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Cc: Amber Burke
Subject: [External] S.178
Attachments: Brief of Law Professors and Social Scientists as Amici Curiae in Support of Petitioner.pdf; Principles for Juries and Jury Trials from the American Bar Association_2-15-2022-1.pdf

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Dear Members of the House Committee on the Judiciary,

I am writing in opposition to S. 178, an act relating to supermajority verdicts in civil trials. The bill will change Vermont's 243-year practice requiring unanimous juries in civil trials. As amended, the bill will allow verdicts to be reached by 80% of the jurors only. The bill was reported out of the Senate Judiciary Committee with a 3-2 vote.

I testified in opposition to S. 178, in light of the current thinking around jury decision-making and critically important policy reasons addressed in recent sources and studies including: 1) The American Bar Association's 2016 Report setting forth the ABA's fundamental aspirations for the jury system entitled "Principles for Juries and Jury Trials,"; 2) *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (A United States Supreme Court case from 2020 holding that non-unanimous juries in criminal cases are unconstitutional and addressing the policy argument that a non-unanimous jury undermines the voices of minority members of a jury); and 3) Amicus Brief of Law Professors and Social Scientists as Amici Curiae in Support of Petitioner in *Ramos v. Louisiana* (addressing jury decision making in civil and criminal cases and the problems with non-unanimous juries).

I was not the only person to testify in opposition to S. 178. Among others who testified or submitted testimony, Wilda White, Esq. of MadFreedom submitted a Letter of Opposition and testified before the Committee. A copy of her letter can be found here: Letter of Opposition, Wilda White.

Chief Superior Judge Thomas Zonay also testified regarding S. 178 on March 9, 2022. Judge Zonay testified that he sent the draft bill to all current Vermont Superior Judges and polled them as to their position on S.178. Judge Zonay testified that no current Superior Judge supports the change to Vermont's rule requiring unanimous jury verdicts in civil trials and that the Vermont Superior Court judges referenced the policy reasons discussed by Wilda White and others, and the recent 2020 decision by the United States Supreme Court in *Ramos v. Louisiana*.

Vermont is not alone in requiring civil trials to be decided by a unanimous jury. In addition to many states courts, every federal trial court in every state requires that civil verdicts be unanimous.

The ABA, which serves as the national representative of the legal profession, addressed this issue recently in 2016 Principles for Juries and Jury Trials (attached). The ABA Report makes the following critical policy points:

- unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions – ones that address and persuade every juror. Empirical assessment tends to support this assumption (citing sources)

- Unanimous verdicts also protect jury representativeness—each point of view must be considered and all jurors persuaded. Studies have shown that minority jurors participate more actively when decisions must be unanimous.
- A non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation. This fosters a public perception of unfairness and undermines acceptance of verdicts and the 25 legitimacy of the jury system.
- There is a fear that a unanimity rule will result in more hung juries. This fear is overstated. Juries rarely hang because of one or two obstinate jurors.
- The requirement that jurors deliberate for a reasonable period of time helps to ensure that minority voices will be heard during deliberations, even if a quorum is reached on the first vote.

Although the Unites States Supreme Court decision in *Ramos* concerned criminal juries, the serious policy concerns are implicated in civil trials as well. *Ramos* recognized that
"non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors 'can simply ignore the views of their fellow panel members of a different race or class.' … That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system…."

In support of S.178, Senator Sears relied on a *2002* report from a committee on jury policy: 2002 Vermont Supreme Court Report. With all due respect to the members of the 2002 committee, this report is almost 20 years old. Vermont should not make changes to this most vital aspect of the legal system based on a decades-old report. Moreover, the report itself does not provide evidence to support the committee's conclusions. For example, the 2002 Committee was concerned with "compromise verdicts," which at the time it believed to be a problem in Vermont. The report does not elaborate on the basis for this conclusion. Although the committee included members of the judiciary, these judges would not have access to jury room during deliberations. That is not permitted. No one is allowed in the jury room except the jurors. It is unclear, and the report does not tell us, why the members at that time believed there to be a problem.

In my testimony, I explained that there is a source of data on the number of illegal compromise verdicts in Vermont. A compromise verdict is illegal if there is evidence that some jurors surrendered their conscientious convictions on one issue in return for a similar surrender by other jurors on another issue. A compromise verdict will be set aside by the Court. A lawyer who believes that the verdict is the result of a compromise has a duty to file a Motion to Set Aside the Verdict. Cases in which this have happened are few and far between. A verdict will not be aside merely because the amount awarded is less than what the Plaintiff requested so long as the jury could reasonably have calculated the damages awarded on the evidence presented.

By contrast, there are situations in which a jury may believe it is deadlocked. In those cases, the Court will instruct the jury with an "Allen Charge", a jury charge that derives its name from a United States Supreme Court case. The Allen Charge instructs in relevant part as follows: "During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. You should not, however, change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict."

In other words, a verdict is an illegal compromise if it is the result of a juror surrendering a conscientious conviction in exchange for a surrender by another juror. A verdict is not illegal if a juror reexamines their own views and changes their opinion or is persuaded that they are wrong.

We have no evidence of a compromise verdict problem in Vermont. There was no evidence presented with the 2002 Report cited above. We do not have any current studies or committee reports from Vermont that suggest there was or is a problem currently. The current Vermont judiciary believes that unanimous juries should continue in Vermont civil cases. Moreover, non-unanimous jury permits the majority to ignore the views of minority members of the jury and reach a decision without the need for either the majority or the minority to reexamine their opinions.

For these reasons, I respectfully request that the Committee retain the longstanding requirement of unanimity in Vermont.

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