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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

 Plaintiff,

 v.

OLAN JERMAINE WILLIAMS,

 Defendant.

Case No. 15CR58698

BRIEF *AMICUS CURIAE* OF AMERICAN
CIVIL LIBERTIES UNION
FOUNDATION OF OREGON

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INTRODUCTION

The Oregon State Constitution, Article I, § 11 was amended in 1934 to allow non-unanimous verdicts in criminal trials that “in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]” (the “Provision”). The Provision violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for its disparate impact on minority defendants.

ARGUMENT

I. Oregon Adopted Non-Unanimous Criminal Verdicts for a Discriminatory Purpose.

Oregon is the only state other than Louisiana that allows felony convictions by a less-than-unanimous jury, adopting the Provision in 1934 against a backdrop of racial and religious bias. That year, Jacob Silverman, a Jewish man, was tried for the murder of James Walker, a Protestant. *State v. Silverman*, 148 Or. 296 (1934). While Mr. Silverman was charged with first degree murder, eleven of the twelve jurors voted to convict on a charge of second degree murder. *Id.* at 297; Clayton Tullos, *Non-Unanimous Jury Trials in Oregon*, Oregon Criminal Defense Lawyers Association (September 29, 2014), https://libraryofdefense.ocdla.org/Blog:Main/Non-Unanimous_Jury_Trials_in_Oregon. One hold-out wanted to acquit. Tullos, *Non-Unanimous Jury Trials in Oregon*. After hours of deliberation, the jurors compromised on a verdict of manslaughter. *Id.*

The prosecutor had announced his intention to seek the death penalty had Mr. Silverton been convicted of first degree murder. *Id.* A second degree murder charge carried with it a

1 statutory sentence of life in prison. *Id.* The manslaughter conviction carried a mandatory sentence
2 of anywhere between one and fifteen years, however, and a maximum fine of \$5,000. *Id.*

3 The public was outraged that Mr. Silverton escaped conviction for murder due to one
4 holdout juror. The *Morning Oregonian* inveighed:

5
6 Jake Silverman of Portland, held responsible for the killing of James Walker in
7 Dutch Canyon last April, has been found guilty only of manslaughter. Such
8 incidents always result in the accumulation of a new batch of letters on the editorial
9 desk, complaining about the miscarriage of criminal justice under the jury system.

10
11 Objections have been especially pointed in the Silverman case, since it has been
12 alleged and apparently with authority, that a few hours after the case went to the
13 jury, the vote stood eleven for conviction on second degree charges and one
14 opposed. The one opposition vote is said to have remained unchanged during the
15 remaining eighteen hours that the jury was out, finally forcing the compromise
16 verdict of manslaughter.

17
18 Obviously, Silverman was not guilty of manslaughter. Either he murdered Walker
19 or he was not involved. But the eleven who stood for second degree either had to
20 give way, or the state had to pay the expenses of a second trial following
21 disagreement.

22
23 This newspaper's opinion is that the increased urbanization of American life, the
24 natural boredom of human beings with rights once won at great cost, and the vast
25 immigration into America from southern and eastern Europe, of people untrained in
26 the jury system, have combined to make the jury of twelve increasingly unwieldy
and unsatisfactory. . . .

Ultimately, conviction will have to be made possible with less than a unanimous
vote of the twelve jurors. But that change will not be made until miscarriages of
justice have become so flagrant that the people cannot deny them. The public is so
attached to the present safe-guards thrown around defendants that it will not make
the change willingly, and, as far as Oregon is concerned, the reorganization will
require an amendment to the state constitution.

Editorial, "One Juror Against Eleven," *Morning Oregonian*, Nov. 25, 1933, at 8 (emphasis added),
cited in Tullos, *Non-Unanimous Jury Trials in Oregon*. The editorial's invocation of immigration
and national origin is noteworthy, as three weeks after the above editorial was published, the
Oregon Legislature proposed a constitutional amendment to be voted on as Ballot Measure 2 in

1 1934. Ashby C. Dickson, Frank H. Hilton, & F.H. Dammash, *Republican Voters' Pamphlet*, P.J.
2 Stadelman, Secretary of State, 1934, at 6. The 1934 Republican Special Election Voters Pamphlet
3 in support of Ballot Measure 2 explicitly cited the *Silverman* case as justification for the measure:

4 The amendment provides that a jury of ten may return a verdict save and except in
5 first degree murder. A notable incident of one juror controlling the verdict is found
6 in the case of State v. Silverman recently tried in Columbia county. In this case 11
7 jurors were for a verdict of murder in the second degree. One juror was for
8 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.

9 Ashby C. Dickson, Frank H. Hilton, & F.H. Dammash, *Republican Voters' Pamphlet*, P.J.
10 Stadelman, Secretary of State, 1934, at 7.

11 Notably, the African-American population in Oregon increased by 3000 percent in the
12 1930's and 1940's due to available work in ship-building. Cheryl A. Brooks, *Race, Politics, and*
13 *Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 Or. L. Rev. 731, 748-49
14 (February 18, 2005). "The newcomers were greeted by signs of 'Whites Only,' housing
15 discrimination, and Klan threats." *Id.* at 749. The Provision was adopted against this backdrop of
16 racial animus.

17 Ballot Measure 2 was therefore approved in 1934, based upon outrage that a Jewish
18 defendant was convicted of a lesser crime and based upon fears that "the vast immigration into
19 America from southern and eastern Europe, of people untrained in the jury system, have combined
20 to make the jury of twelve increasingly unwieldy and unsatisfactory." Editorial, "One Juror
21 Against Eleven," *Morning Oregonian*, Nov. 25, 1933, at 8.

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1 **II. The Effect of Non-Unanimous Juries is to Minimize Minority Voices.**

2 **A. Functionally All-White Juries**

3 Functionally, the Provision removes minority jurors from the panel without the need for
4 formal challenge and without leaving the prosecution open to a *Batson* challenge. *See Batson v.*
5 *Kentucky*, 476 U.S. 79 (1986). In Oregon, minorities are significantly underrepresented in jury
6 pools. Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial
7 System (1994), *available at*

8 http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/rac_eth_tfr.pdf. On the
9 other side, minorities are significantly more likely to be convicted in criminal proceedings.

10 RACIAL AND ETHNIC DISPARITIES AND THE RELATIVE RATE INDEX (RRI), SAFETY
11 AND JUSTICE CHALLENGE, 7 (2016) <http://www.aclu->
12 [http://www.aclu-](http://www.aclu-or.org/sites/default/files/RED_Report_Mult_Co.pdf)
13 [or.org/sites/default/files/RED_Report_Mult_Co.pdf](http://www.aclu-or.org/sites/default/files/RED_Report_Mult_Co.pdf). Examples of racial disparity in Oregon’s
14 criminal justice system can be seen in Oregon’s most populous county. In Multnomah County,
15 African-Americans are over *four* times more likely to be convicted and *six* times more likely to be
16 in jail. Not only are African-Americans more likely to be convicted of a crime, but they are also
17 more likely to be convicted of a felony. *Id.*

18
19 Taken together, these data show that there is nearly no chance that a minority criminal
20 defendant will have a jury with more than two minority jurors. Under the Provision, even if a
21 defendant’s case is considered by a jury with two minority jurors, they can simply be ignored by
22 the remainder of the jury, resulting in a felony conviction of a minority defendant by an all-white
23 jury. This kind of deliberate exclusion of minorities from the jury is exactly the kind of racial bias
24 the Supreme Court tried to prevent in *Batson* and, most recently, *Foster v. Chatman*, 136 S. Ct.
25
26

1 1737, 1741 (2016). The Equal Protection Clause “forbids striking even a single prospective juror
2 for a discriminatory purpose.” *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). The backdoor
3 exclusion of minority jurors created by the Provision has a disparate impact on minority
4 defendants.

5
6 **B. Effect of Non-Unanimous Provision on Jury Decision-Making**

7 Research shows at least two dramatic effects on the decision-making process of a jury
8 caused by the Provision. Most directly, juries in jurisdictions where they can reach a non-
9 unanimous verdict do a worse job:

10 [J]uries not required to be unanimous tend to take less time to reach a verdict (J. H.
11 Davis, Kerr, Atkin, Holt, & Meek, 1975; J. H. Davis et al., 1997; Foss, 1981;
12 Hastie et al., 1983; Nemeth, 1977), take fewer polls (J. H. Davis et al., 1975, 1997;
13 Kerr et al., 1976), and hang less often (Kerr et al., 1976; Nemeth, 1977; Padawer-
14 Singer, Singer, & Singer, 1977; Saks, 1977). Juries also tend to cease deliberating
15 when a quorum is reached, and jurors serving on juries required to reach
16 unanimous verdicts have tended to report being more satisfied and confident that
17 the jury reached the correct verdict (Saks, 1997).

18 Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, Jennifer Pryce, *Jury*
19 *Decision Making*, 7 Psychol. Pub. Pol’y & L. 622, 668 (2001).

20 In addition, a non-unanimous jury can eliminate the reduction in implicit bias seen when a
21 juror with a salient characteristic in common with the defendant is present. Implicit biases are
22 “the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious,
23 without our conscious permission or acknowledgement. Indeed, social scientists are convinced
24 that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases
25 even though we may consciously abhor them.” Judge Mark W. Bennett, *Unraveling the Gordian*
26 *Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed*
Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol’y Rev. 149 (2010).

1 Due to implicit bias, jurors are more likely to convict a defendant of another race. Jury
2 Decision Making, 7 Psychol. Pub. Pol’y & L. at 673-74 (2001); see also *Forgotten Racial*
3 *Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345 (2007). The
4 effect can be ameliorated, at least in part, by a more diverse jury:

5 [J]ury deliberations benefit from the viewpoint of racial minorities. Unconscious
6 stereotyping, which can automatically occur even by individuals who do not
7 espouse any racist notions, will affect how an individual processes information and
8 evidence shown at trial; and jurors belonging to the stereotyped group will recall
9 information differently. Diverse juries will deliberate longer and consider a wider
range of information, and white jurors make fewer inaccurate statements when in a
diverse group than when they are in a homogenous group.

10 Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and*
11 *Incorporation After McDonald*, 101 J. Crim. L. & Criminology 1403, 1430-1431 (2011)
12 (quotation marks omitted); see also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias,*
13 *Decisionmaking, and Misremembering*, 57 Duke L.J. 345 (2007) (collecting research regarding
14 strategies to reduce implicit bias in legal decisionmaking); Antony Page, *Batson's Blind-Spot:*
15 *Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L. Rev. 155 (2005). In
16 addition, when a jury is not required to be unanimous, it begins its deliberations by polling each
17 juror, rather than by discussing the evidence. Kate Riordan, *Ten Angry Men: Unanimous Jury*
18 *Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. Crim. L. & Criminology
19 (2011), at 1429.

20
21
22 But where the non-minority voices in the jury deliberation room can be silenced before
23 deliberations even begin, no bias-reducing effect can take place. It’s as if the court system assured
24 itself of its impartiality by impaneling non-white jurors, but then locked them out of the
25 deliberation room.
26

1 **III. The Equal Protection Clause Prohibits the Use of Non-Unanimous Juries in Criminal**
2 **Cases for its Disparate Impact on Minority Defendants.**

3 The Equal Protection Clause of the Fourteenth Amendment of the United States
4 Constitution commands that no state may deprive any person within its jurisdiction of equal
5 protection under the law. The Provision, enacted with a discriminatory purpose, violates the Equal
6 Protection Clause of the Fourteenth Amendment due to its disparate, or disproportionate, impact
7 on minority defendants.¹

8 “[O]fficial action will not be held unconstitutional solely because it results in a racially
9 disproportionate impact. Disproportionate impact is not irrelevant, but it is not the sole touchstone
10 of an invidious racial discrimination. Proof of racially discriminatory intent or purpose is required
11 to show a violation of the Equal Protection Clause.” *Vill. of Arlington Heights v. Metro. Hous.*
12 *Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (internal citation and quotation marks omitted). “Once
13 racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment
14 of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been
15 enacted without this factor.” *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

16
17
18 *Hunter* lays out a “but for” test to determine discriminatory intent or purpose; if racial
19 animus “was a motivating factor” for a law and it “certainly would not have been adopted” in the
20 absence of the racially discriminatory motivation, it makes no difference if there were an
21 additional, non-discriminatory basis as well. 471 U.S. 222, 231.

22
23
24 ¹ This case is profoundly different than *Johnson v. Louisiana*, 406 U.S. 356 (1972), which held
25 that a nine-to-three verdict did not violate the Equal Protection Clause. The Court stated that such
26 a statutory scheme served a rational bases. However, that scheme was challenged on the basis that
the defendant was disadvantaged in comparison to those convicted of less serious crimes who are
entitled to a unanimous jury. Here, a racially disparate impact is alleged.

1 As discussed above, the impact of the Provision here is to minimize or destroy the impact
2 of minority jurors in criminal cases, particularly where the defendant is also non-white. The
3 history outlined above is overwhelming evidence of the discriminatory intent behind the adoption
4 of the Provision. The Provision clearly violates the Equal Protection Clause under any level of
5 scrutiny.

6
7 “Purposeful racial discrimination in selection of the venire violates a defendant’s right to
8 equal protection because it denies him that protection that a trial by jury is intended to secure.”
9 *Batson*, 476 U.S. at 86. The central holding of *Batson* is that each defendant is entitled to a jury
10 free of discrimination: “[T]he Equal Protection Clause guarantees the defendant that the State will
11 not exclude members of his race from the jury venire on account of race, or on the false
12 assumption that members of his race as a group are not qualified to serve as jurors.”
13 *Id.* The removal of even one juror for discriminatory reasons is a violation of the Equal Protection
14 Clause.” *Snyder* at 478 (internal citations and quotation marks omitted).

15 CONCLUSION

16
17 The Provision was enacted for discriminatory reasons, and results in discriminatory jury.
18 For these reasons, the use of non-unanimous juries in felony criminal trials violates the Equal
19 Protection Clause.

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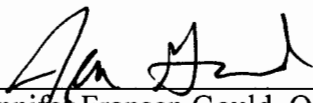
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1 DATED this 18th day of October, 2016.

2 GARVEY SCHUBERT BARER

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Union Foundation of Oregon

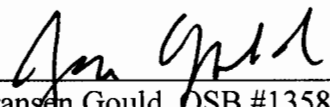
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **BRIEF AMICUS CURIAE OF AMERICAN CIVIL**
3 **LIBERTIES UNION FOUNDATION OF OREGON** was served on:

4 Todd T. Jackson
5 Multnomah County DA's Office
6 600 Multnomah County Courthouse
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11 by mailing to them a copy of the original thereof, contained in a sealed envelope, addressed as
12 above set forth, with postage prepaid, and deposited in the mail in Portland, Oregon, on this 18th
13 day of October, 2016.

14 
15 _____
16 Jennifer Fransen Gould, OSB #135855
17 Attorneys for the American Civil Liberties Union
18 Foundation of Oregon

19 GSB:8121972.1 [39904.00100]
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