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

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| STATE OF OREGON,<br>PLAINTIFF,<br><br>vs.<br><br>JOSEPH GIBSON,<br>DEFENDANT. | No. 19CR53042<br><br>JOSEPH GIBSON'S OBJECTION TO ANY NONUNANIMOUS VERDICT |

**MOTION**

COMES NOW Joey Gibson, the defendant, by and through the Angus Lee Law Firm, PLLC, and objects to any nonunanimous verdict.

"The very object of the jury system,' after all, 'is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Blueford v. Arkansas*, 566 U.S. 599, 608, 132 S. Ct. 2044, 2051 (2012).

**ARGUMENT**

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:



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> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

The United States Supreme Court has made clear that the guarantees in the Bill of Rights must be protected regardless of their current functional purpose, based upon the historical origins of the constitutional protection. This Court has since rejected the hitherto accepted premise of *Apodaca*: that constitutional rights should be confirmed based upon their functional purpose rather than their historical origins. *See Crawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 128 S. Ct. 2678 (2008).

It has also rejected the notion of partial incorporation or watered down versions of the Bill of Rights, nothing that "'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (*citing Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)).

Finally, even if there were an element of the Bill of Rights that need not fully transfer to the states, jury unanimity would not be such an element. ***Louisiana and Oregon are now the only states that allow for non-unanimous jury verdicts.***

These provisions were upheld as constitutional in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972). *Apodaca's* plurality was made up of two distinct, inconsistent, and practically contradictory perspectives, both of which have since been disavowed.



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First, the four-person plurality recognized that the common law long-required juries to return unanimous verdicts, *Apodaca*, at 407-08 & n.2, but relied "upon the function served by the jury in contemporary society," 406 U.S. at 410, to conclude that unanimity "was not of constitutional stature" in criminal cases. 406 U.S. at 406.

Second, Justice Powell offered a never-used-before-never-used-since theory of partial incorporation of the Sixth Amendment. Justice Powell believed that the Sixth Amendment required unanimity at the Founding, and in federal cases, but opined that the protections guaranteed by the Fourteenth Amendment were less than those offered by the Sixth Amendment. Justice Powell's curious view on incorporation has also been exploded by the Supreme Court's recent holding in *McDonald*, where the Court rejected the City's claim that *Apodaca* endorsed a "two-track approach to incorporation," *id*. at 3035 n.14.

There has been a sea change in constitutional exegesis with regard to both the application of the Bill of Rights to the states and whether constitutional rights are merely functional protections since the opinions of *Apodaca v. Oregon*, 406 U.S. 404 (1972), *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Walton v. Arizona*, 497 U.S. 639 (1990).

**A. THE HISTORICAL RECORD IS CLEAR THAT UNANIMITY IS AN ESSENTIAL COMPONENT OF THE JURY TRIAL RIGHT.**

The historical record is clear that unanimity was an essential component of what was conceived of when the Constitution referred to juries. Indeed, In *Johnson v. Louisiana* and *Apodaca*, all nine justices agreed that at the Founding, unanimity was required. See *Apodaca* 406 U.S. at 407-08 (plurality opinion) (White J., Burger C.J., Blackmun J., Rehnquist J., joining) ("Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th

century"); see also *Johnson*, 406 U.S. at 393 (Douglas, J., Brennan, J., Stewart, J., Marshall, J., dissenting) ("The requirements of a unanimous jury verdict in criminal cases and proof beyond a reasonable doubt are so embedded in our constitutional law and touch so directly all the citizens and are such important barricades of liberty that if they are to be changed they should be introduced by constitutional amendment.") *see id*. at 369 (Powell, J., concurring) ("In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial.").

As with the reasonable-doubt standard, a jury unanimity requirement "dates at least from our early years as a Nation." *In re: Winship*, 397 U.S. 358, 361 (1970), and in fact from even earlier. Influential British jurists consistently included jury unanimity as a defining characteristic of the trial by jury.

For example, Sir Matthew Hale wrote that, "[t]he law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment . . . ." 1 Hale, *The History of the Pleas of the Crown* 33 (1736).

In his *Commentaries*, Sir William Blackstone noted the critical role a unanimity requirement can play in ensuring that the Crown not wrongly seize an individual's liberty. Blackstone first observed the special risk of "violence and partiality of judges appointed by the crown" in criminal cases, and the attendant risk of overzealous prosecution if the power to prosecute were "exerted without check or control." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769). Out of concern for those dangers, "[o]ur law has wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and



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the prerogative of the crown." *Id*. But according to Blackstone, it was not merely the existence of the jury that provided that barrier; it was the additional requirement "that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours." Id. Perhaps for this reason, Blackstone explained that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. 3 W. Blackstone, *Commentaries on the Laws of England* 379 (1769).

The Framers carried this perspective with them in crafting the Sixth Amendment. In its original form, the proposed Amendment provided that, "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . ." 1 Annals of Cong. 435 (1789). Although the House ratified that Amendment in substantially similar form, it underwent considerable transformation in the Senate, which was "inflexible in opposing a definition of the locality of Juries. The vicinage they contend is either too vague or too strict a term; . . ." *Williams v. Florida*, 399 U.S. 78, 95 (1970) (emphasis in original) (quoting 1 Letters and Other Writings of James Madison 492-93 (1865)). The debate over the vicinage requirement ultimately led to the more broadly worded Sixth Amendment ratified in 1791, but the historical record contains scant evidence that there was any debate regarding the unanimity requirement. As this Court has acknowledged, however, losing the explicit unanimity requirement "is concededly open to the explanation that the 'accustomed requisites' were thought to be necessarily included in the concept of a 'jury.'" *Williams*, 399 U.S. at 97.



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The subsequent historical record suggests that this explanation is correct. In his Commentaries, Justice Joseph Story wrote, "A trial by jury is generally understood to mean . . . a trial by jury of twelve men . . . who must unanimously concur in the guilt of the accused . . . . Any law, therefore, dispensing with any of these requisites, may be declared unconstitutional." 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 n. 2 (1891). In a series of lectures on the Constitution, Justice John Marshall Harlan asked "whether a state may dispense with a petit jury or modify the trial as it was at the time of the adoption of the Constitution? I answer unhesitatingly that no court of the United States . . . can sentence any man upon the return of a verdict of jury in which all the jury have not concurred." Frye, et al., *Justice John Marshall Harlan*: *Lectures on Constitutional Law*, 81 Geo. Was. L. Rev. 12A, 253 (2013). Indeed, Justice Harlan went even further, in language reminiscent of Blackstone's appreciation of the importance of a unanimity requirement:

> The glory of our civilization is that we do have some regard for human life and human liberty when a man's life is at stake, or when his liberty is put at stake. I have heard that three-fourths might be sufficient to agree to a verdict. I think that a unanimous verdict is required under this Constitution in the Courts of the United States.

*Id*. at 252.

United States Supreme Court precedent provides support for this conclusion as well. After recognizing the historical roots of jury unanimity as one of the essential components of trial by jury, this Court held it "must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to



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them in the law as it was in this country and in England at the time of the adoption of that instrument; . . . ." *Thompson v. Utah*, 170 U.S. 343, 350 (1898).[1]

### B. APODACA AND JOHNSON WERE FRACTURED OPINIONS WITHOUT A COHERENT JUSTIFICATION FOR NON-UNANIMOUS VERDICTS, WHICH HAVE SUBSEQUENTLY BEEN DISAVOWED AND UNWORTHY OF STARE DECISIS.

Principles of *stare decisis* are at their nadir where a case depends upon a plurality opinion in which no five justices are able to muster a controlling view concerning the law. Additionally, the inconsistent and practically contradictory perspectives in the *Apodaca* plurality have since been disavowed. First, *Apodaca's* four-person plurality concluded that unanimity "was not of constitutional stature" in criminal cases, 406 U.S. at 406, although it recognized the long-standing common law requirement for juries to return unanimous verdicts, 406 U.S. at 407-08 & n.2. Second, Justice Powell's concept of "partial incorporation" can no longer be considered good law.

#### i. THE UNITED STATES SUPREME COURT HAS REJECTED THE APODACA CONCEPT THAT CONSTITUTIONAL RIGHTS SHOULD BE ASSESSED BY THEIR FUNCTIONAL PURPOSE

The United States Supreme Court has subsequently broadly rejected the idea that the Sixth Amendment derives its meaning from functional assessments, and has strictly adhered to historical origins of the amendment. *See Crawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 128 S. Ct. 2678 (2008).

This Court no longer measures the value of a constitutional right by the function that it serves. While the *Apodaca* plurality focused "upon the function served by the jury in contemporary

[1] One year earlier, The U.S. Supreme Court also noted, in the civil context, that "unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right." *American Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897). Surely, if unanimity was "substantial and essential" in civil cases, it was even more important in criminal cases, where individuals face deprivation of property, life, and liberty.

society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's purposes, but rather from the original understanding of the guarantees contained therein. In a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id*. at 480. In the course of holding that all factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely*, 542 U.S. at 313. Rather, the controlling value is "the Framers' paradigm for criminal justice." *Id*.

Similarly, in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. *In Giles v. California*, 554 U.S. 353 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id*. at 375. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id*. at 145 (quotation omitted). This pronounced shift in constitutional exegesis—the return to historical analysis—calls *Apodaca* into serious question.

Moreover, evincing this shift, this Supreme Court's Sixth Amendment jurisprudence has repeatedly eschewed a functional approach, holding firm the applicability of the longstanding tenet of criminal jurisprudence that the "truth of every accusation be confirmed by the unanimous suffrage of twelve of his equals and neighbors." *S. Union Co. v. United States*, 567 U.S. 343, 344 (2012) ("The rule that juries must determine facts that set a fine's maximum amount is an application of the "two longstanding tenets of common-law criminal jurisprudence" on which *Apprendi* is based. First, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'"); *United States v. Booker*, 543 U.S. 220, 238, (2005) ("Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, "[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,'…"); *Blakely v. Washington*, 542 U.S. 296, 301, (2004) ("This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,"…"); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("As we have, unanimously, explained, the historical foundation for our recognition of these principles extends down centuries into the common law. "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," ... trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of

[the defendant's] equals and neighbours."); *United States v. Gaudin*, 515 U.S. 506, 510-11, 115 S. Ct. 2310, 2313-14 (1995) ("Blackstone described "trial by jury" as requiring that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . ."); *id* at 511 ("Justice Story wrote that the "trial by jury" guaranteed by the Constitution was "generally understood to mean . . . a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had." This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.").

**ii. SINCE APODACA, THE UNITED STATES SUPREME COURT HAS REJECTED THE CONCEPT OF PARTIAL INCORPORATION**

Second, Justice Powell offered a theory of partial incorporation of the Sixth Amendment, unique to Justice Powell, not found anywhere else in Supreme Court jurisprudence. Justice Powell believed that the Sixth Amendment required unanimity at the Founding, and in federal cases, but that the protections guaranteed by the Sixth Amendment were more expansive that those of the Fourteenth Amendment. This Court's holding in *McDonald* now makes clear that Justice Powell's creative view on incorporation is not constitutionally acceptable. The Supreme Court rejected the City's claim that *Apodaca* endorsed a "two-track approach to incorporation," id. at 3035 n.14. Instead, the Court left no doubt that it "abandoned the notion that the Fourteenth Amendment applies to the States only a watered- down, subjective version of the individual guarantees of the Bill of Rights." *Id*. at 3035 (internal quotation marks and citation omitted). The Court has made clear that "[t]he relationship between the Bill of Rights' guarantees and the States must be

governed by a single, neutral principle": "incorporated Bill of Rights Protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *McDonald v. City of Chicago*, 561 U.S. 742, 765, (2010) (*citing inter alia, Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961); *Ker v. California*, 374 U.S. 23, 33- 34 (1963); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964); *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969); *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985)).

**iii. THE FRACTURED NATURE OF APODACA UNDERMINES ITS CONTINUED VITALITY.**

Nine justices have essentially agreed that unanimity was required at the Founding. Eight justices agreed that the Fourteenth Amendment incorporated the full force of the Sixth Amendment. Five justices agreed that the Sixth Amendment currently required adherence to its historical origins. And yet the odd configuration of opinions resulted in a rule permitting non-unanimous verdicts in the States. *Apodaca*, therefore, is entitled only to "questionable precedential value." *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overturning prior decision in part because a majority of the Court had "expressly disagreed with the rationale of the plurality" (the concurring opinion providing the fifth vote, as well as the dissent)).

Justice Powell's peculiar and atypical view of partial incorporation led the Court to rule by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty." As Justices Douglas, Brennan, Marshall and Stewart observed, dissenting in Johnson, "[t]he result of today's decisions is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be

possible when both decisions stem from the Sixth Amendment?" 406 U.S. at 383. As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*], when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

*Johnson*, 406 U.S. at 395 (Brennan, J. *dissenting*). As this Court observed in *McDonald*, the odd accounting of votes undermines the coherence of the *Apodaca* and *Johnson* opinions:

> In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. . . .
> Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials . . . and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials . . .
> Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. Apodaca, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.

*McDonald*, 561 U.S. at 766. It is significant to note that the four plurality justices who held that the Sixth Amendment did not require unanimity did not do so because of a different view of the original history (compare for instance Justice Stevens' historical understanding of the Second Amendment in *Heller* with Justice Scalia's historical understanding of the Second Amendment), but rather observed, "[o]ur inquiry must focus upon the function served by the jury in contemporary society." *Apodaca*, at 410 (plurality of White, J., Blackmun, J., Rehnquist, J., and Burger, C.J.).



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## CONCLUSION

Although some Oregon trial courts may continue to use *Apodaca* to justify non-unanimous jury verdicts, the Supreme Court's recent Sixth Amendment jurisprudence renders *Apodaca*—both Justice Powell's partial incorporation theory and the plurality's focus on the function of the jury in contemporary society— impossible to defend. In fact, the Supreme Court's recent Sixth Amendment decisions have rejected both theoretical predicates on which the *Apodaca* plurality opinion is based. Accordingly, Mr. Gibson objects to any nonunanimous verdict.

Respectfully submitted this Monday, February 24, 2020.


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## CERTIFICATE OF SERVICE

I, D. Angus Lee, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years

On, Monday, February 24, 2020, I caused JOSEPH GIBSON'S OBJECTION TO ANY NONUNANIMOUS VERDICT to be served in the following manner on the parties listed below:

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