No. 15-606

IN THE
Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF INDIANA, ALABAMA, ARKANSAS, GEORGIA, IDAHO, LOUISIANA, MAINE, NEVADA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Does the Sixth Amendment compel an exception to the no-impeachment rule to address allegations that racially biased statements were made during jury deliberations?

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arkansas, Georgia, Idaho, Louisiana, Maine, Nevada, Pennsylvania, South Dakota, Texas, and Wyoming respectfully submit this brief as *amici curiae* in support of Respondent, the State of Colorado. Forty-two states have a rule or statute generally prohibiting the use of juror testimony regarding statements made during jury deliberations when that testimony is offered to challenge the validity of the verdict. *See* Appendix. Eight states have similar judge-made rules. *Id.* A handful of states have applied state-law racial-bias exceptions to their no-impeachment rules. *Id.*; *see also* Part I, *infra*.

Petitioner seeks to require *all* states to afford a racial-bias exception to the no-impeachment rule as a matter of constitutional right. Doing so, however, would expose jury verdicts to intrusive investigation and judicial second-guessing. To be clear, no one thinks that a system that facilitates criminal convictions based on racial bias or other prejudices is tolerable. The question is whether the Sixth Amendment guarantees a trial scrubbed of any taint of bias at all costs, or whether it permits state and federal judicial systems to respect jury secrecy and finality while providing other safeguards against biased verdicts. The *amici* States have a longstanding, fundamental interest in ensuring the integrity and finality of jury verdicts while providing tools other than juror impeachment to fight prejudice in the jury room.

SUMMARY OF THE ARGUMENT

No-impeachment rules safeguard deliberative secrecy—an essential feature of the jury system. Public confidence in the jury system is undermined where courts have the ability to pry into the "black box" and second-guess jury verdicts. As this Court explained a century ago, once verdicts "can be attacked and set aside on the testimony of those who took part in their publication . . . all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *McDonald v. Pless*, 238 U.S. 264, 267 (1915). When no verdict is truly final, jurors will be "harassed and beset by the defeated party" in an effort to find evidence of misconduct, and such evidence will be used "to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference." *Id.* at 267–68.

Accordingly, the secrecy of the deliberative process is widely regarded as the cornerstone of the American jury system. And, since the earliest days of the Republic, the no-impeachment rule has been a critical tool for ensuring the secrecy of jury deliberations. Every state judicial system, not to mention the federal system, has come to depend on some variation of it. And when the Advisory Committee on the Federal Rules of Evidence proposed softening the no-impeachment rule, the Department of Justice, this Court, and Congress ultimately rejected the proposal.

While not without its costs, the no-impeachment rule has proven over time to be the best method of "promoting the finality of verdicts and insulating the jury from outside influences[.]" *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014). Adhering to it sometimes yields facially unsavory verdicts, but the alternative would be a greater evil still: a system of largely provisional jury decisions, followed by judicial inquiry into the "fairness" of jury deliberations. In such a system, the benefits of relying on juries independently to sift and weigh conflicting evidence and arrive at a collective judgment would be fatally compromised.

Nor do jury finality and the no-impeachment rule operate to the benefit of public prosecutors only. Rather, private parties are protected by the no-impeachment rule when they litigate (even against the government) in civil cases, and in criminal cases a separate protection—the Double Jeopardy Clause—safeguards jury finality. In both situations jury verdicts are final, regardless of juror statements concerning misconduct, and the government is equally bound by them.

Other constitutional and rule-based protections shield parties from juror bias, and it remains the better course to rely on those mechanisms rather than pay the very steep price of undercutting the no-impeachment rule and jury finality. The typical requirements for juror unanimity and for large juries composed of a fair cross-section of the community where the crime was committed all work to neutralize potential biases against a defendant. In

addition, voir dire, peremptory challenges and *Batson* objections all contribute to a system that seeks to sanitize juries of bias as much as possible. Particularly with these safeguards in place, relying on jurors to expose, address, and resolve explicit bias during deliberations, rather than post-verdict, properly balances the competing values of fundamental fairness and finality.

Maintaining that balance is particularly critical considering the potentially far-reaching consequences of a constitutional right to impeach an allegedly unfair verdict using juror testimony. For if that evidentiary right exists in racial-bias cases, presumably it would also exist to support *any* Sixth Amendment claim for new trial. Otherwise the Court would be in the position of elevating some new trial demands over others for purposes of the no-impeachment rule.

ARGUMENT

I. Jury Secrecy, a Critical Feature of American Jurisprudence, Has Long Been Preserved by Robust No-Impeachment Rules

As Professor Wigmore wrote over 85 years ago, "[t]he jury, and the secrecy of the jury room, are the indispensable elements in popular justice." John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Jud. Soc'y 166, 170 (1929). When juries are subject to post-verdict scrutiny and judicial second-guessing, their role as arbiter of justice is seriously undermined. Writing for the Tenth Circuit, Judge

Michael McConnell explained that "[i]f what went on in the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands." *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008). Rather, as Judge Charles Clark wrote for the Fifth Circuit decades ago, the result of such judicial review "would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave." *United States v. D'Angelo*, 598 F.2d 1002, 1005 (5th Cir. 1979).

Accordingly, the no-impeachment rule has been foundational for the American jury system.

1. The no-impeachment rule originated in English common law with the 1785 opinion of Lord Mansfield in *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). Starting from the principle that a "witness shall not be heard to allege his own turpitude," Lord Mansfield held inadmissible an affidavit from two jurors claiming that the jury had come to its decision by way of a coin toss. John L. Rosshirt, *Evidence—Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 Notre Dame L. Rev. 484, 484 (1956). Lord Mansfield explained that his decision might be different if the information came from an external source, such as a person who glimpsed the coin toss through an open window. *Id.* But where the allegation of juror misconduct came from the jurors themselves, the court could not accept testimony impeaching their own character. *Id.*

Lord Mansfield's no-impeachment rule was widely adopted by American jurists, though they generally rejected his rationale. *See, e.g.*, *Smith v. Cheetham*, 3 Cai. R. 57, 59 (N.Y. Sup. Ct. 1805) ("If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged?"). Instead, as this Court explained in *McDonald v. Pless*, adoption of the no-impeachment rule as a matter of American common law was based on policy considerations such as (1) ensuring the finality of "verdicts solemnly made and publicly returned," (2) preventing jurors from being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict," and (3) encouraging "frankness and freedom of discussion and conference" among jurors. 238 U.S. 264, 267–68 (1915); *see also Clark v. United States*, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.").

By the beginning of the twentieth century, the no-impeachment rule was a "near-universal and firmly established common-law rule" throughout the United States. *Tanner v. United States*, 483 U.S. 107, 117 (1987).

2. Today, 42 states have codified the general rule and 8 others recognize it as a matter of common law. *See* Appendix. *Cf.* 8 J. Wigmore, *Evidence* § 2352, pp. 696–97 (J. McNaughton rev. ed. 1961) (stating that Lord Mansfield's rule "came to receive in the

United States an adherence almost unquestioned"). An Appendix to this brief provides citations to rules, statutes, or cases establishing the no-impeachment rule in each state.

Some states do have exceptions to their no-impeachment rules for evidence of racial bias. But Petitioner and his supporting *amici* overstate the number. *See* Pet'r Br. at 30 (claiming that "over twenty jurisdictions" provide an exception); Amicus Curiae Br. of Center on the Administration of Criminal Law [hereafter, "CACL Br."] at 3 (stating that "some 20 jurisdictions" provide an exception). As confirmed by the citations collected in the Appendix, only twelve state courts of last resort have expressly recognized and applied a state-law exception to the no-impeachment rule for evidence of racial bias.

The discrepancies arise because Petitioner (1) includes states with racial-bias exceptions predicated on the Sixth Amendment (rather than state law); (2) includes states based on inferences from broadly stated precedents and rules rather than direct application of a racial-bias exception in an actual case; and (3) includes states where the issue has been decided by an intermediate appellate court but not a state court of last resort.

First, as the whole issue here is whether the Sixth Amendment requires a racial-bias exception, it is pointless to count states whose courts have merely concluded that it does. What matters is the extent to which states have freely chosen to break with the

traditional no-impeachment rule and apply a racial-bias exception as a matter of state law. Accordingly, it is inappropriate to include the District of Columbia, Georgia, and South Carolina as states that have, of their own volition, created exceptions to the no-impeachment rule for racial bias claims. *See Kittle v. United States*, 65 A.3d 1144, 1151–56 (D.C. 2013) (citing only federal constitutional provisions and expressly observing that statements about racial bias are within the ambit of the no-impeachment rule itself); *Spencer v. State*, 398 S.E.2d 179, 184 (Ga. 1990) (relying on federal constitutional precedents to apply a racial-bias exception to the no-impeachment rule); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (citing *McDonald*, 238 U.S. at 269, for the proposition that the federal constitution requires a racial-bias exception).

Second, a few cases cited by Petitioner—from California, Kansas, Oklahoma, and Wisconsin—did not actually apply a racial-bias exception. For California, Petitioner cites *Grobeson v. City of Los Angeles*, 118 Cal. Rptr. 3d 798, 806 (Ct. App. 2010), but that case did not address statements of racial bias. Pet'r Br. at 31 n.7. Indeed, the CACL amicus brief properly does not include California as a state with an exception for racial bias. *See* CACL Br. at App. A & B. For Kansas, Petitioner cites no cases—only that state's version of Rule 606(b), which, while not as broad as the federal rule, includes no express exception for statements concerning racial bias. *See* Kan. Stat. Ann. §§ 60-441, -444; Pet'r Br. at 31 n.7 (admitting Kansas "has yet to address the specific issue of racial bias in deliberations"). For Oklahoma,

Petitioner cites *Fields v. Saunders*, 278 P.3d 577 (Okla. 2012), but there the court stressed that "this is . . . not a case of a juror impeaching a verdict." *Id.* at 581; Pet'r Br. at 31 n.8. Finally, for Wisconsin, Petitioner cites *State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984), but there the court merely agreed that "'there might be instances in which . . . testimony of [a] juror could not be excluded without 'violating the plainest principles of justice.'" *Id.* at 695 (quoting *McDonald*, 238 U.S. at 269); Pet'r Br. at 32 n.9.

Finally, regarding New York, Petitioner cites only intermediate appellate decisions, *People v. Rukaj*, 506 N.Y.S.2d 677 (App. Div. 1986), *People v. Whitmore*, 257 N.Y.S.2d 787 (Sup. Ct. 1965), and no express provision from a rule or case from the New York Court of Appeals. Pet'r Br. at 31, 37. Accordingly, it is not accurate to say that New York has definitively settled on a racial-bias exception to the no-impeachment rule as a matter of state law.

With these eight states properly accounted for, it becomes clear that only twelve states have, as a matter of state law, definitively created and applied a racial-bias exception to the no-impeachment rule. *See* Appendix.

3. In 1975, the federal government adopted its own no-impeachment rule, Federal Rule of Evidence 606(b). Rule 606(b) allows juror testimony only to show that extraneous prejudicial information or an outside influence affected jury deliberations or to show that there was a mistake in entering the verdict onto the verdict form. Fed. R. Evid. 606(b).

An earlier draft of the rule drew criticism from both legislators and Department of Justice officials, as it would have allowed use of a wider range of juror testimony to impeach verdicts. *Tanner*, 483 U.S. at 122. That earlier draft tracked the "Iowa rule," which allowed all juror testimony except that concerning matters "inher[ing] in the verdict," *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866), *i.e.*, "evidence of the jurors' subjective intentions and thought processes in reaching a verdict." *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014) (explaining the Iowa rule). In a letter to the Advisory Committee on the Federal Rules of Evidence, the Department of Justice objected to using the Iowa rule as a model, writing "[s]trong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations." *Tanner*, 483 U.S. at 122 (citation omitted).

The Advisory Committee changed the rule to its present form, which this Court adopted and transmitted to Congress for approval. *Id.* The House Judiciary Committee, however, preferred the Iowa rule and passed an amended version more closely resembling the Advisory Committee's original proposal. *Id.* at 122–23. The Senate Judiciary Committee rejected the House version because it was concerned that it "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.* at 124 (citation omitted). Furthermore, noted the Senate's report,

"[p]ermitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court." *Id.* Ultimately, in conference committee, the Senate's view prevailed and Congress rejected the Iowa rule. *Id.* at 125.

Thus, the Federal Rules Advisory Committee, the Department of Justice, this Court, and Congress *all* considered and rejected a version of the no-impeachment rule that might have allowed the type of evidence Petitioner asks the Court to permit here, *i.e.*, testimony regarding statements made in the jury room. *Cf. Shillcutt v. Gagnon*, 827 F.2d 1155, 1158 (7th Cir. 1987) ("[A]s adopted, [Federal] Rule 606(b) reflects a deliberate choice to exclude post-verdict juror testimony, with only few exceptions."). Notably, even Iowa has now rejected the "Iowa rule," as it adopted a rule substantively identical to Federal Rule 606(b) in 1983. Iowa R. Evid. 606(b). The Iowa Supreme Court has held that it, like its federal counterpart, excludes testimony regarding "each of the components of deliberation including juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room." *Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988).

The Court has recognized that while some states have "made admissible a 'juror's affidavit as to an overt act of misconduct, . . .' the argument in favor of that approach (*i.e.*, the Iowa rule) ha[s] not been generally accepted, because permitting such evidence 'would open the door to the most pernicious

acts and tampering with jurors.'" *Warger*, 135 S. Ct. at 527 (quoting *McDonald*, 238 U.S. at 268). That is, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald*, 238 U.S. at 267. Understandably, the federal judicial system and most state judicial systems have rejected this approach.

* * *

The exception to Colorado's no-impeachment rule that Petitioner seeks is at odds with the history and traditions of jury secrecy in this country. From the time of the founding, no-impeachment rules have maintained the veil of secrecy surrounding how and why juries reach their decisions. Allowing testimony as to what jurors said during deliberations and how those statements may have influenced others will only serve to undermine the ability of the jury to weigh the evidence and arrive at difficult decisions. "[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120–21.

II. The Finality of Jury Verdicts Is Critical to the Jury System and Benefits Government and Private Parties Alike

While historically and philosophically fundamental, the no-impeachment rule sometimes shields verdicts where juror misconduct offends traditional notions of fairness and justice. *See United States v. Leung*, 796 F.3d 1032, 1036 (9th Cir. 2015) (observing the rule "prevents courts from considering some conduct that does not reflect the solemn duty undertaken by jurors"). Yet this Court and others have long recognized that protecting the deliberative process justifies the rule's costs.

A. The public interest in the integrity of the jury system outweighs the rare instance of injury to the private litigant

Application of the no-impeachment rule has sometimes produced results that are difficult for private litigants to abide. In *Tanner*, for example, the Court refused to allow juror testimony alleging that several jurors had used drugs and alcohol during lunch breaks and slept through portions of the trial. 483 U.S. at 115. In *United States v. Benally*, the Tenth Circuit affirmed the conviction of a Native American man despite juror affidavits alleging that several jurors made derogatory remarks about Native Americans during the course of deliberations. 546 F.3d 1230, 1231–32 (10th Cir. 2008) (describing juror statements such as "[w]hen Indians get alcohol, they all get drunk," "when they get drunk, they get violent," and "[we need to] send a

message back to the reservation" (internal quotations omitted)). And in *United States v. Campbell*, the D.C. Circuit refused to inquire into the jury's deliberative process notwithstanding evidence that the jury arrived at unanimity only because jurors were "very unhappy about being sequestered and they were voting so that they could go home to their husbands and wives and families." 684 F.2d 141, 150–51, 150 n.18 (D.C. Cir. 1982) (internal quotations omitted).

This Court acknowledged in *McDonald* that the arguments in favor of admitting this type of juror evidence are "not only very strong, but unanswerable . . . when looked at solely from the standpoint of the private party who has been wronged by such misconduct." *McDonald*, 238 U.S. at 268. The court system is inevitably forced to choose between the "lesser of two evils," as it "must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room." *Id.* at 267.

The Court has consistently favored "the weighty government interest in insulating the jury's deliberative process." *Tanner*, 483 U.S. at 120. And as Judge McConnell explained for the Tenth Circuit in *Benally*, "[w]here the attempt to cure defects in the jury process—here, the possibility that racial bias played a role in the jury's deliberations—entails the sacrifice of structural features in the justice system that have important systemic benefits, it is not necessarily in the interest of overall justice to do

so." *Benally*, 546 F.3d at 1240; *see also Leung*, 796 F.3d at 1036 ("The notion that egregious juror conduct will not necessarily result in relief from the verdict may seem antithetical to our system of due process," but "[t]he [no-impeachment] Rule . . . exists for good reason."); *Carson v. Polley*, 689 F.2d 562, 581 (5th Cir. 1982) ("While jurors may reach a verdict because of secret beliefs that have little to do with the law or the facts," inquiry into such matters "would destroy the effectiveness of the jury process which substantial justice demands and the constitution guarantees." (internal quotation marks and citation omitted)); *United States v. Snipes*, 751 F. Supp. 2d 1279, 1282–83 (M.D. Fla. 2010) (stating that possible juror misconduct in that case "presents . . . a troubling set of circumstances, but further pursuit of the issue is clearly foreclosed by Federal Rule of Evidence 606(b)," which "serves paramount interests that go to the core of our justice system").

In short, while the no-impeachment rule is not without costs, this Court has rightly concluded that, overall, jury finality is worth protecting.

B. Safeguarding the finality of jury verdicts benefits all types of parties, not merely public prosecutors

Petitioner portrays the no-impeachment rule as a shield exclusively within the government's use, *see, e.g.*, Pet'r Br. 38. But the government, too, must respect the finality of adverse verdicts. Whether due to application of the no-impeachment rule in civil cases or the Double Jeopardy Clause in criminal

cases, the government must live with unfavorable verdicts, even when those verdicts are based on considerations other than the evidence.

1. Courts have applied the no-impeachment rule to affirm civil judgments against governmental entities that sought to impeach adverse jury verdicts. In *Reifschneider v. City & County of Denver*, the trial court granted Denver's motion to dismiss a $250,000 verdict for the plaintiff based on the court's conclusion that "the jury was confused when it rendered its final verdict." 917 P.2d 315, 317 (Colo. Ct. App. 1995). The Colorado Court of Appeals reversed, holding that speculation about the jury's reasoning was exactly the type of evidence forbidden to impeach a verdict under Colorado Evidence Rule 606(b). *Id.* at 318. It noted that "the trial court's speculation as to continuing confusion intruded on the jurors' mental processes." *Id.*

Similarly, in *Mesecher v. County of San Diego*, the court affirmed a judgment against the County of San Diego, despite evidence that the jury misapplied the definition of battery. 9 Cal. App. 4th 1677, 1682–83 (1992). After the verdict, the County asked each juror to describe the deliberations and used what it learned as grounds for a new trial motion. *Id.* The motion was properly denied because "evidence about a jury's 'subjective *collective* mental process purporting to show *how* the verdict was reached' is inadmissible to impeach a jury verdict." *Id.* at 1682–84 (emphasis in original) (quoting *Ford v. Bennacka*, 226 Cal. App. 3d 330, 336 (1990)).

Similar concerns arose in *Sailor, Inc. v. City of Rockland*, 428 F.3d 348 (1st Cir. 2005). The city filed a motion for remittitur, arguing the evidence did not support an excessively high damages award. *Id.* at 351. Citing Rule 606(b), the trial court declined to investigate whether the jury had "*reasoned* properly." *Id.* at 354 (emphasis in original). The First Circuit affirmed. *Id.* at 354–55.

It is not the case, therefore, that states support the no-impeachment rule because it always protects verdicts favorable to the government. Rather, it protects the finality of *all* jury verdicts, which benefits the system as a whole, even when the government is on the losing end.

2. The finality of jury verdicts also benefits acquitted criminal defendants. In this context, it is the Double Jeopardy Clause that protects finality, but that provision serves interests similar to those underlying the no-impeachment rule. As this Court has explained, "there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous'" the acquittal might be. *Sanabria v. United States*, 437 U.S. 54, 75 (1978) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). Thus, the rule of finality applies in cases in which jurors were biased against the government, its witnesses, or the victim of a crime.

Even where a juror admits to making a clerical error on the verdict form, the government must respect the acquittal, mistaken though it may be. In *Ex parte Lamb*, the jury foreman admitted, after the

jury had been discharged, that he made a mistake in signing the verdict form "not guilty" under one of the counts. 113 So. 3d 686, 688 (Ala. 2011). The Alabama Supreme Court held that the trial court could not fix this clerical mistake. *Id.* at 691. Although the foreman's error was clear from the record, "[a]ny subsequent alteration of the verdict under the facts of this case would subject Lamb to being placed twice in jeopardy for a crime he had been acquitted of[.]" *Id.*

In other cases, allowing the government to reopen a verdict to correct a jury's improper considerations would (1) "allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first;" (2) "permit him to re-examine the weaknesses in his first presentation in order to strengthen the second;" and (3) "disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States v. Wilson*, 420 U.S. 332, 352 (1975).

Ensuring a mistake-free, or even bias-free, verdict in every case is implausible and, therefore, cannot be the ultimate aim. *See United States v. Farmer*, 717 F.3d 559, 564 (7th Cir. 2013) ("It's a rare jury trial in which there are no mistakes on anyone's part."). Instead, the justice system must balance a variety of other public policy interests, some of which may justify preserving what appears to be an unfair result in a particular case. *See, e.g.*, *Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant

may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" (quoting *Fong Foo*, 369 U.S. at 143)). As a result, the government is forced to recognize that courts protect jury acquittals "no matter how erroneous [the] decision." *Burks v. United States*, 437 U.S. 1, 16 (1978); *see also United States v. Scott*, 437 U.S. 82, 91 (1978) ("[T]he law attaches particular significance to an acquittal.").

Accordingly, while the source of the rule may be different, criminal prosecutors and defendants are both precluded from seeking new trials based on juror testimony about the role of racial (or other) bias during deliberations.

III. The Jury Process Is Capable of Detecting and Addressing Racial Bias Without an Exception to the No-Impeachment Rule

So long as juries are composed of human beings, individual biases will be impossible to exclude from jury deliberations. The exception Petitioner seeks would do nothing to safeguard jury verdicts from the influence of subconscious, unexpressed biases that jurors may hold. And to the extent Petitioner's rule might provide relief in some cases where jurors report explicit bias, it would do so at the risk of driving such bias underground in other cases, making it impossible for other jurors to confront and challenge a biased juror's prejudices. Given these realities, states with no-impeachment rules permissibly trust the deliberative process to expose and address bias, rather than unrealistically seek to

perfect deliberations by undoing verdicts based on juror testimony.

1. As the Court's decisions in *Tanner* and *Warger* recognize, existing trial procedures are more than adequate to the task of detecting bias. In those cases, the Court described several aspects of the trial process that protect a defendant's right to an impartial jury:

- Potential jurors' biases can be detected and tested during voir dire.

- During the trial, jury conduct is observable by the court, court staff, and counsel.

- Jurors can observe each other and report inappropriate behavior to the court before entry of the verdict.

- After a verdict, a party may use non-juror evidence of misconduct to impeach the verdict.

Tanner, 483 U.S. at 127; *Warger*, 135 S. Ct. at 529; *see also* Resp. Br. at 22–42 (describing each of these protections in detail).

Other structural protections also provide safeguards against bias, whether express or subconscious. The federal government and the vast majority of the states guarantee felony defendants the right to a jury of twelve, which is double the Sixth Amendment's minimum. 6 Wayne R. LaFave,

Criminal Procedure § 22.1(d), p. 22 (4th ed. 2015). Larger juries "foster effective group deliberation" and "counterbalanc[e] . . . various biases[.]" *Ballew v. Georgia*, 435 U.S. 223, 233–34 (1978). Additionally, the typical requirement that criminal verdicts be unanimous "ensure[s] careful assessment of the evidence by the jury, enable[s] minority viewpoints to be heard and considered, and reinforce[s] the requirement of proof beyond a reasonable doubt." 6 LaFave, *Criminal Procedure*, at § 22.1(c), p. 25.

Beyond these protections, the Sixth Amendment affords defendants the right not to be convicted except by a jury drawn from the district where the crime was committed and selected from a representative cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). The Court explained in *Taylor* that these requirements are "fundamental to the jury trial guaranteed by the Sixth Amendment," which "'presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.'" *Id.* (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

Among other benefits, these features of the American system afford a greater chance that at least one juror will see things the defendant's way, expose improper biases of other jurors, persuade other jurors against a biased verdict, and even foil an unjust result. In short, these structural and participatory safeguards, most of which have existed since the earliest days of the American jury system,

exist in part to expose or neutralize any improper biases and motivations of jurors (and potential jurors).

Modern practices of peremptory challenges and *Batson* objections add yet more layers of protection from bias. Defense lawyers have the opportunity to ask jurors about biases, affinities, and points of view that might harm their clients, and then to strike jurors they suspect of harboring prejudices. They may also challenge the prosecution for dismissing jurors out of racial bias and other improper prejudices.

Here, the deliberative process itself ultimately exposed Juror H.C.'s biases so that jurors could both confront and account for them. Once the verdict is returned and the judgment entered, all must respect the capacity of jurors to grapple appropriately with expressions of racial bias during deliberations, just as they must respect the capacity of jurors to sift and weigh complex, contradictory evidence on many other matters. *Cf. Farmer*, 717 F.3d at 565–66 (observing, regarding claims of premature deliberation, "[w]e count on the court's final instructions to the jurors and the gravity of the group deliberations to rein in jurors who may struggle with or even make light of their important responsibilities"); *United States v. Paneras*, 222 F.3d 406, 411 (7th Cir. 2000) ("In this situation, it is significant that the [juror's cartoon rendering of trial events] expressed one juror's view of the case, and was subject to the scrutiny and the questioning of other jurors.").

2. Trusting juries to expose and address bias during deliberations may not achieve perfect, unbiased verdicts in every case, but doing so surely balances costs and benefits better than the rule Petitioner urges. If judges and litigants were permitted to peek inside the jury room following a verdict, "[t]here is little doubt" such investigation would "in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior." *Tanner*, 483 U.S. at 120.

And if post-verdict inquiry would indeed yield evidence of improper verdicts in a significant percentage of cases, "[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it." *Id.* "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Id.*; *see also Farmer*, 717 F.3d at 564 ("[T]he jury system cannot afford to allow the perfect to become the enemy of the good."); *State v. Boyles*, 567 N.W.2d 856, 860 (S.D. 1997) ("The best justification of the rule is . . . that it protects a good system that cannot be made perfect." (quoting Christopher B. Mueller & Laird C. Kirkpatrick, 3 *Federal Evidence* § 247, at 55 (2d ed. 1994))).

Where jury verdicts are merely the starting point for multiple regressions of factual analysis, the utility of using juries to decide factual disputes—and even the fulfillment of the constitutional right to a jury decision—becomes questionable. Petitioner seeks a special exception for evidence of juror racial

bias, but the existence of such bias is far from the only form of juror misconduct that may necessitate a new trial under the Sixth and Seventh Amendments. And while the Constitution in some contexts provides special substantive protections against racial bias, it is hard to see how that could translate into a special rule of evidence. A criminal defendant unjustly convicted by jurors who drank alcohol and used drugs during the course of deliberations, *see Tanner*, 483 U.S. at 113–15, would surely have equal claim to a right to use juror testimony as evidence. And defendants who believe their convictions were tainted by other types of bias could claim the same right, even *decades* after entry of the verdict against them. *See, e.g., Rhines v. Young*, 2016 WL 3661223, at *2–3 (D. S.D. July 5, 2016) (denying habeas petitioner's motion to alter or amend judgment—"roughly twenty years" post-conviction—based on "newly discovered evidence" that jurors "harbored anti-homosexual bias" against the petitioner).

Yet permitting examination of jury deliberations for evidence of any type of misconduct that could justify a new trial would insert judges, post hoc, into the deliberative conversation. The Seventh Circuit has explained that when evaluating a defendant's request for a new trial based on juror misconduct, "[e]ach case turns on its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting" from the alleged misconduct. *Paneras*, 222 F.3d at 411 (quotation and citation omitted). The defendant is entitled to a new trial when there is a "reasonable possibility" that juror

misconduct had a prejudicial effect on the jury verdict. *Id.*

Thus, among other inquiries, judges considering post-verdict motions predicated on juror statements during deliberations would need to consider the weight and sincerity of those statements, testimony concerning jurors' body language and attentiveness during deliberations, and even the weight of evidence supporting the verdict. For if Rule 606(b) does not preclude using jurors' deliberative statements as evidence of racial bias, surely it does not preclude use of other deliberative statements for purposes of considering prejudicial effect. Plainly, that sort of inquiry would seriously undermine the ability of juries to decide factual questions independently. The same is not true, it must be said, for *external* evidence of juror misconduct, which does not by its nature insert the court into the middle of the deliberative process.

It should also be plain that the rule Petitioner seeks may be brought to bear on *every* jury verdict. After all, no trial is perfect, and it is not uncommon for jurors to make post-verdict statements calling into question the legitimacy of their verdicts. *See, e.g.*, Marc Freeman, *Bullying Claim May Lead to Retrial*, Sun Sentinel, Feb. 23, 2016, at 1A (reporting a juror's post-conviction claim that she and other jurors were "bullied" during deliberations in a murder trial); Bridget Murphy, *Second Juror Claims Misconduct*, Newsday, Mar. 7, 2015, at A10 (reporting post-verdict allegations by two jurors that fellow jurors discussed the case before deliberations,

joked about the defendant's testimony, and made comments about wanting to "take a detective's gun and shoot the defense attorney"); Daphne Duret, *Juror Has Doubts of Goodman's Guilt*, Palm Beach Post, May 1, 2012, at 1A (reporting juror's post-verdict allegation that other jurors had pushed him to find the defendant guilty "and had their minds made up before deliberation began"). Dissatisfied litigants can even hire firms to conduct post-verdict juror interviews "to provide unique insights into the jurors' deliberations and reasoning processes." *FAQs*, Nat'l Jury Project Litig. Consulting, http://www.njp.com/services.html (last visited Aug. 30, 2016). Jurors' post-verdict critiques of deliberations will only proliferate in a system where they can be used to impeach verdicts.

Accordingly, while litigants have "a *powerful* interest in ensuring that the jury carefully and impartially considers the evidence," that interest does not outweigh the "*compelling* interests [in] prohibiting testimony about what goes on in the jury room after a verdict has been rendered." *Benally*, 546 F.3d at 1234 (emphasis added). Rules protecting jury secrecy "exist[] for good reason," as they "maintain[] the integrity and finality of jury verdicts." *Leung*, 796 F.3d at 1036.

There always has been a certain "black box" quality to the jury system. Outsiders cannot know exactly how and why juries reach the decisions they do, even with the benefit of post-verdict juror statements. That reality can sometimes be frustrating, but it has long been the price of a

functioning jury system. Without jury finality and secrecy, courts would be stuck in an endless search for whether each verdict is "correct." If that were possible, we wouldn't need juries.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

STATE NO-IMPEACHMENT RULES		
State	**Rule**	**Applied State Law Racial Bias Exception**
AL	Ala. R. Evid. 606	
AK	Alaska R. Evid. 606	
AZ	Ariz. R. Evid. 606; Ariz. R. Crim. P. 24.1	
AR	Ark. R. Evid. 606	
CA	Cal. Evid. Code § 1150	
CO	Colo. R. Evid. 606	
CT	*Aillon v. State*, 363 A.2d 49 (Conn. 1975)	*State v. Santiago*, 715 A.2d 1 (Conn. 1998)
DC	*Sellars v. United States*, 401 A.2d 974 (D.C. 1979)	

State	Rule	Applied State Law Racial Bias Exception
DE	Del. R. Evid. 606	*Fisher v. State*, 690 A.2d 917 (Del. 1996)
FL	Fla. Stat. § 90.607	*Powell v. Allstate Ins. Co.*, 652 So.2d 354 (Fla. 1995)
GA	Ga. Code Ann. § 24-6-606	
HI	Haw. R. Evid. 606	*State v. Jackson*, 912 P.2d 71 (Haw. 1996)
ID	Idaho R. Evid. 606	
IL	Ill. R. Evid. 606	
IN	Ind. R. Evid. 606	
IA	Iowa R. Evid. 5.606	
KS	Kan. Stat. Ann. §§ 60-441, -444	

State	Rule	Applied State Law Racial Bias Exception
KY	*Brown v. Commonwealth*, 174 S.W.3d 421 (Ky. 2005)	
LA	La. Code Evid. art. 606	
ME	Me. R. Evid. 606	
MD	Md. R. 5-606	
MA	Mass. G. Evid. 606	*Commonwealth v. McCowen*, 939 N.E.2d 735 (Mass. 2010)
MI	Mich. R. Evid. 606	
MN	Minn. R. Evid. 606	*State v. Bowles*, 530 N.W.2d 521 (Minn. 1995)
MS	Miss. R. Evid. 606	
MO	*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (en banc)	*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (en banc)

State	Rule	Applied State Law Racial Bias Exception
MT	Mont. R. Evid. 606	
NE	Neb. Rev. Stat. § 27-606	
NV	Nev. Rev. Stat. § 50.065	
NH	*Kravitz v. Beech Hill Hosp., L.L.C.*, 808 A.2d 34 (N.H. 2002)	
NJ	*State v. Kociolek*, 118 A.2d 812 (N.J. 1955)	*State v. Levitt*, 176 A.2d 465 (N.J. 1961)*
NM	N.M. R. Evid. 11-606	
NY	*Sharrow v. Dick Corp.*, 653 N.E.2d 1150 (N.Y. 1995)	

* The CACL amicus brief cites *Levitt* as creating an exception based on the Sixth Amendment, CACL Br. at 3a, but the case is at best ambiguous on the source (as are other New Jersey precedents), so the *amici* States have counted it as a state-law exception.

State	Rule	Applied State Law Racial Bias Exception
NC	N.C. R. Evid. 606	
ND	N.D. R. Evid. 606	*State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008)
OH	Ohio R. Evid. 606	
OK	Okla. Stat. tit. 12, § 2606	
OR	*Carson v. Brauer*, 382 P.2d 79 (Or. 1963) (en banc)	*State v. Gardner*, 371 P.2d 558 (Or. 1962)
PA	Pa. R. Evid. 606	
RI	R.I. R. Evid. 606	*State v. Brown*, 62 A.3d 1099 (R.I. 2013)
SC	S.C. R. Evid. 606	
SD	S.D. Codified Laws § 19-19-608	
TN	Tenn. R. Evid. 606	

State	Rule	Applied State Law Racial Bias Exception
TX	Tex. R. Evid. 606	
UT	Utah R. Evid. 606	
VT	Vt. R. Evid. 606	
VA	Va. R. Sup. Ct. 2:606	
WA	*Gardner v. Malone*, 376 P.2d 651 (Wash. 1962)	*City of Seattle v. Jackson*, 425 P.2d 385 (Wash. 1967)
WV	W. Va. R. Evid 606	
WI	Wis. Stat. § 906.06	
WY	Wyo. R. Evid. 606	