No. 15-606

In The
Supreme Court of the United States

MIGUEL ANGEL PENA-RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ Of Certiorari To The Colorado Supreme Court

BRIEF *AMICUS CURIAE* OF PROFESSOR CEDRIC MERLIN POWELL OF THE UNIVERSITY OF LOUISVILLE BRANDEIS SCHOOL OF LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The parties present this case as one arising under the Sixth Amendment right to an impartial jury, and primarily address their arguments to that constitutional provision. Pena-Rodriguez Pet. 2; *see also* Colorado Pet. Resp. 16-19. Because there is direct evidence that racial animus may have influenced at least one juror, and thus, the outcome of Petitioner Miguel Angel Pena-Rodriguez's jury trial, *amicus* believes this case also raises significant issues under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In addition to the Sixth Amendment, *amicus* contends that the Equal Protection Clause and Due Process Clause each serve as an independent basis to reverse the Colorado Supreme Court's decision interpreting Colorado Rule of Evidence (CRE) 606(b). Thus, *amicus* will address the following question:

> Whether the Colorado Supreme Court's categorical application of Rule 606(b) to bar post-verdict juror testimony and evidence concerning the presence of racial animus in jury deliberations is consistent with the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, *amicus curiae* Professor Cedric Merlin Powell respectfully submits this brief in support of the Petitioner.[1] Professor Powell teaches constitutional law, criminal law, and evidence, among other courses, at the University of Louisville Louis D. Brandeis School of Law. Professor Powell has written on a broad range of topics, including this Court's criminal law and Fourteenth Amendment decisions. Specifically, Professor Powell has conducted extensive research on the interaction between race and crime, including the possibility of reform to address certain racial disparities in the administration of justice. Professor Powell sees this case as critical to increasing fairness in the criminal justice system, and improving public perception of the courts as a whole. Accordingly, Professor Powell has a profound interest in how this case is resolved because the Court's decision will affect the ability of trial courts to ensure that jury verdicts are fair, impartial, and rendered based upon the evidence presented at trial.

[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The Colorado Supreme Court concluded that Rule 606(b) barred a trial court from considering post-verdict juror testimony and other evidence showing that one juror, Juror H.C., made derogatory comments about the ethnicity and immigrant status of Pena-Rodriguez and an alibi witness. Pet. App. 2a-4a. The proposed post-verdict juror testimony and evidence also showed that Juror H.C. made statements about the supposed propensity of Mexicans and immigrants to commit sex offenses. *Id*. at 4a-5a. In doing so, the Colorado Supreme Court rejected Pena-Rodriguez's argument that Rule 606(b)'s categorical bar on the consideration of post-verdict juror testimony and evidence ran afoul of the Sixth Amendment right to an impartial jury. Pet. App. 11a-16a. Under the decision below, individual jurors are free to rely upon racial animus and racial stereotyping to decide the fate of criminal defendants, and Rule 606(b) bars those determinations from further constitutional challenge. That is not the law.

First, the presence of state evidentiary rules has never stopped this Court from addressing significant constitutional issues. State evidentiary rules must conform to the Constitution. When they do not, and instead serve as impediments to a criminal defendant's constitutional right to a fair and impartial trial by excluding competent and reliable evidence, they have been struck down as unconstitutional. Because the presence of racial animus in jury deliberations goes to the fairness of a criminal trial, it implicates the equal

protection and due process rights of defendants. And under this Court's precedent, Rule 606(b) cannot serve as an impenetrable roadblock to a criminal defendant's attempt to vindicate those rights by excluding competent and reliable juror testimony and evidence that jury deliberations were tainted by racial animus. Equal protection and due process are too important, and must supersede a state evidentiary rule, regardless of the policy considerations underlying it.

Second, the Colorado Supreme Court's decision ignores this Court's longstanding efforts to eradicate racial discrimination in the criminal justice system under the Equal Protection Clause. Juror H.C.'s ethnically derogatory comments about Pena-Rodriguez, immigrants, and the propensity of Mexicans to commit sex offenses are all based upon racial animus and stereotyping that is fundamentally at odds with that provision. If unchecked, racial animus permits jurors to rely upon inaccurate racial and ethnic group stereotypes instead of the facts and evidence presented at trial. Reliance on such stereotypes denies a criminal defendant an unbiased and rational determination of guilt or innocence that treats the defendant as an individual. That is the hallmark of equal protection.

None of the Colorado Supreme Court's asserted interests for insulating racially tainted jury verdicts from constitutional challenge are compelling under the Equal Protection Clause. The Colorado Supreme Court's first asserted interest, protecting the privacy of jury deliberations, is insufficiently compelling because jurors may discuss jury deliberations with anyone

post-verdict. The Colorado Supreme Court's second asserted interest, post-verdict juror harassment, is overstated because Rule 606(b) does not prohibit contact with jurors, but only the evidence that may come from such contact. If Rule 606(b) is intended to protect jurors, then jurors must have the right to waive such protections where a criminal defendant's right to equal protection is at stake. The Colorado Supreme Court's third asserted interest in finality and public confidence ignores that finality assumes a jury verdict was rendered based upon the evidence, not racial animus. Public confidence is enhanced not when a jury verdict is final, but when the jury verdict is both final and free from bias.

Third, the Colorado Supreme Court's decision is inconsistent with the Due Process Clause. Due process requires that a criminal defendant be tried by fair and impartial jurors based upon the evidence. That minimal standard of due process is not met where, as here, evidence suggests that at least one juror relied upon racial animus and stereotyping to reach a verdict. Race has no place in a criminal trial, and when a jury relies upon racial animus and stereotyping, it deprives a defendant of liberty based upon an arbitrary consideration. That violates the Due Process Clause, and Rule 606(b) should not be read to protect such verdicts from further examination.

ARGUMENT

I. This Court has historically invalidated state evidentiary rules that bar a criminal defendant from presenting competent and reliable testimony in order to ensure a fair and impartial trial.

This Court has repeatedly concluded that the categorical application of evidentiary rules cannot supersede the constitutional rights of criminal defendants. While this Court has "traditionally accorded [respect] to the States in the establishment and implementation of their own criminal trial rules and procedures," it has declared those rules and procedures invalid "where constitutional rights directly affecting the ascertainment of guilt are implicated." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Although evidentiary rules promote efficiency, judicial economy, and other important government interests, they must comport with the Constitution. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Evidentiary rules cannot "be applied mechanistically to defeat the ends of justice," but must be aimed at protecting the criminal defendant's right to a fair and impartial trial. *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers*, 410 U.S. at 302).

For example, in *Washington v. Texas*, 388 U.S. 14, 16 (1967), this Court found that the application of state evidentiary rules declaring a certain class of witness – co-defendants – incompetent to testify at a criminal trial invalid under the Sixth Amendment. The Court reversed the defendant's conviction because the state's evidentiary rules arbitrarily denied the defendant "the

right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 23. In concluding that the state's evidentiary rules violated the Sixth Amendment, this Court said that arbitrary evidentiary rules "that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief" were unconstitutional. *Id*. at 22.

This Court applied the same rationale in *Rock*. This Court reversed a conviction where a state evidentiary rule completely barred the defendant from relying on "hypnotically refreshed testimony." *Rock*, 483 U.S. at 48-49. This Court reasoned that "[j]ust as a state may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Id.* at 55. Again, this Court did not hesitate to strike down an evidentiary rule that arbitrarily excluded potentially reliable evidence that vindicated a criminal defendant's right to a fair and impartial trial.

This Court has also invalidated evidentiary rules where the reliability of the proposed testimony cannot be questioned. For instance, in *Chambers*, this Court emphatically rejected the categorical application of an evidentiary rule where "[t]he testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness," was not inadmissible hearsay, and was

"critical to [the criminal defendant's] defense." *Id.* at 302.[2] In short, these cases make clear that "a state court may not apply a state rule of evidence in a per se or mechanistic manner so as to infringe upon a defendant's constitutional right to a fundamentally fair trial. . . ." *Paxton v. Ward*, 199 F.3d 1197, 1214 (10th Cir. 1999) (discussing cases). That rule should have governed here.

But the Colorado Supreme Court did not follow this Court's lead. Instead, the Colorado Supreme Court applied Rule 606(b) to completely bar post-verdict juror testimony and evidence suggesting that racial animus affected jury deliberations. Although Rule 606(b) permits jurors to "testify as to matters other than their own inner reactions," mistakes on verdict forms, and "prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process" post-verdict, the Colorado Supreme Court's interpretation of Rule 606(b) renders jurors incompetent to testify about the presence of racial animus in deliberations. Fed. R. Evid. 606 advisory committee's note (1972) ("[Rule 606(b)] deals only with the competency of jurors to testify. . . ."); *see also* Pet. App.

[2] *See also Crane*, 476 U.S. at 690 (concluding that "blanket exclusion" of testimony and exculpatory evidence concerning the defendant's confession deprived him of a fair trial); *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (concluding that a state procedural rule excluding testimony and exculpatory evidence violated the defendant's right to present a defense).

8a-16a.[3] But there can be no more reliable or competent witness to testify about whether racial animus affected jury deliberations than a juror who actually participated in those deliberations. This content-based line between post-verdict juror testimony concerning racial animus in jury deliberations and other types of post-verdict juror testimony, is arbitrary.[4]

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[3] The Advisory Committee's comments to CRE 606 state that the Rule was modeled after its federal counterpart. CRE 606 advisory committee's comments (2007). The Colorado Supreme Court has also relied upon the Advisory Committee's notes to the Federal Rules of Evidence and federal case law to interpret the Colorado Rules of Evidence. *See, e.g.*, *People v. Stewart*, 55 P.3d 107, 123 (Colo. 2002); *see also People v. Eppens*, 979 P.2d 14, 20 (Colo. 1999).

[4] Further, the Advisory Committee's notes to Rule 606(b) states "that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." Fed. R. Evid. 606 advisory committee's note (1974). That obligation should not change post-verdict. Jurors should also be encouraged to bring juror misconduct, including statements of racial animus, to the court's attention post-verdict as well. In fact, imposing a temporal restriction on post-verdict reports of juror misconduct and racial animus seems illogical when "jurors are not able to discuss the case with each other until deliberations themselves," which makes it "quite difficult for one juror to identify a peer's racial bias in the context of the case before the deliberations." Ashok Chandran, Note, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 Colum. J. Race & L. 28, 44 (2015). Additionally, a juror may not express racial animus toward the criminal defendant until jury deliberations, which cannot be supervised by either the court or counsel for the parties. Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(B)*, 60 UCLA L. Rev. 262, 282 (2012).

Singling out and excluding post-verdict juror testimony and evidence of racial animus in jury deliberations offends "our American ideal of fairness" from which "the concepts of equal protection and due process, both stem[]. . . ." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Those principles are essential in a criminal trial. Indeed, the primary purpose of a criminal trial is to ascertain the truth in a proceeding that is free from bias, prejudice, and outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *see also In re Murchison*, 349 U.S. 133, 136 (1955). Evidentiary rules should be interpreted to do the same. *See* Fed. R. Evid. 102. Nothing could be more contrary to the concepts of equal protection, due process, and fundamental fairness than to apply Rule 606(b) in a way that allows a racially tainted jury verdict of guilty to stand unchallenged.

Thus, the Colorado Supreme Court's ruling, if affirmed, not only places a criminal defendant's constitutional right to a fair and impartial trial under the Sixth Amendment in serious jeopardy, but also endangers a defendant's equal protection and due process rights by excluding otherwise reliable juror testimony and evidence concerning the presence of racial animus in jury deliberations as incompetent. State evidentiary rules, regardless of their purpose, cannot supplant the constitutional command that every criminal defendant is entitled to equal protection and due process in a jury trial.

II. The Colorado Supreme Court's application of Rule 606(b) in this case is inconsistent with this Court's jurisprudence under the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment says that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This Court's earliest decisions interpreting the Fourteenth Amendment recognized that the primary purpose behind the Equal Protection Clause was to eliminate discrimination on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879); *see also Neal v. Delaware*, 103 U.S. 370, 394 (1880); *Bush v. Kentucky*, 107 U.S. 110, 119 (1883). In those cases, this Court "was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate . . . even though it addressed the issue in the context of reviewing an individual criminal conviction." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Thus, for over a century, a fundamental principle of this Court's equal protection jurisprudence has been that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Id*.

Following that principle, this Court has stated that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect," and is therefore, subject to strict scrutiny. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (quotation omitted). By applying strict scrutiny under the Equal Protection Clause, this Court has

"engaged in unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quotation omitted). The great majority of those efforts have been aimed at eliminating the use of juries in criminal cases that are the product of racial animus toward the criminal defendant or individual jurors. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). In doing so, this Court has recognized that trial by a fair and impartial jury is "a vital principle underlying the whole administration of criminal justice," and serves as "a criminal defendant's fundamental protection of life and liberty against race or color prejudice." *McCleskey*, 481 U.S. at 309 (quotation omitted); *id*. at 310 (quotation omitted).

The Equal Protection Clause, then, "do[es] not prohibit racial . . . bias in jury selection only to encourage it in jury deliberations." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring). "Once seated, a juror should not give free rein to some racial . . . bias of his or her own." *Id*. Because a fair and impartial jury is central to the administration of justice, individual jurors, as actors empowered by the government to decide guilt and innocence, are obligated to base their verdicts on the evidence presented at trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).[5] "A juror who allows racial . . .

[5] The jury in reaching the verdict in this case as well as the trial court's adoption and enforcement of that verdict both constitute official state action that is subject to the Fourteenth Amendment. As this Court noted in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991), "[t]he jury exercises the power of the court and of the government that confers the court's jurisdiction."

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). This case involves such a juror.

A. The statements of Juror H.C. are direct evidence that the jury verdict is a product of racial animus in violation of the Equal Protection Clause.

As the Colorado Supreme Court noted below, two affidavits from Jurors M.M. and L.T. allege that Juror H.C. made derogatory comments about the ethnicity and immigrant status of Pena-Rodriguez and an alibi witness during jury deliberations. Pet. App. 4a-5a. According to Jurors M.M. and L.T., Juror H.C. commented that he thought Pena-Rodriguez was guilty because "he's Mexican and Mexican men take whatever they want." Pet. App. 4a. Juror H.C. further stated that he "believed that [Pena-Rodriguez] was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id*. Juror H.C. also "said that where he used to patrol, nine

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And in *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948), this Court said that "the action of the States to which the [Fourteenth] Amendment has reference, includes action of state courts and state judicial officials." This authority leaves no doubt that the actions of the trial court and individual jurors in this case are constrained by the requirements of equal protection and due process in accordance with the Fourteenth Amendment.

times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id*.

None of the comments by Juror H.C. concerning Pena-Rodriguez's guilt were based on any evidence at trial. Those statements were instead motivated by Juror H.C.'s belief that Mexican men are more likely to be "aggressive toward women and young girls," and thus, have a greater propensity to commit sex offenses. *Id*. In Juror H.C.'s view, Pena-Rodriguez's guilt was determined primarily by his ethnicity – that is, there was a 90% probability that Pena-Rodriguez, as a Mexican, committed the crime. A jury verdict based upon that kind of racial animus cannot be protected by Rule 606(b) consistent with the Equal Protection Clause.

Nothing can be more offensive to the concept of equal protection than a juror's use of racial prejudice and stereotyping in jury deliberations. Determinations of guilt based upon the assumption that a certain race or ethnicity has a greater propensity to commit crime – by even a single juror – has no place in the criminal justice system. *See Parker v. Gladden*, 385 U.S. 363, 365-66 (1966); *see also Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 1033 (1998). "One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough*, 464 U.S. at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Because the facts of each case vary, this requires a jury to make a highly *individualized* factual determination about a criminal defendant's guilt or innocence. *See Zant v. Stephens*, 462 U.S. 862, 879

(1983); *see also Johnson v. California*, 543 U.S. 499, 509 (2005).

And "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the [g]overnment must treat citizens as individuals, not as simply components of a racial . . . class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quotation omitted). Racial prejudice and stereotyping during jury deliberations rob the criminal defendant of the individualized consideration that the Equal Protection Clause demands. *See id*. Although jurors have a "general body of experiences . . . [they] are understood to bring with them to the jury room," racial bias and stereotypes are often not based upon actual experience, but upon a set of erroneous assumptions about a racial or ethnic group. *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014); *see also Batson*, 476 U.S. at 104 (Marshall, J., concurring). Treating racial bias as "everyday experience" that a juror brings into jury deliberations legitimizes a form of racial animus and group stereotyping that this Court has repeatedly said is antithetical to the Equal Protection Clause. Pet. App. 10a; *see also Miller*, 515 U.S. at 911 (collecting cases).

Racial bias and stereotyping by a single juror places upon the criminal defendant a crude racial label that "is inconsistent with the dignity of individuals in our society." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring). With racial labeling comes the negative stigma that certain racial and ethnic groups are more prone to commit crime, and the resulting presumption

that the criminal defendant is entitled to less protection at trial merely due to membership in one of those groups. Thus, the primary danger of such racial prejudice and stereotyping in jury deliberations is the assumption by one or more jurors that "members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike," behave similarly, and therefore, share the same tendency to engage in criminal conduct. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Further, using Rule 606(b) to ignore overt racial bias and stereotyping in juror deliberations encourages jurors "to substitute racial stereotype for evidence, and racial prejudice for reason." *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (statement of Sotomayor, J.). In an ordinary criminal case where the jury is asked whether guilt has been proven beyond a reasonable doubt, a racially biased juror may employ racial stereotypes to disregard, or to urge other jurors to disregard, evidence at trial that tends to exonerate the criminal defendant. *See Parker*, 385 U.S. at 365-66. On the other hand, statements of racial bias and racial stereotyping during juror deliberations may be used to fill in evidentiary gaps to convict a criminal defendant. *Calhoun*, 133 S. Ct. at 1137 (statement of Sotomayor, J.) (quotation omitted); *see also* Amicus Br. of NACDL in Support of Cert. 8-10. Where there is direct evidence of racial bias and stereotyping in jury deliberations, there is a strong risk that the criminal defendant's race or ethnicity played a significant, if not predominant, role in the jury verdict. *See Bush v. Vera*, 517 U.S.

952, 959 (1996). This offends the Equal Protection Clause, and entitles a criminal defendant to at least an evidentiary hearing to determine what role racial bias had in the jury verdict.

Leaving jury verdicts based upon racial prejudice and stereotyping to stand unchallenged under Rule 606(b) sends a chilling message to the broader community. Protecting jury verdicts motivated by racial animus under Rule 606(b) tells all citizens that racial and ethnic minorities may be judged and punished by the color of their skin alone. Such verdicts also convey the message that racial and ethnic minorities are not entitled to the same protections under the Equal Protection Clause – that it is permissible to assume that they are criminals first and individuals second. This Court's precedent does not allow for such differential treatment. To the extent the opinion below is inconsistent with this Court's equal protection decisions, it should be reversed.

B. The Colorado Supreme Court's asserted interests for its interpretation of Rule 606(b) are not compelling enough to permit the racially tainted jury verdict in this case.

The Colorado Supreme Court believed that Rule 606(b) could be invoked to shield racially tainted jury verdicts because "[p]rotecting the secrecy of jury deliberations is of paramount importance in our justice system." Pet. App. 13a. The Colorado Supreme Court

also emphasized that invoking Rule 606(b) in this instance promoted finality and helped preserve public confidence in "the fundamental notion of trial by jury." *Id*. Additionally, the Colorado Supreme Court thought that unconditional application of Rule 606(b) curtailed the likelihood of post-verdict juror harassment. *Id*. at 14a (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915)). While important policy considerations, none of these asserted interests are sufficiently compelling under the Equal Protection Clause.

None of the Colorado Supreme Court's justifications fall within the limited circumstances in which the government may permissibly consider race under the Equal Protection Clause.[6] Indeed, this Court has been reluctant to recognize new compelling interests when racial animus impacted a criminal defendant's right to a fair and impartial jury trial. *See J.E.B.*, 511 U.S. at 137 n.8 (refusing to recognize a "special state interest" in establishing paternity of a child born out of wedlock). And for good reason: because of the importance of a fair and impartial jury trial in the administration of justice, and the primary aim of the Equal Protection Clause to prohibit racial discrimination, the only *compelling* interest a state can have "in *every* trial is to see that the proceedings are carried out in a fair,

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[6] *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (national security); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (government may take race-conscious remedies to address past racism for which it was responsible); *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003) (permitting use of race in college admissions to promote diversity).

impartial, and nondiscriminatory manner." *Id*. (emphasis in original).

In addition, the Colorado Supreme Court's asserted interest in protecting the privacy of jury deliberations loses force post-verdict. *See Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (Brennan, J., Circuit Justice). After a verdict is rendered, jurors may discuss a verdict, and the underlying jury deliberations that culminated in that verdict, with anyone. *See* Wolin, *supra* at 294-95. The fact that jurors can discuss jury deliberations everywhere except the courtroom severely undercuts any argument that the privacy of jury deliberations is a compelling state interest that justifies excluding evidence that racial bias and stereotyping may have directly influenced the outcome. *See id*. If a state's true interest is to protect "the freedom of the jury to reach verdicts on the basis of bias or prejudice without fear of discovery," then there is no way that interest could be compelling in light of this Court's continuing efforts to eradicate racial bias in all areas of the criminal justice system. *Id*.; *see also McCleskey*, 481 U.S. at 309.

Similarly, the Colorado Supreme Court's concern about post-verdict juror harassment is exaggerated. Rule 606(b) itself "does not prohibit the contact that would cause . . . jurors to be harassed and embarrassed but rather only use of the evidence that may come from those contacts." Wolin, *supra* at 296. The breadth of Rule 606(b) even bars consideration of evidence where a juror is willing to voluntarily forego the protections of the Rule to come forward with information that jury

deliberations were tainted by racial animus. *See id*. If a criminal defendant may waive the protections of an evidentiary rule that supposedly inures to his or her benefit, then a juror should have the same right, especially where the waiver would vindicate a criminal defendant's right to a fair and impartial trial. *See United States v. Mezzanatto*, 513 U.S. 196, 804-05 (1995).

The Colorado Supreme Court was also incorrect when it found that finality is an interest that requires the enforcement of racially tainted jury verdicts. A state does not have an interest in mere finality; instead, the concept of finality, in addition to promoting efficiency, incorporates the idea that the criminal defendant received a fair and impartial trial, and that the jury based its verdict solely on the evidence presented at that trial. *See McDonough*, 464 U.S. at 554. Finality necessarily assumes that a jury verdict is free from racial animus.

Thus, in both a jury trial and jury deliberations, a state must ensure that the process "produces decisions based on fair procedures, accurate fact-finding, and community values." Victor Gold, *Juror Competency to Testify That a Verdict Was the Product of Racial Bias*, 9 St. John's J. Legal Comment. 125, 132 (1993). And reaching a verdict that is both fair and accurate based upon the evidence must outweigh the state's interest in finality and cost-savings if the criminal justice system is to retain any legitimacy in view of the public. *See Tanner v. United States*, 483 U.S. 107, 137 (1987) (Marshall, J., concurring in part). "Permitting defendants to expose racially tainted deliberations gives the

public – particularly minority citizens – *more* reason, not *less*, to trust the final results of the criminal justice system." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1600 (1988) (emphasis in original); *see also J.E.B.*, 511 U.S. at 154 (Kennedy, J., concurring) ("Nothing 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.").

None of the policy concerns that drove the Colorado Supreme Court's analysis in this case are compelling enough for this Court to depart from the rule that race and ethnicity are illegitimate considerations in the administration of justice under the Equal Protection Clause. The Colorado Supreme Court's decision should be reversed.

III. The Colorado Supreme Court's interpretation of Rule 606(b) violates the Due Process Clause because it forecloses any challenge to jury verdicts that are racially tainted and arbitrary.

The Due Process Clause states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. 14 § 1. As this Court noted in *Murchison*, "[a] fair trial in a fair tribunal is a basic requirement of due process." 349 U.S. at 136. Thus, "it [is] well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial

verdict, based on the evidence and the law." *Peters v. Kiff*, 407 U.S. 493, 501 (1972).

Because race-based decision-making by the government is inherently arbitrary, it implicates the Due Process Clause. *Bolling*, 347 U.S. at 500. As an arbitrary consideration, race has no place in the administration of justice. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). And in a criminal trial, when a jury "[e]mploy[s] racial bias to reach a verdict[,] [it] is analogous to flipping a coin," and arbitrarily deprives a criminal defendant of liberty under the Due Process Clause. Gold, *supra*, at 139; *see also Bolling*, 347 U.S. at 500 (noting that the government's invidious use of race "constitutes an arbitrary deprivation of . . . liberty" in violation of due process).[7]

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[7] Although *Bolling* is sometimes characterized as an equal protection decision, some commentators argue that the case is more accurately described as a due process case that is concerned about arbitrary deprivations of liberty. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting); *see also* David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 Wash. U. L.Q. 1469, 1513-14 (2005) ("[A] close reading of *Bolling* reveals that while dicta in *Bolling* states that the concept of due process overlaps to some extent with the concept of equal protection, the ultimate holding of the Court is based on the traditional due process concern that the government not engage in arbitrary deprivation of liberty."). While the due process issues in this case intersect with the equal protection concerns described above, this Court should treat due process and equal protection as two separate independent grounds to reverse the Colorado Supreme Court. Here, Pena-Rodriguez suffered a loss of liberty by being sentenced to probation and required to register as a sex offender, which imposes a host of legal restrictions and other stigmatizing effects upon him. Pena-Rodriguez Pet. 6; *see also*

A. The Colorado Supreme Court's reading of Rule 606(b) denies criminal defendants due process by permitting jury verdicts motivated by racial animus.

The Colorado Supreme Court's decision below cannot be read consistent with this Court's interpretation of the Due Process Clause. Under the Colorado Supreme Court's logic, so long as it occurs in the jury room, Rule 606(b) permits a juror – like Juror H.C. in this case – to rely upon racial animus and stereotyping to reach a verdict. But a criminal defendant's right to due process does not end when the door to the jury room shuts. In most other contexts, the use of racial animus and stereotyping by a government actor is generally banned under the Constitution. But the Colorado Supreme Court's reading of Rule 606(b) allows jurors to engage in the very type of arbitrary race-based decision-making this Court has said is clearly impermissible under the Due Process Clause. *E.g.*, *Armstrong*, 517 U.S. at 464.

Rule 606(b) does not create an exception to the Due Process Clause, and evidentiary rules must yield to the Constitution, not the other way around. "The right to a trial by an impartial jury lies at the very heart of due process," and "[f]airness and reliability

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Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty."); *Smith v. Doe*, 538 U.S. 84, 112 (2003) (Stevens, J., concurring). To the extent that sentence was imposed through a racially tainted jury verdict, it is arbitrary and a violation of the Due Process Clause.

are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial." *Smith*, 455 U.S. at 224-25 (Marshall, J., dissenting). But if the Colorado Supreme Court's decision is left undisturbed, Rule 606(b) insulates a jury verdict that is the product of racial animus and stereotyping from ever being challenged. That precludes a criminal defendant, like Pena-Rodriguez here, from ever vindicating his due process rights, even where there is clear evidence that the jury verdict stems from constitutionally illegitimate considerations. That cannot be the law.

B. Juror H.C.'s ethnically derogatory statements are direct evidence that the jury verdict against Pena-Rodriguez was tainted by actual bias in violation of the Due Process Clause.

Juror H.C.'s statements during jury deliberations are direct evidence that the jury verdict reached in Pena-Rodriguez's case was the product of "deep and bitter prejudice" harbored toward Mexicans and immigrants. *Irvin v. Dowd*, 366 U.S. 717, 727 (1961). Juror H.C.'s race-based probability analysis suggests that at least in his view, Pena-Rodriguez was predisposed to committing the crime, and therefore, most likely guilty before jury deliberations – in fact, perhaps before trial – even began. Where there is evidence of actual bias towards a criminal defendant and that jurors are inclined to find the defendant guilty because of such bias, this Court has found a violation of the Due Process

Clause. *E.g.*, *Irvin*, 366 U.S. at 727; *see also Estes v. Texas*, 381 U.S. 532, 534-35 (1965). This case is no different.

And even assuming that Juror H.C.'s vote on the verdict was ultimately based upon the evidence presented at trial, the fact that he made ethnically derogatory statements and sought to influence other jurors to act upon racial animus and engage in racial stereotyping cannot survive under the Due Process Clause. This Court has made clear that "even if there is no showing of actual bias in the tribunal . . . due process is denied by circumstances that create the *likelihood or the appearance of bias*." *Peters*, 407 U.S. at 502 (emphasis added). In order to show a due process violation in a criminal trial, this Court has only required a criminal defendant to show that the trial was tainted by a probability of bias. *Estes*, 381 U.S. at 545. This Court has always assumed that where there is some evidence that jurors were biased, that it is "highly probable that [such bias] will have a direct bearing on [a juror's] vote as to guilt or innocence." *Id*. The showing made by Pena-Rodriguez here is at least enough to entitle him to a hearing on that issue.

This Court, therefore, should reject the Colorado Supreme Court's reading of Rule 606(b) to the extent it bars consideration of Juror H.C.'s statements and the jury verdict from further review in the trial court as inconsistent with due process.

CONCLUSION

For the foregoing reasons, the Colorado Supreme Court's decision should be reversed, and this case remanded for further proceedings to determine whether Pena-Rodriguez is entitled to a new trial.

Respectfully submitted,

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