigrants and religious bigotry, rather than racial discrimination.
- Following a decade of KKK influence, the result of *State v. Silverman*, in which a Jewish man received a lighter sentence because of a hung jury, spurred a flood of anti-immigrant rhetoric in the media, creating the perfect storm for passage of Oregon's nonunanimous jury provision.

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[1] Toy Eckhard, *Ku Klux Klan*, OR. ENCYCLOPEDIA, http://oregonencyclopedia.org/articles/ku_klux_klan/#.Vx_mZGOePJo (last visited Jan. 25, 2019).
[2] Stephen Dow Beckham, *Oregon History: Mixed Blessings* (2017).
[3] Elizabeth McLagan, *A Peculiar Paradise: A History of Blacks in Oregon, 1788-1940*, 133-39 (1980).
[4] OR. CONST. art 1, § 35; *Williams*, No. 15CR58698, at *11.

- Receiving national attention, reporters continuously contrasted the "sense of duty shown by the white persons on the jury in bringing a verdict of guilty against their fellow white men" with the "lack of responsibility shown by native and mixed-blood people in freeing the assaulters [in *Silverman*]."[5] The *Morning Oregon* newspaper went so far as to blame "increased urbanization of American life . . . and the vast immigration into America from southern and eastern Europe[] of people untrained in the jury system" for the "unwieldy and unsatisfactory" result.[6]
- Focusing voters' attention on the "unreasonable juror" theory, touting the frequency of juror disagreements due to one or two holdout jurors who refused to agree with the majority, Oregon passed 302-03, permanently altering the Oregon Constitution and effectively silencing minority juror voices and abandoning the Sixth Amendment of the United States Constitution.

Oregon's nonunanimous jury provision undermines the criminal justice system, such that the public's confidence has substantially receded.

- Enacted in an environment fraught with discrimination, Oregon's nonunanimous provision continues to silence minority voices today, permitting felony convictions based on an incomplete representation of a defendant's peers.
- Consequently, Oregon juries are subjected to the inevitability of discounted minority opinions and views throughout the deliberative process, minimizing citizen participation and confidence in Oregon's criminal justice system.
- Studies show the nonunanimous verdict rule deprives criminal defendants the guarantee of a full and fair deliberation.[7] Rather, convictions based on nonunanimous juries discount the state's burden to provide proof beyond a reasonable doubt, as guaranteed by the Sixth Amendment.[8]
- As Justice Douglas wrote in his *Johnson v. Louisiana* dissent, the lack of unanimity requirement diminishes verdict reliability because "nonunanimous juries need not debate and deliberate as fully as most unanimous juries."[9] Rather, nonunanimous juries are

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[5] *"Honor Case" Jury Upheld*, The Morning Oregonian, May 7, 1932.
[6] *One Juror Against Eleven*, The Morning Oregonian, Nov. 25, 1933.
[7] *See* Aliza B. 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, 32–36. *See also* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 388 (2017).
[8] U.S. CONST. amend. VI. *See Allen v. United States*, 164 U.S. 492, 501 (1896) (stating "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments of the jurors themselves"); *Rassmussen v. United States*, 197 U.S. 516, 535 (1905) (assuming a criminal conviction by a nonunanimous jury was not in compliance with the Fifth and Sixth Amendments); *Patton v. United States*, 281 U.S. 276, 288–90 (1930) (discussing unanimity as a required and essential element of a trial by jury in a criminal case); In re Winship, 397 U.S. 358, 364, 367 (1970) (holding that all elements of a crime must be proven beyond a reasonable doubt, regardless of whether the defendant is tried as an adult or a juvenile).
[9] 406 U.S. at 388 (Douglas, J., dissenting).

"verdict-driven," meaning they are driven more by a desire to reach a verdict rather than attention to and careful consideration of case facts and evidence.[10]
- By disregarding minority jurors' voices and directing focus on the verdict rather than the merits, the public's confidence in the criminal justice system has substantially receded, undermining the efficacy of Oregon's criminal justice system.

Given the U.S. Supreme Court's jurisprudence since *Apodaca v. Oregon* and *Johnson v. Louisiana*, if the Court was to address the issue today, it would support jury unanimity.

- Although a 1972 plurality of the U.S. Supreme Court, in addressing the issue of nonunanimous juries in two cases,[11] "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of [ten] to two or [eleven] to one," four dissenting Justices believed unanimity to be an indispensable feature of our criminal justice system.[12]
- Foreshadowing the Court's future treatment of full incorporation of the Sixth Amendment, Justice Stewart wrote in his dissent, applying to both *Apodaca* and *Johnson*, that "the Fourteenth Amendment alone clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict."[13]
- Treating *Apodaca* as a jurisprudential orphan, in 2019 in *McDonald v. City of Chicago*,[14] the Court clarified that *Apodaca* "was the result of an unusual division among the Justices."[15]
- Rather, *McDonald* set forth a standard governing incorporation of the Bill of Rights protections against the states, requiring said right to include "immutable principles of justice which inhere in the very idea of free government . . . ,"[16] principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[17] and values "essential to a fair and enlightened system of justice."[18]
- Importantly, jury unanimity meets the *McDonald* incorporation standard as it is rooted in common law and history, signifying that the Founders considered jury unanimity a

[10] 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).
[11] *Apodaca v. Oregon*, 406 U.S. 356 (1972) (deciding whether a state defendant's Sixth Amendment right to a jury trial included the right to a unanimous verdict); *Johnson v. Louisiana*, 406 U.S. 404 (1972) (deciding whether the "reasonable doubt" standard required unanimous verdicts under the Fourteenth Amendment).
[12] *Apodaca*, 406 U.S. 404, 411, 414 (1972) (Stewart, J., with whom Brennan, J., and Marshall, J., join, dissenting); *Johnson*, 406 U.S. 356, 380–83 (Douglas, J., with whom Brennan, J., and Marshall, J., concur, dissenting) (stating that the opinion also applies to *Apodaca*).
[13] *Johnson*, 406 U.S. at 397 (Douglas, J., with whom Brennan, J., and Marshall, J., concur, dissenting) (stating that the opinion also applies to *Apodaca*).
[14] 561 U.S. 742 (2010).
[15] *McDonald*, 561 U.S. at 766 n.14.
[16] *Id.* at 760 (quoting *Twining*, 211 U.S. at 102).
[17] *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).
[18] *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted).

fundamental right.[19] In fact, in cases since *Apodaca*, the Court has recognized the necessity of examining the "Framers' paradigm for criminal justice," and not "whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice."[20]

- *Apodaca* was most recently condemned in the Courts' 2019 decision, *Timbs v. Indiana*, a 9-0 opinion, in which the Court states "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."[21] The Court goes on to clarify "[t]he sole exception is our [*Apodaca*] holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings." However, relying on *McDonald*, the Court emphasizes yet again that *Apodaca* "'was the result of an unusual division among the Justices,' and it "does not undermine the well-established rule that incorporated Bill of Rights protections apply identical to the States and the Federal Government.'"[22]
- Just a few weeks ago, the Court agreed to hear *Ramos v. Louisiana*. The issue before the Court is: Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict.
- Based on everything I just explained, I am pretty darn sure that the Court will strike down nonunanimous juries when it hears the issue in its next term.

Oregon is the last state standing.

- In November 2018, Louisiana voted to do away with their nonunanimous jury provision, making Oregon the last state permitting criminal convictions based on an incomplete deliberative process—a process guaranteed by the Sixth Amendment of the United States Constitution.
- All states, except for Oregon, and the federal government require that jurors reach a verdict unanimously.
- Effectively, since 1934, criminal defendants in Oregon have been convicted and imprisoned, even in felony cases by nonunanimous juries.
- To ensure criminal defendants procedural justice, protect innocent defendants from being wrongfully convicted, and align Oregon with state and federal courts across the nation, Oregon must strike its unconstitutional nonunanimous jury provision.

Thank you for the opportunity to discuss HJR 10. I am happy to answer any questions.

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[19] *See* Petition for Writ of Certiorari at 12–17, *Herrera v. Oregon*, 562 U.S. 1135 (No. 10-344) ("The unanimity requirement was indeed not just an 'accidental,' 'superfluous' detail, but an 'essential element[]' of the jury trial. It was a part of 'our [English] constitution' that protected 'the liberties of England' (Blackstone), and that was then accepted in America (as Story stressed). It 'preserve[d] the rights of mankind' (Adams). It was 'of indispensable necessity' (Wilson), 'indispensable' to a criminal jury verdict (Story), part of the American design of 'the several powers of government' (Tucker), and part of the trial by jury secured by 'all our constitutions' (Dane).").

[20] *Blakely v. Washington*, 542 U.S. 296, 313 (2004). *See also Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[21] *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

[22] *Id.* at 687 n.1 (quoting *McDonald*, 561 U.S. at 766 n.14).