

No. 16-461

In the Supreme Court of the United States

TERRY CHRISTENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE AS AMICUS CURIAE IN SUPPORT OF
PETITIONER**

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TABLE OF CONTENTS

Interest of amicus curiae	1
Summary of the argument	2
Argument:	
I. The right to a trial by an impartial jury and the secrecy of jury deliberations are fundamental features of the american court system	4
A. The jury has played a central role in the administration of justice since english common law, and the right to an impartial jury trial is enshrined in the constitution	4
B. The secrecy of jury deliberations is protected by the Sixth Amendment	5
II. Trial courts violate the Sixth Amendment and otherwise exceed their authority when their actions intrude on jury deliberations	6
A. A district court's coercive investigation and removal of a deliberating juror violates the Sixth Amendment	6
1. Courts are prohibited from taking actions that may coerce a jury during deliberations	8
2. This Court's post-verdict impeachment jurisprudence underscores the importance of jury secrecy	10
3. Even inconsistent verdicts are permissible to protect jury secrecy	11
B. The Federal Rules of Criminal Procedure allow judges to remove deliberating jurors only in rare circumstances	12

II

Table of Contents—Continued:

III. Judicial intrusion into the deliberative process through invasive questioning and juror removal is a recurring problem, often resulting in convictions.....	16
A. Ninth Circuit	17
B. Third Circuit	18
C. Eleventh Circuit	20
Conclusion.....	23

III

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Allen v. United States</i> , 164 U.S. 492 (1896)	8, 9, 16
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	5
<i>Brasfield v. United States</i> , 272 U.S. 448 (1926)	8, 9
<i>Clark v. United States</i> , 289 U.S. 1 (1933).....	7
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	2, 5
<i>Dunn v. United States</i> , 284 U.S. 390 (1932).....	11
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961).....	5
<i>Jenkins v. United States</i> , 380 U.S. 445 (1965).....	8, 9
<i>Johnson v. Williams</i> , 133 S. Ct. 1088 (2013)	16
<i>McDonald v. Pless</i> , 238 U.S. 264 (1915).....	10
<i>Pena-Rodriguez v. Colorado</i> (No. 15-606).....	11
<i>Tanner v. United States</i> , 483 U.S. 107 (1987).....	6, 10
<i>United States v. Abbell</i> , 271 F.3d 1286 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002)	20, 21
<i>United States v. Augustin</i> , 661 F.3d 1105 (11th Cir. 2011), cert. denied, 132 S. Ct. 2444 (2012)	22
<i>United States v. Barone</i> , 83 F.R.D. 565 (S.D. Fla. 1979).....	13
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	4
<i>United States v. Burrous</i> , 147 F.3d 111 (2d Cir.), cert. denied, 525 U.S. 939 (1998).....	14
<i>United States v. Egbuniwe</i> , 969 F.2d 757 (9th Cir. 1992).....	18
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	4

IV

Cases—Continued:	Page(s)
<i>United States v. Geffrard</i> , 87 F.3d 448 (11th Cir.), cert. denied, 519 U.S. 985 (1996).....	14, 22
<i>United States v. Kemp</i> , 500 F.3d 257 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008) ...	18, 19, 20
<i>United States v. Meinster</i> , 484 F. Supp. 442 (S.D. Fla. 1980), aff'd sub nom. <i>United States v.</i> <i>Phillips</i> , 664 F.2d 971 (5th Cir. 1981)	13
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	5
<i>United States v. Phillips</i> , 664 F.2d 971 (5th Cir. 1981).....	13
<i>United States v. Polar</i> , 369 F.3d 1248 (11th Cir. 2004).....	22
<i>United States v. Powell</i> , 469 U.S. 58 (1984).....	11
<i>United States v. Smith</i> , Nos. 14-50440, 14-50441, 14-50442, 14-50446, 14-50449, 14-50455, 14- 50583, 2016 WL 4138247 (9th Cir. Aug. 4, 2016)	18
<i>United States v. Spock</i> , 416 F.2d 165 (1st Cir. 1969).....	8
<i>United States v. Stratton</i> , 779 F.2d 820 (2d Cir. 1985), cert. denied, 476 U.S. 1162 (1986)	14
<i>United States v. Symington</i> , 195 F.3d 1080 (9th Cir. 1999).....	7
<i>United States v. Taylor</i> , 617 F. App'x 671 (9th Cir.), cert. denied, 136 S. Ct. 349 (2015)	18
<i>United States v. Thomas</i> , 116 F.3d 606 (2d Cir. 1997).....	5
<i>Warger v. Shauers</i> , 135 S. Ct. 521 (2014)	10, 11

V

Cases—Continued:	Page(s)
<i>Yeager v. United States</i> , 557 U.S. 110 (2009).....	10
Constitution and rule:	
U.S. Const. Amend. VI	<i>passim</i>
Fed. R. Crim. P. 23(b)	12, 13, 14, 15
Miscellaneous:	
<i>The Declaration of Independence</i> (U.S. 1776).....	5

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INTEREST OF AMICUS CURIAE¹

California Attorneys for Criminal Justice (CACJ) is a non-profit organization of criminal defense lawyers founded in 1972. Most of the CACJ's membership practices in the Federal and State courts located throughout California. CACJ has as one its goals (and bylaws) the protection of rights afforded by the Constitution. CACJ has appeared in this Court as amicus curiae on several occasions.

While the petition for writ of certiorari explains that this Court should grant the petition in order to resolve a circuit split as to how to protect Sixth Amendment rights when a judge dismisses a deliberating

¹ Counsel for amicus gave 10-day notice to counsel for the parties of the intention to file this brief. Counsel for the petitioner and counsel for the respondent have provided their written consent to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person contributed money intended to fund preparing or submitting this brief.

juror, CACJ files this brief separately to underscore petitioner's argument that this Court should grant the petition because the standard used by the Ninth Circuit, as well as the Third and Eleventh Circuits, threatens a centerpiece of jury trials: the constitutional right to an impartial jury trial. These three circuits dictate the standard for federal district courts in fifteen states, and as a result the problem here is pervasive, not confined to the circumstances of one individual case. This case presents in stark terms the very real problem with the standard adapted in these circuits, and is an appropriate case to allow this Court to fully address the urgent issues the Ninth Circuit's decision raises.

The first question presented by petitioner is one of greatest public importance, implicating two related foundations of our jury system: (1) the right to a verdict by an impartial jury; and (2) the secrecy of jury deliberations. The Ninth Circuit's standard for how it evaluates and potentially dismisses a deliberating juror is at odds with accepted interpretations of both of these principles. CACJ's appearance here is consistent with its interest in ensuring that all criminal defendants enjoy the right to a verdict by a jury that is impartial and free from undue judicial intrusion.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for a writ of certiorari in order to limit judicial interference in jury deliberations that threaten the impartial jury guaranteed by the Sixth Amendment to criminal defendants. This right to trial by an impartial jury is "fundamental to the American scheme of justice," providing independent protection against government overreach. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Similar-

ly, the secrecy of jury deliberations is a critical underpinning of the right to an impartial jury and is also protected by the Sixth Amendment. By allowing a district court to interject itself into deliberations in order to conduct intrusive inquiries into the reasons behind a juror's intended vote, the Ninth Circuit is purporting to permit an approach that deprives these fundamental Sixth Amendment rights to criminal defendants.

Once a jury has begun deliberations, a judge is authorized to remove a juror only in very narrow circumstances where a juror becomes incapable of deliberating. This allows judges to excuse a juror who cannot continue to deliberate, while also preserving the secrecy of jury deliberations. By contrast, where, as here, judges inquire into the deliberative process and remove jurors who remain willing to deliberate, they exceed their authority and violate the long-standing principle of preserving jury deliberations from intrusion. This Court has vigorously protected jury deliberations against coercive judicial instructions and post-verdict impeachment testimony. However, it has never addressed the circumstances under which a district court may remove a deliberating juror. We urge this Court to do so here.

Judicial intrusion into the deliberative process through invasive questioning and juror removal is a recurring issue. Decisions in the Ninth, Third, and Eleventh Circuits show that when a judge questions a jury regarding a juror who does not agree with the majority, and then ultimately dismisses that holdout, the remaining jurors often promptly return a guilty verdict. CACJ tenders this brief to emphasize that the consequences for piercing the secrecy of jury deliberations are severe, and make clear that the time has come for

the Court to prescribe a clear and uniform standard for dismissing deliberating jurors that protects criminal defendants' Sixth Amendment rights.

ARGUMENT

I. THE RIGHT TO A TRIAL BY AN IMPARTIAL JURY AND THE SECRECY OF JURY DELIBERATIONS ARE FUNDAMENTAL FEATURES OF THE AMERICAN COURT SYSTEM

The Sixth Amendment guarantees that all criminal defendants “shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. Amend. VI. The United States inherited the right to an impartial jury from English common law, and it was one of the most uncontroversial provisions of the Bill of Rights. It has long been understood that, in order for a jury to be “impartial,” the deliberative process must remain secret and be protected from intrusion. Judicial actions that intrude into the deliberative process threaten the impartiality of the jury and, therefore, the accused’s constitutional rights as guaranteed by the Sixth Amendment.

A. The Jury Has Played A Central Role In The Administration Of Justice Since English Common Law, And The Right To An Impartial Jury Trial Is Enshrined In The Constitution

The right to a trial by jury was a central feature of English common law, and “ha[s] been enshrined since the Magna Carta.” *United States v. Booker*, 543 U.S. 220, 239 (2005). This right to an “impartially selected” jury “was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.” *United States v.*

Gaudin, 515 U.S. 506, 510-511 (1995) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1779-1780, at 540-541 (1873)).

Though inherited from English common law, the jury and its “proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement.” *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968). Indeed, one of the grievances cited within the Declaration of Independence was that England had been “depriving us in many cases, of the benefit of Trial by Jury.” *The Declaration of Independence* para. 20 (U.S. 1776). Ultimately, this desire to protect the jury trial tradition became the Sixth Amendment, which “was one of the least controversial provisions of the Bill of Rights.” *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). “In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

B. The Secrecy Of Jury Deliberations Is Protected By The Sixth Amendment

The secrecy of jury deliberations is a “cardinal principle” of the American justice system. *United States v. Olano*, 507 U.S. 725, 737 (1993) (quoting the Fed. R. Crim. P. 23(b) advisory committee’s notes); see also *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) (describing the “secrecy of jury deliberations” as a “cornerstone” of the modern jury system). This Court has explained that “the primary if not exclusive purpose of jury privacy and secrecy is to protect the jury’s deliberations from improper influence.” *Olano*, 507 U.S. at 737-738. In other words, the “very substantial concerns” that “support the protection of jury de-

liberations from intrusive inquiry” are rooted in the constitutional requirement that juries remain impartial and free from *any* outside influence. *Tanner v. United States*, 483 U.S. 107, 127 (1987). As an organization dedicated to protecting the rights of the accused, CACJ has grave concerns that judges are intruding into jury deliberations through invasive questioning that targets holdout jurors and signals to the jury that they must come to census and vote to convict. By doing so, judges are threatening the Sixth Amendment’s guarantee of an “impartial jury” to criminal defendants.

II. Trial Courts Violate The Sixth Amendment And Otherwise Exceed Their Authority When Their Actions Intrude On Jury Deliberations

At the heart of this case is the Sixth Amendment’s protection of the accused. The constitution prohibits judicial coercion of the jury and protects the secrecy of jury deliberations. Amicus’s members represent criminal defendants, and their clients are prejudiced when district courts exercise their uniquely powerful position to unduly influence juries. Accordingly, Amicus writes separately to offer CACJ’s ground-level perspective on the consistent and dangerous violation of the Sixth Amendment occurring throughout California district courts due to the Ninth Circuit’s permissive standard. This Court has long protected the secrecy of jury deliberations, and Amicus urges that it grant the petition for certiorari in order to do so again.

A. A District Court’s Coercive Investigation And Removal Of A Deliberating Juror Violates The Sixth Amendment

The Sixth Amendment’s guarantee of a right to trial “by an impartial jury” is framed as a constitutional

right enjoyed by “the accused.” U.S. Const. Amend. VI. When district courts conduct intrusive investigations into the jury’s deliberations and exceed their authority by removing jurors who are willing and able to continue deliberating, they almost always target holdout jurors who are more likely to vote for acquittal than the rest of the jury. In so doing, Amicus believes district courts create tangible harms to defendants and infringe upon their constitutional rights. This is particularly true in circuits like the Ninth Circuit which favor intrusive judicial inquiry and allow judges to dismiss jurors for reasons wholly unrelated to an inability to continue deliberating. See, *e.g.*, *United States v. Symington*, 195 F.3d 1080, 1087 (1999) (adopting a standard under which a juror can be dismissed when “the available evidence is sufficient” to suggest “the impetus for a juror’s dismissal is unrelated to her position on the merits”).

This Court has a long-standing and constitutionally mandated tradition of supporting jury impartiality and preserving the secrecy of jury deliberations in all but the most unusual of circumstances, which protects juries from coercive outside influence and in turn defends the Sixth Amendment right to an impartial jury. This Court has noted that “[f]reedom 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,” and in at least three contexts described below, this Court has zealously defended the privacy of jury deliberations. *Clark v. United States*, 289 U.S. 1, 13 (1933). As an organization dedicated to representing the rights of criminal defendants throughout California, Amicus urges this Court to grant the petition for certiorari in order to continue this tradition and ensure that all criminal de-

fendants, in California and throughout the nation, receive robust, and equal, protection of their Sixth Amendment right to an impartial jury.

1. Courts Are Prohibited From Taking Actions That May Coerce A Jury During Deliberations

Judicial action that has the effect of coercing the jury is impermissible. This principle has been protected by this Court for over half a century. *Jenkins v. United States*, 380 U.S. 445, 446 (1965); see also *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969) (explaining that “[i]n the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent”). Courts may not scrutinize the viewpoints and opinions of individual jurors or otherwise pressure the jury to reach preferred outcomes.

This principle applies even in the strict limits imposed on courts when they consider whether, and under what circumstances, they may urge a jury to reach a verdict when the jury appears deadlocked. The so-called “*Allen*” or “dynamite” charge allows a trial judge to instruct jurors “that they should listen, with a disposition to be convinced, to each other’s arguments” with the hope of reaching a consensus. *Allen v. United States*, 164 U.S. 492, 501 (1896). However, even with *Allen* charges, this Court has indicated that their permissibility is entirely dependent on the context and the precise nature of the district court’s actions. For example, in *Brasfield v. United States*, 272 U.S. 448, 450 (1926), this Court determined that an *Allen* charge was in error where the trial court also inquired as to a dead-

locked jury's numerical split, reasoning that "the inquiry itself should be regarded as ground for reversal" since "in general its tendency is coercive."

In this case, the district court questioned several jurors about the substance of deliberations, and one juror's viewpoint in particular. That juror explained that he had concerns with the substantive strength of the government's case, and at least one other juror supported this explanation. The district court did not ask the juror in question whether he was willing to continue deliberating. Instead, the court simply removed the juror, and shortly after the alternate was seated, the jury voted to convict. The dismissal of a juror, who may simply have been expressing his views on the merits of the case, sent a clear and coercive message not just to the dismissed juror but to the remaining jurors: surrender "views conscientiously held" if they conflict with the majority or face immediate dismissal from the jury. *Jenkins*, 380 U.S. at 446. This conduct is more coercive than any *Allen* charge, which simply involves the transfer of information, and is certainly more coercive than the inquiry into numerical division rejected in *Brasfield*.

Accordingly, the district court's actions, which involved judicial scrutiny of the motives, discussions, and viewpoints of individual jurors, were coercive and exercised undue influence on the jury. They therefore threatened one of the core protections of the Sixth Amendment, and this Court should grant the petition for certiorari to protect these constitutional rights.

2. This Court's Post-Verdict Impeachment Jurisprudence Underscores The Importance Of Jury Secrecy

One of the other long-standing protections of jury impartiality is the broadly applicable ban on post-verdict impeachment testimony by jurors. Indeed, more than one hundred years ago this Court noted that allowing post-verdict juror testimony would “make what was intended to be a private deliberation, the constant subject of public investigation,” which would in turn lead “to the destruction of all frankness and freedom of discussion and conference.” *McDonald v. Pless*, 238 U.S. 264, 267-268 (1915). More recently, this Court noted that “[c]ourts properly avoid [] explorations into the jury’s sovereign space * * * and for good reason. The jury’s deliberations are secret and not subject to outside examination.” *Yeager v. United States*, 557 U.S. 110, 122 (2009). Only in “extreme cases,” where other constitutional rights are at stake, may this prohibition be modified. *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014).

This rule is explicitly grounded in the view that it is preferable for some juror misconduct to go uncorrected than for deliberative secrecy to be compromised, and this Court has strictly maintained this standard even in the face of well-intentioned efforts to impeach verdicts. Thus, this Court refused to consider the post-verdict representation that jurors drank and used drugs during deliberations, insisting that “full 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 v. United States*,

483 U.S. 107, 120-121 (1987). Similarly, this Court has also refused, as a general matter, to consider post-verdict testimony about juror bias. *Warger*, 135 S. Ct. at 529.²

In this case, there is no countervailing constitutional consideration making this an “extreme case,” which would be necessary to justify judicial intrusion into the jury’s deliberative process. While the Sixth Amendment may require judicial intrusion in cases of racial bias, it ordinarily prohibits judicial intrusion. The significant interests in protecting the secrecy of jury deliberations animating the ordinary post-verdict impeachment cases should lead the Supreme Court to grant the petition and condemn any unconstitutional intrusions into the jury’s deliberations.

3. Even Inconsistent Verdicts Are Permissible To Protect Jury Secrecy

This Court has even permitted inconsistent or illogical jury verdicts to stand in order to protect the secrecy of jury deliberations. In *Dunn v. United States*, 284 U.S. 390, 393-394 (1932), this Court held that even though inconsistent verdicts may be the result of compromise or outright mistake, defendants may not attack jury convictions on one point by pointing out its inconsistency with other rulings because “verdicts cannot be upset by speculation or inquiry into such matters.” This rule remains in effect today. See *United States v.*

² In *Pena-Rodriguez v. Colorado* (No. 15-606), this Court is currently considering whether post-verdict testimony about a juror’s racist bias is warranted. The distinction between the possible exception proposed in *Pena-Rodriguez* and the general rule is clear: in the ordinary case there is no countervailing constitutional consideration, whereas a jury infected with racism may itself raise Sixth Amendment impartiality issues.

Powell, 469 U.S. 58, 64, 66 (1984) (upholding “the *Dunn* rule” and explaining that “an individualized assessment of the reason for the inconsistency * * * would require inquiries into the jury’s deliberations that courts generally will not undertake”).

Given that this Court values the secrecy of jury deliberations to such an extent that it refuses even to permit post-judgment attacks on the verdicts when the jury inconsistently and illogically applied the law, it certainly may not permit judges to take advantage of their uniquely powerful position to harm criminal defendants and ensure that the jury reaches a particular verdict. This case squarely presents another opportunity for this Court to limit impermissible outside influence on juries, and Amicus urges this Court to grant the petition for writ of certiorari and defend the Sixth Amendment right to an impartial jury.

B. The Federal Rules Of Criminal Procedure Allow Judges To Remove Deliberating Jurors Only In Rare Circumstances

Consistent with the Sixth Amendment, the Federal Rules of Criminal Procedure only allow judges to remove deliberating jurors in narrow circumstances. In fact, prior to 1983, district courts could remove jurors only by the consent of the parties. Fed. R. Crim. P. 23(b) advisory committee’s notes to 1983 amendment. The 1983 amendment to Rule 23(b) granted courts narrow authority to unilaterally remove a deliberating juror and allow a verdict by those remaining upon a finding of good cause for removal. *Ibid.* The advisory committee notes stress that this amendment was not intended to make a substantial change in the law, as it addressed “a situation which [did] not occur with great

frequency.” *Ibid.* Instead, judicial authority to remove jurors was intended to be a limited grant of authority that could only be exercised when “one of the jurors is seriously incapacitated or otherwise found to be unable to continue to serve upon the jury.” *Ibid.*

The examples provided by the advisory committee demonstrate the intended limits of the 1983 amendment, and they strongly suggest that Federal Rule of Criminal Procedure 23(b) was designed to allow judges to remove jurors when they were physically or mentally unable to continue deliberating. See *United States v. Meinster*, 484 F. Supp. 442 (S.D. Fla. 1980) (juror had heart attack during deliberations after “well over four months of trial”), *aff’d sub nom. United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981); *United States v. Barone*, 83 F.R.D. 565, 566 (S.D. Fla. 1979) (juror removed upon recommendation of psychiatrist during deliberations after “approximately six months of trial”). *Meinster* and *Barone* are illustrative of the kinds of situations that the Advisory Committee contemplated, with the Advisory Committee framing its amendment as an effort to avoid mistrials in situations where “a juror is lost during deliberations.” Fed. R. Crim. P. 23(b) advisory committee’s notes to 1983 amendment.

The limitations on Rule 23(b) established by the Advisory Committee are logical and consistent with the Constitution. The Sixth Amendment does not allow invasive judicial intrusion into deliberations and arbitrary removal of jurors, and Rule 23(b) was not intended to offend this principle. Instead, it was meant to authorize district courts to address practical concerns while also firmly protecting a defendant’s constitutional right to an impartial jury free from undue influence. In circumstances where a juror is “found to

be *unable* to continue service upon the jury,” the judge may either remove the juror without any investigation or conduct a very limited inquiry focused on the juror’s incapacity, neither of which requires the judge to conduct an intrusive inquiry into the substance of the jury’s deliberations or threatens the jury’s impartiality on the merits. Fed. R. Crim. P. 23(b) advisory committee’s notes to 1983 amendment (emphasis added).

Courts interpreting Rule 23(b) in the wake of the 1983 amendment determined that the purpose of the rule was best served by allowing judges, in their discretion, to remove jurors in circumstances other than “where a juror suffers permanent or at least lengthy incapacitation,” *United States v. Stratton*, 779 F.2d 820, 832 (2d Cir. 1985), cert. denied, 476 U.S. 1162 (1986), so long as the juror was nevertheless “unable to continue service upon the jury,” as contemplated by the Advisory Committee. Fed. R. Crim. P. 23(b) advisory committee’s notes to 1983 amendment. In other words, courts may exercise discretion when faced with situations comparable to physical or mental incapacitation, and in so doing apply the “good cause” standard slightly “more broadly to encompass a variety of temporary problems” that prohibit a juror from deliberating, such as the need to attend a religious holiday. *Stratton*, 779 F.2d at 832; see also *United States v. Burrous*, 147 F.3d 111, 115 (2d Cir.) (juror excused when her religious beliefs made her incapable of “judging” others), cert. denied, 525 U.S. 939 (1998); *United States v. Geffrard*, 87 F.3d 448, 452 (11th Cir.) (juror excused when her religious beliefs made her incapable of rendering a guilty verdict in accordance with the law), cert. denied, 519 U.S. 985 (1996).

Significantly, this judicial gloss on Rule 23(b) does not alter the rule's fundamental nature, which is a limited allowance of judicial authority to remove jurors when they are "unable to continue service upon the jury." Fed. R. Crim. P. 23(b) advisory committee's notes to 1983 amendment. A juror who needs to attend a religious holiday, for example, is as incapable of deliberating during that time as would be a physically or mentally incapacitated juror, and the judicial inquiry necessary to remove such a juror is equally limited. Accordingly, allowing district courts this small measure of discretion is helpful in supporting the purpose of Rule 23(b) and still consistent with the Sixth Amendment, and does not transform the rule into an authorization for district courts to impose their viewpoints on jurors or insert themselves unconstitutionally into the deliberative process.

In cases like this one, however, where courts remove holdout jurors who are willing and able to continue deliberating, the district court exceeds its authority by transforming Rule 23 from a narrow grant of authority consistent with the Sixth Amendment's general prohibition on judicial interference with juries into a much wider-reaching judicial authority to exercise undue influence over deliberations. Amicus submits that this behavior, which exceeds the authorization provided by Rule 23(b) (and even more so what is permitted by the Sixth Amendment), has the serious effect of creating incentives for district courts to conduct a greater number of more intrusive inquiries into jury deliberations. These intrusive judicial inquiries typically work to the detriment of criminal defendants like the ones Amicus's members represent, raising grave Sixth Amendment concerns that this Court should address.

III. JUDICIAL INTRUSION INTO THE DELIBERATIVE PROCESS THROUGH INVASIVE QUESTIONING AND JUROR REMOVAL IS A RECURRING PROBLEM, OFTEN RESULTING IN CONVICTIONS

Members of this Court recently demonstrated concern regarding a court's ability to dismiss jurors once the jury has begun deliberating. In *Johnson v. Williams*, 133 S. Ct. 1088 (2013), the California trial judge questioned jurors following an indication from the foreman that one juror intended to disregard the law and expressed concern regarding the severity of the charge. After inquiry, and over the defendant's objection, the trial judge dismissed the juror for bias, and the defendant was promptly convicted by the remaining jurors for first-degree murder.

During oral argument, three members of this Court recognized that such intervention into jury deliberations is "troublesome." Tr. of Oral Argument at 18, *Johnson, supra* (No. 11-465). Justice Ginsburg found it "very troublesome" that a judge, in a jurisdiction without the *Allen* charge, could dismiss the juror after identifying "the hold-out" juror. *Id.* at 19. Justice Sotomayor agreed that she was "deeply troubled" by the intrusion, and Justice Kennedy stated that he hoped "this doesn't happen with much regularity." *Id.* at 21.

The justices' concern is justified. In the federal jurisdictions that allow the most intrusive questioning and easiest dismissal of jurors, including the Ninth Circuit where CACJ members practice, trial judges regularly intervene in jury deliberations. Amicus sees an urgent need for clarification from this Court on the

permissible scope of judicial intrusion into jury deliberations, and requests the Court limit this practice in order to protect the Sixth Amendment rights of the accused.

A. Ninth Circuit

A glaring example of a decision within the Ninth Circuit countenancing removal of a holdout juror is the opinion below, where the district court removed a juror despite that juror explicitly noting his position on the merits of the case, and “that he disagreed with the other jurors because he [could not] agree to judge [his] decision on circumstantial evidence.” Pet. App. 96a. In this instance, the district court questioned the removed juror as well as five other jurors, and found the removed juror not to be credible. *Id.* at 92a-95a. Despite the clear evidence regarding the dismissed juror’s opinion on the sufficiency of the evidence presented, the Ninth Circuit merely indicated that there are “special challenges’ for the trial judge attempting to determine whether a problem between or among deliberating jurors stems from disagreement on the merits,” and deferred to the trial court due to its proximity to the jury, rather than establishing a rule that protected the defendant’s Sixth Amendment right to an impartial jury. *Id.* at 88a. If a court may dismiss a juror for any disagreement other than a disagreement on the merits, that court is incentivized to conduct a greater number of more intrusive inquiries that will inevitably, as here, involve judicial scrutiny of the jury’s deliberations and the individual juror’s substantive views.

The Ninth Circuit provides numerous other examples of juror dismissal following judicial intrusion into

deliberations, suggesting that this case is symptomatic of a broader practice. See, e.g., *United States v. Smith*, Nos. 14-50440, 14-50441, 14-50442, 14-50446, 14-50449, 14-50455, 14-50583, 2016 WL 4138247, at *6 (Aug. 4, 2016) (affirming district court’s dismissal of a juror because of her “emotional state” despite dismissed juror’s insistence she could continue to deliberate); *United States v. Taylor*, 617 F. App’x 671 (affirming district court’s dismissal of a juror who the district court found could not understand the law governing the case), cert. denied, 136 S. Ct. 349 (2015); *United States v. Egbuniwe*, 969 F.2d 757 (1992) (affirming the district court’s dismissal of a juror who the district court found was preoccupied by his live-in girlfriend’s arrest during deliberations, despite the dismissed juror’s willingness to continue serving).

B. Third Circuit

The Third Circuit, like the Ninth, allows district courts to inquire into the substance of a jury’s deliberations. For example, *United States v. Kemp* dealt with a public corruption trial involving Corey Kemp, the former Treasurer of Philadelphia. 500 F.3d 257 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008) During the course of deliberations, the trial court received two notes; the first alleged that the jurors felt the deliberations were “futile” and the second reported on a juror who was making rude comments about witnesses and fellow jurors. *Id.* at 272. The trial judge gave an instruction urging the jurors to continue deliberating. The following day, the judge received additional notes complaining about one juror. *Id.* at 273. The trial judge then “resolved to question each juror individually,” and asked each juror several questions about the status of the deliberations and the willingness of all jurors to fol-

low the law. *Ibid.* These responses singled out one juror, Juror 11, for being difficult. *Ibid.* Following another set of notes to the judge, the court once again individually questioned each juror about deliberations, and again received complaints from some jurors about Juror 11. *Ibid.* Eventually, the judge instructed the jury that, “[i]f one of you or more of you believe that a juror is biased against the government, I instruct you to send me another note, saying that you believe that.” *Id.* at 275.

The jury followed the judge’s instructions, and a majority of the jurors stated their view that Juror 11 was biased. *Kemp*, 500 F.3d at 276-277. Juror 11 denied bias or a refusal to deliberate, and other jurors supported Juror 11’s statements. *Ibid.* Nevertheless, on the basis of the delay and the comments about bias from several of the jurors, the district court dismissed Juror 11. *Id.* at 277.

In *Kemp*, the district court repeatedly interviewed jurors regarding potential bias, repeatedly asking the jurors to report on one another’s behavior as part of an effort to drive the jury towards reaching a unanimous verdict. Even after learning the specific identity of the dissenting juror, the court repeated its slanted questions about bias and failure to follow instructions. Perhaps most galling, the court specifically instructed the jurors to submit a note alleging bias, triggering a third set of interviews of each member of the jury. Faced with Juror 11’s insistence that she was willing to continue deliberating and statements from other jurors in support, the district court nevertheless removed her from the jury.

The Third Circuit reasoned that “a district court may investigate allegations of juror misconduct when presented with ‘substantial evidence’ of that misconduct,” giving *carte blanche* to district courts to conduct intrusive investigations by stating that district courts are “in the best position to understand and respond to the exigencies of the situation.” *Kemp*, 500 F.3d at 301-302. The Third Circuit acknowledged that it is “more intrusive to question each juror individually” than to conduct other intrusive questioning about deliberations, but dismissed the objection by noting “that there are times in which individual questioning is the optimal way in which to root out misconduct” and assuming that this must have been the case here based on the district court’s proximity to the jury. *Id.* at 302.

In short, *Kemp* represents willingness by the district court to individually interview every juror over and over again about the status of deliberations until the court had an excuse to remove a juror and break the impasse. It also represents a failure by the Third Circuit to scrutinize the district court’s exercise of undue influence with any rigor, and ultimately an abdication of the duty to protect Kemp’s constitutional right to an impartial jury.

C. Eleventh Circuit

The Eleventh Circuit is in accord with the Ninth and Third Circuits. *United States v. Abbell* involved a money laundering prosecution against two defendants. 271 F.3d 1286 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002). In a note to the district judge, several jurors alleged that one of the jurors was “not applying the law as directed.” *Id.* at 1302. Following this note, the district court gave instructions to the jury about its

duty to apply the law and obey its instructions. *Id.* at 1303. This appeared to have cured any actual problems with the holdout juror, who stopped making statements suggesting a belief in jury nullification. *Id.* at 1303. However, the other jurors continued to complain about the holdout juror, intimating that they were “outraged by [the juror’s] decision to do her nails during deliberations.” *Id.* at 1304. The district court then interviewed each juror, found the holdout juror was not credible, and removed her from the case. *Ibid.*

The *Abbell* court stressed that “judges must be careful not to dismiss jurors too lightly, even in the face of complaints from a majority of the jury.” 271 F.3d at 1302. However, in reality the district court below merely gave one general instruction—which appears to have cured all problems other than the jury’s dislike of the odd woman out—before deciding to intrusively intervene in jury deliberations. The court interviewed every juror about the holdout’s potential misconduct, clearly signaling to the other jurors that the court shared their displeasure. *Ibid.* Although the Eleventh Circuit indicated the importance of not dismissing holdout jurors “too lightly,” it nevertheless deferred to the district court’s decision to remove the holdout juror, a decision based on one conversation where the court came away with a “skeptical view.” *Id.* at 1302, 1304. The case illustrates that appellate panels are allowing overly invasive and improper interference into jury deliberations, based on overly lenient standards that favor reaching a verdict over constitutional rights.

The Eleventh Circuit has numerous other examples of juror dismissal following judicial intervention into deliberations to investigate jurors, suggesting broad tolerance of these invasive inquiries. See, *e.g.*,

United States v. Augustin, 661 F.3d 1105, 1129-1130, 1132 (2011) (affirming the district court’s decision to question and ultimately dismiss a juror who felt “very ill” because other jurors were not “respect[ing] [her] answers” and she felt she was “being attacked” but was “willing to follow the law”), cert. denied, 132 S. Ct. 2444 (2012); *United States v. Geffrard*, 87 F.3d 448, 451 (affirming the district court’s decision to dismiss a juror after determining that juror’s inability to communicate her interpretation of the truth borne out by her religious beliefs resulted in her inability to follow the court’s instructions), cert. denied, 519 U.S. 985 (1996). In fact, the mere intrusion by a district court could intimidate jurors enough to change the verdict even without dismissal. See, e.g., *United States v. Polar*, 369 F.3d 1248, 1251, 1253 (11th Cir. 2004) (affirming the district court’s decision to interview a juror that “indicated a mistrust of and bias against the government”; the juror returned and found the defendant guilty).

Taken together, these cases demonstrate the importance of criminal defendants’ Sixth Amendment right to an impartial jury, and the significant pressures being placed on that constitutionally guaranteed right throughout the country by intrusive judicial inquiry into jury deliberations. As such, the Court should grant review and reverse the judgment.

CONCLUSION

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

Respectfully submitted,

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