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

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BRIEF OF *AMICUS CURIAE* PROFESSOR KATE STITH

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INTEREST OF *AMICUS CURIAE*[1]

Kate Stith is the Lafayette S. Foster Professor of Law at Yale Law School. She has written extensively on criminal law and procedure, including on the Sixth Amendment.

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amicus Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or her counsel made a monetary contribution to the brief's preparation or submission.

Professor Stith also has served as a member of the Advisory Committee on the Federal Rules of Criminal Procedure of the Judicial Conference of the United States (1995-2001), on the Committee on Law and Justice of the National Research Council (1997-2002), and as an Adviser for the Model Penal Code: Sentencing project of the American Law Institute (2002-present).

Professor Stith has an interest in ensuring that criminal justice processes in the United States meet the requirements set forth in the United States Constitution, and in particular that the criminal petit jury is available in all cases to perform its constitutionally ordained roles.

REASONS FOR GRANTING THE PETITION

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court upheld the 1934 amendment to the Oregon Constitution allowing non-unanimous juries in all criminal cases except those charging first-degree murder. Since *Apodaca*, the Court's methodologies for interpreting the provisions of the Sixth Amendment, and for determining the applicability of those protections to the States through the Due Process Clause of the Fourteenth Amendment, have changed considerably. In at least four respects, the result in *Apodaca* is inconsistent with these jurisprudential developments and other subsequent events.

First, in *Apodaca*, the four-Justice plurality (White, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ.), adopted a functional approach to interpretation of the jury-trial right in the Sixth Amendment. The plurality concluded that even though the requirement that a jury verdict be unanimous arose during the Middle Ages and was

"an accepted feature of the common-law jury by the 18th century," the unanimity requirement "was not of constitutional stature." 406 U.S. at 406-408. This plurality considered the primary function served by the criminal petit jury as "the commonsense judgment of a group of laymen," 406 U.S. at 410 (citing *Williams v. Florida*, 399 U.S. 78, 100 (1970)), and concluded that in serving this function there is "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." 406 U.S. at 411.

By contrast, the Court has now concluded that the Sixth Amendment derives its meaning primarily from the original understanding at the time the provision was adopted, not from a functional assessment of the provision's purpose. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court rejected its previously articulated, reliability-based understanding of the Confrontation Clause and instead adopted the conception of the right known to the Framers, looking to practice at common law.

Similarly, in *Blakely v. Washington*, 542 U.S. 296, 313 (2004), the Court emphasized that "our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice"; rather, the relevant inquiry is "the Framers' paradigm for criminal justice."

In sum, the *Apodaca* plurality's examination of the "function" of the jury trial is not the approach that a majority of the Court has adopted in recent cases interpreting the Sixth Amendment. Looking to the understanding at the time the Bill of Rights was adopted yields the conclusion that unanimity is a requirement of the Sixth Amendment right to a jury trial. Even the *Apodaca* plurality recognized that at

that time, unanimity was a critical characteristic of the petit jury.

Second, the *Apodaca* plurality believed that "the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases. The reasonable-doubt standard developed separately from both the jury trial and the unanimous verdict." 406 U.S. 411 (citing *In re Winship*, 397 U.S. 358, 361 (1970)).

Yet the Court has since held, unanimously, 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). Further, in *Apprendi* and its progeny, this Court "has repeatedly held that under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt * * *." *Cunningham v. California*, 549 U.S. 270, 281 (2007) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

In sum, the *Apodaca* plurality's dismissal of any relationship between the Sixth Amendment's jury-trial right and the standard of proof beyond a reasonable doubt has since been rejected by the Court. Indeed, the present understanding seems to be that the reasonable doubt standard is effectively part of the Sixth Amendment right to a jury trial. This strongly suggests that unanimity, which helps safeguard that standard, is also a part of the right itself.

Third, eight Justices in *Apodaca* (the majority plurality—consisting of Justice White and those joining his opinion—and the four Justices in the minority plurality) agreed that the right to a jury trial applies to the States, through the Fourteenth

Amendment, identically as it applies to the United States. There was a bare majority to uphold Oregon's constitutional provision allowing non-unanimous verdicts only because one member of the Court, Justice Powell, believed that the Fourteenth Amendment did not require that the federal constitutional rule apply in all respects to the States. *See Johnson v. Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting). As the Court recently noted in *McDonald v. City of Chicago*, "that ruling [in *Apodaca*] was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation." No. 08-1521 (June 28, 2010), slip op. 18 n.14.

Most significantly, *McDonald* 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.'" *Id*. at 17-18 (internal citation omitted). This had been the judgment of eight Justices in *Apodaca*, and in *McDonald* only one Justice expressed the contrary view, *see* No. 08-1521 (June 28, 2010), slip op. 7-13 (Stevens, J., dissenting).

In sum, the result in *Apodaca*, whereby the provisions of the Bill of Rights may be applied differently to the States and to the federal government, has been rejected by a substantial majority of the present Court. Under the approach to incorporation set forth in *McDonald*, the jury unanimity requirement, which has been held by the Court to be mandated by the Sixth Amendment against the federal government, *see Andres v. United States*, 333 U.S. 740 (1948), should also be enforced against the States.

Fourth, the actions (and non-actions) of the States since *Apodaca* lend support to the understanding that a unanimous criminal jury is fundamental to our constitutional order, unlike other aspects of the Bill of Rights that have not been incorporated to apply to the States. After *McDonald* there remain three federal Bill of Rights protections that have not been incorporated against the States: the right to a grand jury indictment (*Hurtado v. California*, 110 U.S. 516 (1884)), the right to a jury trial in a civil case (*Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916)), and the right to a unanimous jury verdict in a criminal case (*Apodaca/Johnson*). *McDonald* discussed these three exceptions.

McDonald observed that after the *Hurtado* decision, almost all States stopped using a grand jury as an exclusive means to indict. After the *Minneapolis & St. Louis* decision, States established small claims courts without a jury trial right. No. 08-1521 (June 28, 2010), slip op. 7-13 (plurality opinion). By contrast, after *Apodaca/Johnson*, no State abolished the right to a unanimous jury verdict in a non-petty criminal case. In fact, one State—Oklahoma—which at the time of *Apodaca* had allowed non-unanimous juries for misdemeanors, altered its law in 1989 to require unanimous juries in all cases where the Sixth Amendment right to a jury trial applies (that is, in all but "petty offense" cases). *See* 1989 Okla. Sess. Law. Serv. Sen. Jt. Res. 17 (West), enacted as OKLA. CONST. art. II, § 19. Oregon and Louisiana thus remain unique. But even in Oregon, when the voters were recently given the opportunity to abolish that State's only remaining unanimity requirement, in first-degree murder cases, they declined to do so.

See 1999 Ballot Measure 72.[2] This history strongly suggests that the people of this Nation understand the right to a jury trial to include the right to a verdict agreed to by *all* the jurors.

Finally, *Amicus* urges that the Court not be deterred by efficiency concerns, as the criminal jury is not intended to be maximally efficient or to perform as we expect modern bureaucracies to perform. The Court has observed:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.

Blakely v. Washington, 542 U.S. at 313.

Similarly, one Justice previously explained:

> The founders of the American Republic were not prepared to leave it [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the

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[2] Ballot Measure 72 was defeated at the polls in 1999: Yes 316,351; No. 382,685. *See* OREGON SECRETARY OF STATE, http://www.sos.state.or.us/elections/nov299/m72abs.html (last viewed Nov. 29, 2010).

> Bill of Rights. It has never been efficient; but it has always been free.

Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

More generally, as *Amicus* has previously noted:

> [W]e should be cautious in adopting modifications that alter or remove features of the jury once thought to be fundamental. * * * [A]bolition of peremptories and of the unanimity requirement, and opening up jury deliberations to greater press, public, and appellate scrutiny are some of the "reforms" that may be urged upon us in the coming years in response to irrepressible demands for greater equality, rationality, and accountability. * * * [But] we would do well to consider the possibility that, at its core, the jury is an institution that will never harmonize well with certain values that are preeminent in the modern age. The jury's greatest contribution may be precisely that it tempers those values with the competing values of intuition, common-sense, lay judgment, anonymity, and secrecy.

Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 145 (1995).

The *Apprendi/Blakely* line of cases is based on a deeply rooted tradition of protecting the jury as a bulwark against government power. Jury verdicts can produce aberrational results, and jury trials are not models of efficiency. But the point of a jury verdict is that it is a verdict by a jury. And unanimity has been a traditional feature of a jury verdict, as acknowledged in *Apodaca*.

In sum, this Court, the 48 States that retain the unanimity requirement, and even the people of Oregon (with respect to murder cases) have all recognized that the requirement of unanimity is a fundamental aspect of the right to a jury trial in criminal cases.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the judgment and decision of the Oregon Court of Appeals in this case.

Respectfully submitted,

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