No. 15-606

IN THE

# Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
*Petitioner,*

v.

STATE OF COLORADO,
*Respondent.*

**On Petition for Writ of Certiorari to the Colorado Supreme Court**

## BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


SHERRILYN IFILL
Director-Counsel
JANAI NELSON
CHRISTINA SWARNS
JIN HEE LEE
LILIANA ZARAGOZA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

JOHN PAUL SCHNAPPER-CASTERAS *
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005
202-682-1300
jschnapper@naacpldf.org


December 10, 2015

* *Counsel of Record*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Other Authorities**

## INTEREST OF *AMICUS CURIAE* [1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned about the influence of race on the administration of the criminal justice system in particular and with laws, policies, and practices that impose a disproportionate negative impact on communities of color more generally. For example, LDF served as counsel of record for the defendants in cases involving racial bias and the racial make-up of juries, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus*

---

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner and Respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

*curiae* in cases involving the use of race in peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*). LDF also recently testified before the United States Congress as well as the President's Task Force on 21st Century Policing about the prevalence of racial bias throughout the criminal justice system and the need to eliminate such discrimination in order to foster public confidence and trust in our public institutions.[2]

Given its expertise in matters concerning the influence of race on the criminal justice system, LDF believes its perspective would be helpful to the Court in evaluating the importance of this case and determining whether to grant certiorari.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In the criminal proceedings below, Petitioner entered the courthouse "believing that times had changed" and "confident that justice . . . would be guided by the promise . . . that [he] would be judged

---

[2] *See* Testimony of Sherrilyn Ifill to the United States Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts (Nov. 17, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-senate-judiciary-committee%E2%80%99s-subcommittee-oversight-agency-action-federal-rig; Statement by the NAACP Legal Defense and Educational Fund, Inc. Before the President's Task Force on 21st Century Policing (Jan. 13, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-presidents-task-force-21st-century-policing.

not by the color of [his] skin,"[3] but by relevant, objective, and fair measures. Instead, Petitioner was convicted after a trial in which a juror asserted during deliberations that Petitioner was guilty of the crime charged because of his race. Specifically, the juror made several statements urging the jury to convict Petitioner because of his ethnicity, arguing that Petitioner was guilty "because he's Mexican and Mexican men take whatever they want," and referencing the juror's own "experience as an ex-law enforcement officer" where, allegedly, on "patrol, nine times out of ten Mexican men were guilty of being aggressive toward women . . . ." Pet. App. 4a-5a. That same juror also suggested that an alibi witness did not provide credible testimony because of his race.

Even after two other jurors came forward to report the explicit racial bias of their fellow juror, the Colorado Supreme Court held that, notwithstanding the Sixth Amendment's guarantee of an impartial jury, this egregious misconduct was not subject to judicial review. This erroneous ruling not only violates Petitioner's constitutional rights and undermines the integrity of his individual criminal trial, but it also gravely erodes public confidence in our system of justice more broadly. Recent events only confirm the stark and unsettling reality that racial bias and stereotyping remain serious and stubbornly persistent problems that undermine confidence in the criminal justice system.

*Amicus curiae*, therefore, writes separately at the certiorari stage of this case to emphasize two key reasons why this Court should grant the Petition:

---

[3] *Edmonson v. Leesville Concrete Co.*, No. 89-7743, 1991 WL 636291, at *29 (U.S. Oral Arg., Jan. 15, 1991).

First, the problem of racial bias in the jury system is a vitally important issue that merits this Court's intervention. For over a century, this Court has strived to eradicate racial bias from our criminal justice system. Time and again, this Court has treated such discrimination, particularly in the context of the jury, as an exceptional harm deserving of exceptional attention and remedies. Consonant with that history of intervention, the Petition should be granted to resolve an entrenched circuit split and because it implicates an important issue involving the Constitution's special concern for racial prejudice in the jury system. Allowing the Colorado Supreme Court's decision to stand would further undercut public trust in the criminal justice system.

Second, the Colorado Supreme Court fundamentally misconstrued the constitutional significance of racial bias in juries. The Colorado Supreme Court failed to appreciate – or even cite – this Court's longstanding precedents addressing the special harms of racial bias in juries, its jurisprudence about extreme forms of bias like those expressed in this case, or the critical importance of public confidence in the operation of our system of justice. Remarkably, the Colorado Supreme Court equated constitutional protections of an impartial jury with policies animating the rules of evidence, thereby subjugating Sixth Amendment rights to mere policy concerns.

We urge this Court to grant the Petition and to restore the promise of an impartial jury trial free from the taint of racial animus to every defendant, who our Constitution commands be equal in the eyes of the law.

## ARGUMENT

The Sixth Amendment guarantees a criminal defendant the right to a trial "by an impartial jury." U.S. Const. Amend. VI.[4] An "impartial jury" is one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982), and that disregards any personal prejudices or biases. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (referencing a defendant's "right to be tried by a jury free from ethnic . . . [or] racial . . . prejudice"); *United States v. Maldonado-Rivera*, 922 F.2d 934, 971 (2d Cir. 1990) (jurors must "be able to view the evidence with impartiality and to decide the case without bias"). At the same time, Federal Rule of Evidence 606(b) and its state analogs, such as the one at issue in this case, reflect the general practice that juror testimony is not normally admissible to impeach a jury verdict. The Rule itself recognizes that this practice promotes the "freedom of deliberation," "finality of verdicts," and "protection of jurors against annoyance," Fed. R. Evid. 606 Advisory Committee's Notes. But this so-called "no-impeachment" rule is, of course, still subject to constitutional constraints. This Court should resolve the circuit split over the question of whether the Sixth Amendment requires consideration of juror testimony when racial bias infects jury deliberations.

---

[4] The Fourteenth Amendment, which makes the Sixth Amendment applicable to the states, likewise provides a coterminous right to an impartial jury. *See, e.g.*, Pet. 12 n.3. Throughout this brief, we refer to this simply as a Sixth Amendment right.

## I. RACIAL BIAS IN THE JURY SYSTEM IS A CRITICALLY IMPORTANT ISSUE THAT WARRANTS INTERVENTION BY THIS COURT.

For over a century, spanning ten Chief Justices, strong majorities of this Court have repeatedly recognized that racial animus in the jury system is antithetical to core constitutional principles and deleterious to the integrity of – and public confidence in – our legal system. Accordingly, this Court has consistently identified jury-related racial bias as an exceptional problem meriting recurrent and decisive interventions.

### A. This Court has long approached racial prejudice in the jury system as a uniquely harmful and critical constitutional issue.

This Court has consistently made clear that a criminal conviction cannot stand if it was compromised by racial bias. An "unbroken line of cases," *Rose v. Mitchell*, 443 U.S. 545, 551 (1979), extending "over a century of jurisprudence[,] [has been] dedicated to the elimination of race prejudice within the jury selection process," *Edmonson*, 500 U.S. at 618. "[A] defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*, 505 U.S. at 58. If a jury is to fulfill its duty as a "prized shield against oppression," *Glasser v. United States*, 315 U.S. 60, 84 (1942), and the defendant is to reap the benefit of its "common-sense judgment," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), then the jury must remain free from racial bias.

The Court has emphasized that jury-related discrimination is inimical to our judicial system "because it is 'a stimulant to that race prejudice which is an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others.'" *Batson*, 476 U.S. at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)); *see also Rose*, 443 U.S. at 555 ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *id.* at 558-59 (describing modern forms of discrimination as "[p]erhaps . . . more subtle" but still seriously injurious). With respect to jury deliberations in particular, "[n]othing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring in the judgment).

The Court has applied these foundational principles broadly. *See, e.g.*, *Edmonson*, 500 U.S. at 618 (concluding that racial discrimination in the jury system is impermissible in civil, as well as criminal, proceedings); *J.E.B.*, 511 U.S. at 131-42 (extending *Batson* to prohibit discrimination in jury selection on the basis of gender). These expansive protections against discrimination in the jury are rooted in the critical role that juries play in ensuring the fair and impartial administration of justice:

> We do not prohibit racial . . . bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial . . . bias of his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord

> with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial . . . bias to influence assessment of the case breaches the compact and renounces his or her oath.

*J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring in the judgment); *see also Edmonson*, 500 U.S. at 624 ("The jury exercises the power of the court and of the government that confers the court's jurisdiction.").

The Court's special focus on eradicating racial bias in the jury system is grounded upon a jury's critical role as the last line of defense in ensuring the proper administration of justice. "England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury." *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *see also id.* at 722 (noting that the right to an impartial jury requires that a "verdict . . . be based upon the evidence developed at the trial").

As this Court has repeatedly recognized, juries are the principal means by which to protect our citizenry from the State's potential misuse of its broad powers to confine or execute its citizens. *See, e.g.*, *Batson*, 476 U.S. at 86 ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."). A longstanding pillar of this Court's jurisprudence is that the jury stands as a criminal defendant's fundamental "'protection of life and liberty against race or color prejudice.'" *Batson*, 476 U.S. at 87 (quoting *Strauder*,

100 U.S. at 309). Additionally, "the jury system performs the critical governmental function[] of . . . 'ensur[ing] continued acceptance of the laws by all of the people.'" *Edmonson*, 500 U.S. at 624 (quoting *Powers*, 499 U.S. at 407); *see also infra* Part I.C (discussing linkages among jury, public confidence, and integrity of the judicial system).

The presence of racial bias in juries can be a pivotal factor in decisions affecting a defendant's liberty, life, and death.[5] Under such circumstances, "[r]acial prejudice undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." 27 Charles A. Wright & Victor J. Gold, *Fed. Prac. & Proc.: Evid.* § 6074 (2d ed. 2007). Indeed, even a single juror harboring racial bias can infect every aspect of the deliberations and drastically alter the course of other jurors' decision-making. *See Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) ("The bias or prejudice of even a single juror would violate [the defendant]'s right to a fair trial."), *cert. denied*, 525 U.S. 1033 (1998); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.) ("If only one juror is unduly biased or prejudiced . . . the criminal defendant is denied his Sixth Amendment

---

[5] The possibility that an individual could be sentenced to death by a racially biased jury and that a rule of evidence could trump constitutional protections and prevent any examination of such a claim is particularly troubling. *See, e.g.*, Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present A Defense*, 61 Baylor L. Rev. 872, 897-98 (2009) (analyzing capital cases where Rule 606(b) was applied to prevent jurors from impeaching their verdicts with evidence of racial bias).

right to an impartial panel."), *cert. denied*, 434 U.S. 818 (1977).

Indeed, here the jury was initially unable to reach a verdict on any of the charges that Petitioner faced, and it ultimately failed to reach a verdict on the felony charge brought against him. Pet. 4. This sort of equivocation only confirms the likely reality that bias unfairly tilted the scales of justice.

### B. This case presents a quintessential issue of racial bias in the jury system that warrants Supreme Court intervention.

Given this Court's longstanding practice of remedying racial bias in the jury system, especially when there is a clear and intractable circuit split, the case at bar warrants this Court's review. *See generally* Stern & Gressman, *Supreme Court Practice* 222 et seq. (8th ed. 2002) (key guidelines for the exercise of certiorari jurisdiction include the emergence of circuit splits and the importance of the legal issue).

The facts here are appalling: After a jury convicted Petitioner on several misdemeanor charges, two jurors informed his counsel that another juror had infected the jury's deliberations with racial animus. Specifically, the juror in question suggested that the jury should convict Petitioner on charges of attempted sexual assault, unlawful sexual conduct, and harassment, Pet. App. 3a, "because he's Mexican and Mexican men take whatever they want." *Id.* at 4a. The same juror also contended that the jury should not believe Petitioner's alibi witness because the witness was Hispanic. *Id.* at 4a-5a. Thereafter, Petitioner sought a new trial on the ground that his constitutional right to an impartial jury had been

violated. Over Justice Márquez's vigorous dissent, the Colorado Supreme Court held that applying Colorado's "no-impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations is permissible under the Sixth Amendment.

The Colorado Supreme Court openly acknowledged that its decision had deepened the split of authority on a federal constitutional question. *Id.* at 23a n.4. Nonetheless, the court permitted the juror's racist remarks about Petitioner's guilt to go uninspected, *id.* at 16a, relying on dubious legal grounds regarding the relationship between constitutional rights and the rules of evidence, as discussed below, *infra* Part II.

Racial bias in jury deliberations continues to be a serious problem today, notwithstanding the progress that we, as a nation, have made towards greater equality and inclusion. In recent years, a number of courts across the country have faced incidents of racial animus in jury deliberations that are as offensive as those at issue here. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1147-48 (D.C. 2013) (jurors allegedly asserted that "all 'blacks' are guilty regardless"); *State v. Brown*, 62 A.3d 1099, 1106, 1110 (R.I. 2013) (juror allegedly referred to Native American defendants as "those people" and mockingly beat water bottles "like tom-tom drums"); *United States v. Villar*, 586 F.3d 76, 81, 85-87 (1st Cir. 2009) (in case involving Hispanic defendant, one juror allegedly said "I guess we're profiling but they cause all the trouble"); *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (juror allegedly said, in case with Native American defendant, that "[w]hen Indians get alcohol, they all get drunk, and . . . when

they get drunk, they get violent").[6] Many of those courts have rightly concluded that such expressions of race-based impartiality cannot go unaddressed.[7]

This is plainly an important issue given impartial juries are central to the fair administration of justice and in light of the range of circuits and states that are confronted with incidents of juror bias. Moreover, the constitutional law that applies to the Colorado Rules of Evidence also applies to the Federal Rules of Evidence, after which Colorado's rules (and many other states' equivalents) are modeled. *See* Pet. App.

---

[6] *See also, e.g.*, *Commonwealth v. Laguer*, 571 N.E.2d 371, 375 (Mass. 1991) (during deliberations in aggravated rape trial, juror allegedly asserted that "spics screw all day and night" and alluded to defendant's guilt); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (in prostitution case, white male juror commented about the defendant, "Let's be logical. He's black and he sees a seventeen year old white girl – I know the type."); *United States v. Heller*, 785 F.2d 1524, 1526 (11th Cir. 1986) (juror allegedly made ethnic slurs and jokes during trial of Jewish defendant).

[7] *See, e.g.*, *Brown*, 62 A.3d at 1110 ("no-impeachment" rule cannot preclude admission of testimony concerning jurors' racial bias in deliberations where necessary to protect defendant's constitutional right to fair trial by impartial jury); *Villar*, 586 F.3d at 85-87 (trial court has discretion to conduct inquiry into jurors' expressions of racial animus during deliberations under the Sixth Amendment and the Due Process Clause); *Laguer*, 571 N.E.2d at 376 (Sixth Amendment requires consideration of juror testimony alleging racially biased statements during deliberations because "the possibility . . . that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored"); *Heller*, 785 F.2d at 1527-28 (reversing conviction of Jewish defendant in light of allegations that juror engaged in ethnic slurs and jokes during trial because it "displayed the sort of bigotry that clearly denied the defendant . . . the fair and impartial jury that the Constitution mandates"); *see also* Pet. 14-15.

7a ("Colorado's rule is virtually identical to its federal counterpart.").

This Court's previous admonition remains as true today as ever before: We "cannot deny that . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious." *Rose*, 443 U.S. at 545. In short, "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Edmonson*, 500 U.S. at 628. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Id.* at 630-31. For all these reasons, the Court should adhere to its longstanding tradition of promoting fairness in the criminal justice system by reviewing the still-pressing issue of racial bias in the jury system once more.

### C. If racial bias is allowed to infect jury deliberations with impunity, public confidence in the criminal justice system will be seriously undermined.

The jury exists, in part, to instill public confidence in our legal system, but when racial bias in jury deliberations is allowed to fester, this important trust is eroded. "[T]he jury system performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people.'" *Edmonson*, 500 U.S. at 624 (quoting *Powers*, 499 U.S. at 407); *see also McCollum*, 505 U.S. at 49 ("One of the goals of our jury system is 'to impress upon the criminal defendant and the community . . . that a verdict . . . is

given in accordance with the law by persons who are fair. . . .'") (quoting *Powers*, 499 U.S. at 413).[8] Allowing racial prejudice in juries to proceed unchecked undermines these foundational constitutional and democratic values. "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality," thereby "compound[ing] the racial insult inherent in judging a citizen by the color of his or her skin." *Edmonson*, 500 U.S. at 628 (citations omitted).

As recurring majorities of this Court have made clear, racial discrimination in the jury system imposes at least two critical systemic harms:

First, prejudice in the jury system impairs the fairness of specific proceedings. *See, e.g.*, *id.* (discrimination in the courtroom "raises serious questions as to the fairness of the proceedings conducted there"); *Powers*, 499 U.S. at 411 ("[R]acial discrimination in the selection of jurors . . . places the fairness of a criminal proceeding in doubt."). This, in turn, "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" overall. *Rose*, 443 U.S. at 555-56; *see also id.* at 556 (allowing jury partiality to fester "impairs the confidence of the public in the administration of justice"); *J.E.B.*, 511 U.S. at 140 (unredressed juror prejudice "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *id.* (noting the "inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders"). Indeed, bias in the jury

---

[8] Indeed, this Court has made clear that "[t]he need for public confidence is especially high in cases involving race related crimes," where "emotions in the affected community will inevitably be heated and volatile." *McCollum*, 505 U.S. at 49.

system "undermine[s] the very foundation of our system of justice – our citizens' confidence in it." *McCollum*, 505 U.S. at 49-51.

Second, racial bias in the jury system injures the broader community and democratic ideals. *See Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The injury is not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."); *see also J.E.B.*, 511 U.S. at 140 ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes."); *Batson*, 476 U.S. at 87 (explaining that the harm "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community"). And, as this Court repeatedly has emphasized, race-based discrimination in juries "'is at war with our basic concepts of a democratic society and a representative government.'" *Rose*, 443 U.S. at 556 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

The Court's failure to intervene in this case leaves untouched an outcome likely to erode public trust in the criminal justice system. In the instant case, two jurors lodged affidavits averring that a third juror urged the jury to convict Petitioner "because he's Mexican and Mexican men take whatever they want" – a statement that speaks directly to the defendant's guilt and motive – and challenged on racial grounds an alibi witness's credibility.[9] Permitting such

---

[9] In some instances, a racial epithet alone will – in light of its substance and context – be egregious enough to raise a presumption of bias. *See generally* Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Petitioner, *Sterling v. Dretke*, 117 Fed. App'x 328 (5th

prejudice to stand without redress would lead to fundamental unfairness in Petitioner's case, significant impairment of public confidence in our system of justice, and broader wounds to our society and its democratic ideals. The Court should not countenance such racial bias expressed by the representative of an institution designed to ensure fairness and equality in our criminal justice system.

It is especially important for this Court to continue its longstanding commitment to the eradication of racial discrimination in the jury system because such forms of racial bias have deep and obdurate roots. Throughout the post-Civil War period, and even as this Court began to overturn state laws restricting jury service based on race, these forms of exclusion and bias persisted. *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 119 (2010) (tracing the return of the all-white jury during the Reconstruction era). In some instances, biased juries issued verdicts as a symbol of resistance to integration and civil rights laws. *See, e.g.*, John C. Tucker, *Trial and Error: The Education of a Courtroom Lawyer* 288 (2003) (jury foreman said he hoped that the verdict, ruling against Black homeowners in a housing segregation case, would help end "the mess Earl Warren made with *Brown v. Board of Education* and all that nonsense"). In others, prejudiced juries issued indictments in ways that endorsed or exacerbated racial violence. *See, e.g.*, Charles Abrams, *Forbidden Neighbors: A Study of Prejudice in Housing* 103-19

---

Cir.) (unpublished), *cert. denied*, 544 U.S. 1053 (2005), 2005 WL 952252 (Apr. 22, 2005). But here, we have more than a presumption of bias; the juror's expressed stereotype spoke directly to the defendant's guilt and motive and to an alibi witness's credibility.

(1955), *in The Suburb Reader* 328-30 (Becky M. Nicolaides & Andrew Wiese eds., 2006) (grand jury refused to indict the white mob that attacked the family of a Black veteran that had moved into an all-white apartment building, instead charging the family's NAACP attorney and the apartment building's owner, attorney, and agent).

Throughout the course of the twentieth century and continuing to the modern day, this Court has understood that the problem of racial prejudice in juries is especially damaging to the integrity of the judicial system and our nation's democratic ideals. This Court's decisions, therefore, have consistently treated racial bias as a uniquely injurious problem meriting an exceptional legal response. *See, e.g.*, *Edmonson*, 500 U.S. at 618 (referencing "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process"). The Court should grant the Petition in this case in order to ensure public faith in the jury verdict and the judicial process as a whole.

## II. THE COLORADO SUPREME COURT FUNDAMENTALLY MISAPPREHENDED THE CONSTITUTIONAL SIGNIFICANCE OF RACIAL BIAS IN JURIES.

At the most basic level, the Colorado Supreme Court failed to recognize this Court's repeated holdings about the special salience of racial bias in the jury system. As explained above, this Court has long emphasized a constitutional imperative to remove racial animus – an "especially pernicious" form of bias – from the criminal justice system. *See Rose*, 443 U.S. at 555-56. Yet, nowhere did the Colorado Supreme Court even cite to any of this Court's precedents regarding how "racial animus"

intolerably "distort[s] our system of criminal justice." *McCollum*, 505 U.S. at 58. Nor did the Colorado court acknowledge this Court's jurisprudence making clear that the failure to redress racial prejudice in a jury subverts the foundational purposes of the right to a jury trial. *See id.* at 49-51. Indeed, it was only the dissent below that pointed out how "[r]acial bias differs from other forms of bias in that it compromises institutional legitimacy." Pet. App. 25a.

Instead, the Colorado Supreme Court majority erroneously equated constitutional principles with evidentiary rules. Pet. App. 2a (comparing "two fundamental tenets": "a defendant's constitutional right to an impartial jury" and the protections of the state's "no-impeachment" rule). The court plainly erred in according rules of evidence the same legal weight as a core provision of our federal constitution. *See* U.S. Const. Art. VI (Supremacy Clause); *Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("[W]e once again reject the view that the Confrontation Clause['s] . . . application . . . depends upon 'the law of Evidence for the time being.'"); 27 Wright & Gold § 6074 ("Evidentiary rules that insulate from discovery the violation of constitutional rights may themselves violate those rights."). This gross error alone invites the Court's intervention.

Given that the U.S. Constitution, especially the Sixth Amendment's impartial jury trial right, values the need for public confidence in the judicial process, *supra* Part II.C, it is particularly ironic that the Colorado Supreme Court invoked the public confidence stemming from the privacy and finality of jury verdicts to support its decision to bypass the Sixth Amendment. The majority opinion got it precisely backwards.

Indeed, in *Aldridge v. United States*, 283 U.S. 308 (1931), this Court expressly rejected the argument "that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices," *id.* at 314-15, on the ground that "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred," *id.* at 315. Here, too, there would be "[n]o surer way . . . to bring the processes of justice into disrepute," *id.*, than to insulate a juror's racial bias from judicial scrutiny or redress.

Even if it were a close call as to whether the Sixth Amendment should give way to evidentiary rules – which it is not – this Court has evinced particular concern for the public "impression that the judicial system has acquiesced" to certain forms of discrimination "or that the 'deck has been stacked' in favor of one side." *J.E.B.*, 511 U.S. at 140. "The fear that too much scrutiny of jury deliberations would undermine public confidence in jury verdicts ignores the demoralizing effect on public confidence caused by reports that jurors are racist, but evidence of their racism is not admissible to overturn their verdicts." Note, *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1600 (1988) (footnote omitted). "Permitting defendants to expose racially tainted deliberations gives the public – particularly [communities of color] – *more* reason, not *less*, to trust the final results of the criminal justice system." *Id.*

In fact, this Court has already recognized that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court

can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). In other contexts, members of this Court have recognized the desirability of having a postconviction hearing "to determine whether a juror is biased." *Phillips*, 455 U.S. at 221-22 (O'Connor, J., concurring); *see also id.* (noting that there "are some extreme situations that would justify a finding of implied bias"). This case, in which a juror expressly urged the jury to convict a defendant based on his race, presents exactly the sort of "extreme" situation that the Court noted in *Warger*.

The remainder of the Colorado Supreme Court's reasoning about the costs and benefits of ignoring racial bias in the jury system is deeply flawed. Concerns about attorney harassment alone cannot support an unbounded application of Rule 606(b), because many jurors volunteer information about racial bias in deliberations, and the rule otherwise contains exceptions allowing testimony about "outside influence" and "extraneous information." *See, e.g.*, 27 Wright & Gold § 6072 (noting that "sometimes a juror volunteers to take the stand, coming forward not as a result of an attorney 'fishing expedition,'" and that Rule 606(b) "contains exceptions permitting testimony about 'extraneous information' and 'outside influence'"); Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187, 194 (1988) (noting the "evident willingness of jurors to volunteer information" and explaining Rule 606(b)'s exceptions arguably "permit[] good faith attempts to discover evidence relating to an 'outside influence'"); *see also Racist Juror Misconduct During Deliberations*, 101 Harv. L.

Rev. at 1599 ("[A]n exception for testimony pertaining to racist juror misconduct would not significantly impair rule 606(b)," yet "would promote universally accepted countervailing interests – the defendant's and society's interests in having a criminal justice system free of racial bias.").

Further, the Colorado Supreme Court failed to consider that other protections sufficiently address the valid policy concerns underlying Rule 606(b). *See e.g.*, Nicholas S. Bauman, *"Extraneous Prejudicial Information": Remedying Prejudicial Juror Statements Made During Deliberations*, 55 Ariz. L. Rev. 775, 798, 802 & nn.245-47 (2013) (describing other rules some jurisdictions have adopted to protect jurors from harassment); Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1493-95 (2006) (noting that states place other limits on attorneys or their investigators contacting jurors after trial). And it was erroneous for the Colorado Supreme Court majority to think that voir dire could root out racial bias in jury deliberations, *see* Pet. 21-25, because jurors are unlikely to publicly admit to their own racial prejudices, Pet. 23-24, and jurors' unconscious biases may later manifest as explicit bias during deliberations.[10]

---

[10] *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian 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, 152 (2010) ("Implicit biases . . . are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful."); Pet. 23 (discussing observations of federal judge on unconscious bias).

On balance, courts are readily equipped to deal with extreme and extraordinary instances of juror bias, such as those in this case, and should not ignore a defendant's Sixth Amendment impartial jury trial right irrespective of governing evidentiary rules. *See* Pet. 26, 29. The constitutional imperative to guarantee a fair and impartial trial to all criminal defendants takes primacy over any countervailing evidentiary concerns, and this Court should resolve the existing circuit split to make that mandate clear and unequivocal.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHERRILYN IFILL
Director-Counsel
JANAI NELSON
CHRISTINA SWARNS
JIN HEE LEE
LILIANA ZARAGOZA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

JOHN PAUL SCHNAPPER-CASTERAS *
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005
202-682-1300
jschnapper@naacpldf.org

December 10, 2015

* *Counsel of Record*