No. 16-1125

IN THE

Supreme Court of the United States

ROGERS LACAZE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Court of Louisiana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND OTHER ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Louisiana Association of Criminal Defense Lawyers (LACDL) respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as *amici curiae* in support of Petitioner.

All parties were timely notified of LACDL's intent to file an *amicus* brief. Petitioner has consented to the brief. Respondent State of Louisiana refused to consider LACDL's request for consent unless provided with a draft of the brief prior to filing. Because that is not, of course, required—or even accepted—practice, proposed *amici* declined to accede to that demand and must now file this motion instead.

LACDL, the Arizona Attorneys for Criminal Justice, Colorado Criminal Defense Bar, Connecticut Criminal Defense Lawyers' Association, Delaware

Association of Criminal Defense Lawyers, District of Columbia Association of Criminal Defense Lawyers, Florida Association of Criminal Defense Lawyers, Idaho Association of Criminal Defense Lawyers, Iowa Association of Criminal Defense Lawyers, Kansas Association of Criminal Defense Lawyers, [redacted]

yers, Association of Criminal Defense Lawyers of New Jersey, New Mexico Criminal Defense Lawyers Association, North Carolina Advocates for Justice, North Dakota Association of Criminal Defense Lawyers, Ohio Association of Criminal Defense Attorneys, Oregon Criminal Defense Lawyers Association, Rhode Island Association of Criminal Defense Lawyers, South Carolina Association of Criminal Defense Lawyers, Tennessee Association of Criminal Defense Lawyers, Texas Criminal Defense Lawyers Association, and Wisconsin Association of Criminal Defense Lawyers, are associations that represent the interests of their respective states' criminal defense bars and strive to protect the constitutional rights of people charged with crimes. As explained in the attached brief, *amici* are concerned that the Louisiana Supreme Court's decision below improperly deprived Petitioner of his right to an impartial jury under the Sixth Amendment and the Louisiana Constitution. Their brief explains how federal and state courts have applied *McDonough Power Equip., Inc. v. Greenwood* in criminal cases

without guidance from this Court as to the proper interpretation of *McDonough* in a criminal context. 464 U.S. 548 (1984). The brief further underscores the circuit split the petition presents, illustrating how criminal defendants across the country will continue to receive disparate levels of protection against biased jurors absent guidance from this Court. *See* Sup. Ct. R. 10(b).

For the foregoing reasons, the motion should be granted.

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BRIEF OF *AMICI CURIAE* LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND OTHER ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Louisiana Association of Criminal Defense Lawyers (LACDL) respectfully submit this brief as *amici curiae*.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, but Respondent State of Louisiana refused to consider LACDL's request for consent unless provided with a draft of the brief

LACDL is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana.

LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL acts as *amicus curiae* in cases where the rights of defendants are implicated. LACDL has filed *amicus* briefs concerning the role of counsel in capital cases as well as Louisiana's sordid history of race-based strikes.

The Arizona Attorneys for Criminal Justice, Colorado Criminal Defense Bar, Connecticut Criminal Defense Lawyers' Association, Delaware Association of Criminal Defense Lawyers, District of Columbia Association of Criminal Defense Lawyers, Florida Association of Criminal Defense Lawyers, Idaho Association of Criminal Defense Lawyers, Iowa Association of Criminal Defense Lawyers, Kansas Association of Criminal Defense Lawyers, Maine Association of Criminal Defense Lawyers, Maryland Criminal Defense Attorneys' Association, Criminal Defense Attorneys of Michigan, Minnesota Association of Criminal Defense Lawyers, Missouri Association of Criminal Defense Attorneys, Montana Association of Criminal Defense Lawyers, New Hampshire Association of Criminal Defense Lawyers, Association of Criminal Defense Lawyers of New Jersey, New Mexico Criminal Defense Lawyers Association,

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prior to filing. Proposed *amici* declined to accede to that demand, necessitating the motion accompanying this submission.

ARGUMENT

For more than three decades, federal and state courts across the country have imported the *McDonough* plurality's standard into the criminal context. But because courts lack guidance as to how to evaluate a criminal defendant's right to an impartial jury under *McDonough*, criminal defendants receive varied levels of protection from court to court and jurisdiction to jurisdiction, leading to widely disparate results.

I. THIS COURT SHOULD RESOLVE THE INCONSISTENT APPLICATION OF *MCDONOUGH* TO ENSURE CRIMINAL DEFENDANTS RECEIVE STRONG AND UNIFORM PROTECTIONS AGAINST JUROR BIAS.

A. This Court Has Never Applied *McDonough* In The Criminal Context.

Since this Court issued *McDonough*, courts have struggled to apply the fractured opinion's two-prong test for ascertaining juror bias. *See* Pet. 20-25 (discussing the three-way split on the second prong, regarding what it means to show "a valid basis for a challenge for cause"); *id.* 25-26 (examining courts' conflict over whether the first prong of the *McDonough* test applies to misleading nondisclosure). This confusion was evident even with the opinion in *McDonough* itself, which featured two concurrences that only added complexity—and uncertainty—to the plurality's analysis. *See McDonough*, 464 U.S. at 557 (Brennan, J., concurring in judgment) (noting "difficulty understanding the import of the legal standard adopted by the Court").

was a products liability case—a claim for injury from a lawn mower accident. 464 U.S. at 549. This was a capital case. The jury held Petitioner's very life in its hands. Yet the same test for determining juror bias applied.

Despite the significant differences in procedure, rights, and consequences in civil and criminal cases, this Court has never decided that *McDonough* should apply in the criminal context—much less to what degree. The Court's analyses of *McDonough* instead have been limited to civil cases or discussions of the harmless-error standard.[2] Lower courts have attempted to fill the void, but as we next explain, they generally have applied *McDonough* to criminal cases with little consideration as to how the test might differ in the criminal context.

B. Courts Applying The *McDonough* Test For Juror Bias In The Criminal Context Have Largely Ignored The Constitutional Divide Between Criminal And Civil Defendants.

Most courts, including the Louisiana Supreme Court here, have applied *McDonough* to criminal cases without even acknowledging whether the

[2] *See Warger v. Shauers*, 135 S. Ct. 521, 528 (2014) (examining juror testimony regarding juror bias in a civil case in light of *McDonough*); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (citing *McDonough*'s discussion of the civil harmless-error rule); *O'Neal v. McAninch*, 513 U.S. 432, 441 (1995) (citing *McDonough*'s history of the federal harmless-error statute); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 312 (1986) (citing *McDonough*'s discussion of the civil harmless-error rule); *United States v. Powell*, 469 U.S. 57, 67 (1984) (citing *McDonough* as an exception to the finality of jury verdicts).

important distinctions between civil disputes and criminal prosecutions require a modified test for juror bias. Some have limited their analysis to a single sentence. *See, e.g.*, *United States v. McMahan*, 744 F.2d 647, 652 (8th Cir. 1984) ("Although *McDonough* was a civil case, we believe the same principle would apply to a criminal trial."). Others have said nothing at all. *See, e.g.*, *United States v. Perkins*, 748 F.2d 1519, 1531 (11th Cir. 1984) (noting that *McDonough* provides the standard for examining juror bias, but failing to acknowledge any differences between criminal and civil cases).

Civil litigants and criminal defendants, however, are not created equal. Criminal defendants' liberty interest is one of "transcending value," worthy of additional substantive and procedural protections. *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Indeed, "[m]uch of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution," including the state's "awesome power" and "virtually limitless resources." *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring); *see also Duncan*, 391 U.S. at 155-56 (noting that criminal juries "prevent oppression by the Government" and act as a defense "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").[3] For these reasons, criminal defendants' Sixth Amendment right to an

[3] Although Mr. Lacaze does not allege prosecutorial misconduct in his petition, the widespread abuses of the Orleans Parish District Attorney's Office at the time of Mr. Lacaze's trial are well documented. *See Connick v. Thompson*, 563 U.S. 51 (2011).

U.S. at 554; *see also State v. Hall*, 616 So. 2d 664, 668 (La. 1993) (acknowledging *voir dire*'s role in "testing [jurors'] competency and impartiality"); *State v. Monroe*, 329 So. 2d 193, 195 (La. 1975) (highlighting *voir dire*'s ability to "uncover predisposition or attitudes of prospective jurors").

Post-conviction challenges to an impartial jury are an extension of the protections afforded to criminal defendants during the *voir dire* process, mandating a robust inquiry to root out individual juror's improper subversion of criminal defendant's rights under the Sixth Amendment. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (recognizing that *voir dire* may be insufficient to root out, or may even compound, biases). But courts applying *McDonough* in criminal cases have ignored the greater protections provided to criminal defendants in other Sixth Amendment contexts.

McDonough itself illustrates the peril of importing the civil juror bias standard without considering the criminal context. The Court decided *McDonough* in the context of the civil harmless-error rule (Fed. R. Civ. P. 61), which places the burden of persuasion on the party raising the issue. 464 U.S. at 556; *see Howard v. Gonzales*, 658 F.2d 352, 357 (5th Cir. Unit A Oct. 1981). Integrating Rule 61 into its analysis, the *McDonough* Court required the party alleging juror bias both to show that the bias existed and that the bias would affect the party's substantial rights. 464 U.S. at 556. The corresponding Rule of Criminal Procedure, Fed. R. Crim. P. 52(a), however, places the burden of persuasion on the *Government*—not the defendant. *See United States v. Olano*, 507 U.S. 725, 741 (1993). And yet courts apply *McDonough* to criminal cases without considering who should bear

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