No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned about the influence of race on the administration of the criminal justice system in particular and with laws, policies, and practices that have a disproportionate negative impact on communities of color, especially African Americans. For example, LDF served as counsel of record in cases challenging racial bias in the criminal justice system, including the racial make-up of juries, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in cases involving the use of race in peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*). LDF also recently testified before the United States

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Congress, as well as the President's Task Force on 21st Century Policing, about the prevalence of racial bias throughout the criminal justice system and the need to eliminate such discrimination in order to foster confidence and trust in our public institutions.[2] LDF is also lead counsel in *Buck v. Stephens*, 630 F. App'x 251 (5th Cir. 2015), *cert. granted*, No. 15-8049, 2016 WL 531661 (U.S. June 6, 2016), a case involving the explicit use of race in capital sentencing in which this court recently granted certiorari.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 9,000 direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to

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

provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that rules of evidence are interpreted and applied in a manner consistent with a criminal defendant's constitutional right to a full and fair trial by an impartial jury.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its involvement in the Scottsboro cases more than 80 years ago, *Powell v. Alabama*, 287 U.S. 45 (1932) and *Patterson v. Alabama*, 294 U.S. 600 (1935), the ACLU has been deeply engaged in identifying and addressing the persistence of racial discrimination in our criminal justice system—from policing to prosecution to sentencing—and has appeared before this Court in numerous cases raising those issues, both as direct counsel and as *amicus* curiae.

Given their expertise in matters concerning the influence of race on the criminal justice system, *amici* believe their perspective would be helpful to the Court in resolving the important constitutional issues presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the extreme and explicit injection of racial prejudice into a jury's deliberative process—through, in part, a juror's use of racial slurs and stereotypes linking race to criminality. During deliberations on the guilt or innocence of Petitioner, Miguel Angel Peña-Rodriguez, one juror repeatedly

urged his fellow jurors to use Mr. Peña-Rodriguez's ethnicity as a basis for conviction. The juror argued that Mr. Peña-Rodriguez was guilty "because he's Mexican and Mexican men take whatever they want." Pet. App. 4a-5a. The juror referenced his own "experience as an ex-law enforcement officer" where he purportedly observed on "patrol, nine times out of ten Mexican men were guilty of being aggressive toward women . . . ." *Id.* This juror also asserted that an alibi witness's testimony was not credible because he was an "illegal" (in fact, the witness was a lawful permanent resident). Pet. Br. 8.

This egregious display of racial bias was voluntarily reported by two concerned members of the same jury and decisively documented in affidavits. Yet, the Colorado Supreme Court held that, notwithstanding the Sixth Amendment's guarantee of an impartial jury, this extreme misconduct was insulated from judicial review because the state rules of evidence generally bar the admission of juror testimony to impeach a jury verdict (the "no-impeachment" rule).

Amici represent three leading legal organizations that work on a wide range of civil rights, civil liberties, racial justice, and criminal justice issues in jurisdictions across the country. Two of the *amici* filed briefs at the certiorari stage in this case, to elucidate the important issues that it raises. Now, all three join together to urge the Court to recognize the constitutional limits of the "no-impeachment" rule in cases involving racially-prejudiced juror misconduct, and to highlight two key reasons for reversing the Colorado Supreme Court.

First, for over a century, this Court has strived to eradicate racial bias from our criminal justice system writ large. Because racial bias and discrimination in the jury system uniquely undermines the proper

functioning of the criminal justice system, this Court has consistently treated such discrimination as an exceptional harm that requires exceptional remedies. Recent national events exposing the stubborn persistence of racial bias in the administration of criminal justice powerfully reinforce the continued need for this Court's commitment to fair and race-neutral criminal proceedings.

Yet, despite this Court's longstanding concerns, the Colorado Supreme Court fundamentally misconstrued the constitutional significance of racial bias in jury deliberations. It failed to appreciate this Court's well-established precedents addressing both the special harms of racial bias in jury decision-making and the critical importance of public confidence in the operation of our system of justice. In doing so, the Colorado Supreme Court subjugated Mr. Peña-Rodriguez's federal Sixth Amendment rights to the state policy concerns that animate Colorado's state rules of evidence.

Second, allowing racial bias to fester in the jury system has grave ramifications for public confidence in the criminal justice system at several levels. Leaving the lower court's decision in place raises the risk of apparent and actual bias for an individual facing criminal charges in what should be fair and impartial judicial proceedings. It erodes community trust in the objectivity and accuracy of jury verdicts and the legal system overall. It also undermines central democratic ideals of fairness and equality that the jury and the Sixth Amendment's guarantee of impartiality aim to uphold. Thus, the Colorado Supreme Court's refusal to allow the lower court to even *consider* the undisputed racial prejudice that tainted Mr. Peña-Rodriguez's jury deliberations not only harmed Mr. Peña-Rodriguez in a very tangible way, but also

undermined public confidence in this particular jury verdict and the fair operation of the judicial system generally.

Were this Court to affirm Colorado's decision to insulate overt juror racial discrimination, it would send an ominous signal to jurors, judges, defendants, and the public that the courts condone racially biased verdicts. As this Court has repeatedly declared, however, this simply cannot be true. Given the egregiousness of this case and the growing public concerns about racial bias in our criminal justice system, it is imperative for this Court to reaffirm its existing precedents regarding the sanctity of the Sixth Amendment and the integrity of the justice system.

Ultimately, defendants and jurors alike should be able to enter the courthouse, "believing that times ha[ve] changed" and "confident that justice . . . [will] be guided by the promise . . . that they would be judged not by the color of their skin, but by the content of their character."[3] That promise was broken for Mr. Peña-Rodriguez, but this Court can and should restore that covenant by correcting the overt and extreme racial prejudice that infected the jury verdict in the proceedings below.

ARGUMENT

After two jurors came forward to report how racial animus had tainted the jury's deliberations, Mr. Peña-Rodriguez claimed that this prejudice violated his Sixth Amendment constitutional right to trial "by an

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

impartial jury," U.S. Const. Amend. VI,[4] and sought a new trial. A bare majority of the Colorado Supreme Court affirmed Mr. Peña-Rodriguez's conviction based on Colorado's "no-impeachment" rule, which closely mirrors Federal Rule of Evidence 606(b) and reflects the general common law practice that juror testimony is not normally admissible to impeach a jury verdict.[5] *Amici* urge this Court to make clear that the Sixth Amendment right to an impartial jury indisputably trumps the policy considerations underlying state evidentiary rules—especially where, as here, a juror contaminated the deliberation process with egregious and explicit racial bias.

I. THE RIGHT TO AN IMPARTIAL JURY INCLUDES THE RIGHT TO A JURY DETERMINATION UNCORRUPTED BY RACIAL PREJUDICE.

For over a century, strong majorities of this Court have repeatedly recognized that racial prejudice in the jury system is an exceptional problem meriting recurrent and decisive interventions. This is because the right to a trial reflects "a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges," rather than a defendant's fellow citizens. *Duncan v. State of*

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

[5] The Rule says that this practice promotes the "freedom of deliberation," "finality of verdicts," and "protection of jurors against annoyance," Fed. R. Evid. 606 Advisory Committee's Notes.

La., 391 U.S. 145, 155-56 (1968). This investiture of judicial power in the community upholds democratic principles of sovereignty and legitimacy by "ensur[ing] continued acceptance of the laws by all of the people." *Edmonson*, 500 U.S. at 624 (quoting *Powers v. Ohio*, 499 U.S. 400, 407 (1991)) (internal quotation marks omitted).

Juries also serve as the principal means of protecting the American citizenry from the State's potential misuse of its broad powers to confine or execute its citizens. *See, e.g.*, *Glasser v. United States*, 315 U.S. 60, 84 (1942) (the jury serves as the "prized shield against oppression"); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."); *see also Batson*, 476 U.S. at 87 (arguing that juries ensure the "'protection of life and liberty against race or color prejudice.'") (citation omitted). The right to an impartial jury trial establishes "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," "prevent[s] oppression by the Government," and "protect[s] against unfounded criminal charges" and "arbitrary law enforcement." *Duncan*, 391 U.S. at 155-56. Indeed, jurists and historians alike have long recognized these critical functions of the jury, dating back to our nation's founding.[6]

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[6] *See, e.g.*, *Irvin v. Dowd*, 366 U.S. 717, 721 (1961) ("England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury."); *see also* 3 Blackstone, William, *Commentaries on the Laws of England* *380 (William D.

In order to ensure that the jury is able to fulfill these vital functions, this Court has enacted a range of procedural safeguards and substantive requirements. Chief among them is the right to a jury untainted by racial bias because "[a] juror who allows racial . . . bias to influence assessment of the case breaches the compact [between judge and jury] and renounces his or her oath." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring in the judgment). Indeed, this Court has unequivocally declared that "discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *see also id.* at 558-59, and "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," *J.E.B.*, 511 U.S. at 154.

A. The Colorado Supreme Court Misapprehended the Constitutional Import of Racial Prejudice in the Jury System as a Uniquely Harmful and Critical Issue.

"It [would be] an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992). Jury-related discrimination is inimical to our judicial system and

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Lewis ed., Rees Welsh & Co. 1900) (stressing the significance of unbiased jury members, who are "the best investigators of truth, and the surest guardians of public justice."); 1 Alexis de Tocqueville, *Democracy in America* 282 (Henry Reeve trans., George Adlar 1840) (arguing that jury service is "as direct and as extreme a consequence of the sovereignty of the people as universal suffrage").

"an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others.'" *Batson*, 476 U.S. at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). In the context of criminal proceedings, the taint of racial bias can contaminate critical decisions affecting a defendant's liberty, life, and death.[7] A single juror harboring racial bias can infect every aspect of the deliberations and undermine the integrity of the particular case and the justice system as a whole.[8]

With respect to jury selection, this Court has consistently vacated criminal convictions that were compromised by racial bias because "a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*, 505 U.S. at 58. *See also Powers*, 499 U.S. at 411 (referencing a defendant's "right to be tried by a jury free from ethnic . . . [or] racial . . . prejudice"); *Batson*, 476 U.S. 79; *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v.*

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

[8] *See Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) ("The bias or prejudice of even a single juror would violate [the defendant]'s right to a fair trial."), *cert. denied*, 525 U.S. 1033 (1998); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.) ("If only one juror is unduly biased or prejudiced . . . the criminal defendant is denied his Sixth Amendment right to an impartial panel."), *cert. denied*, 434 U.S. 818 (1977).

Louisiana, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S. Ct. 1737 (2016). "[O]ver a century of jurisprudence [has been] dedicated to the elimination of race prejudice within the jury selection process." *Edmonson*, 500 U.S. at 618 (concluding that racial discrimination in the jury system is impermissible in civil, as well as criminal, proceedings).

While racial discrimination in jury selection centers on an attorney's discriminatory use of peremptory challenges to exclude members of protected groups from the jury, as opposed to the racial discrimination exhibited by a seated juror during jury deliberations, both forms of discrimination undermine the integrity of the jury process and public confidence in the justice system. "We do not prohibit racial . . . bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial . . . bias of his or her own." *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring in the judgment).[9] Indeed, race discrimination should play *no part* in the justice system at *any* stage: "In our heterogeneous

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[9] In some instances, biased juries issued verdicts as a symbol of resistance to integration and civil rights laws. *See, e.g.*, John C. Tucker, *Trial and Error: The Education of a Courtroom Lawyer* 288 (2003) (jury foreman said he hoped that the verdict, ruling against Black homeowners in a housing segregation case, would help end "the mess Earl Warren made with *Brown v. Board of Education* and all that nonsense"). In others, prejudiced juries issued indictments in ways that endorsed or exacerbated racial violence. *See, e.g.*, Charles Abrams, *Forbidden Neighbors: A Study of Prejudice in Housing* 103-19 (1955), *in The Suburb Reader* 328-30 (Becky M. Nicolaides & Andrew Wiese eds., 2006) (grand jury refused to indict the white mob that attacked the family of a Black veteran that had moved into an all-white apartment building, instead charging the family's NAACP attorney and the apartment building's owner, attorney, and agent).

society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that *justice* in a court of law *may turn upon* the pigmentation of skin, the accident of birth, or the choice of religion." *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976) (emphasis added).

In the jury deliberation context, this Court has warned that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). If this case, involving multiple statements of overt racial and ethnic bias does meet that standard, it is hard to imagine any constitutional limits on "no-impeachment" rules.

The promise and protection of jury impartiality, as codified in the Sixth Amendment, has even greater constitutional significance in light of the Equal Protection Clause of the Fourteenth Amendment. Because "[e]radication of the evil of state supported racial prejudice is at the heart of the Fourteenth Amendment," the "constitutional interests of the affected party are at their strongest when a jury employs racial bias. . . ." 27 Charles A. Wright and Victor J. Gold, Fed. Prac. & Proc.: Evid. § 6074 (2d ed. 2016) (footnotes omitted). Indeed, the Reconstruction Amendments took specific aim at both racial exclusion in jury selection and racial prejudice in jury deliberations:

> A principal gain under that [Reconstruction] program, implicit in the Fourteenth Amendment and made explicit under the 1875 Civil Rights Act, was the right to a fair jury trial. . . . The Fourteenth Amendment and the 1875 follow-up legislation had pounded the point [of the Sixth Amendment] home. Their purpose in this connection was quite obviously to integrate

> Negroes into the jury system in order to assure the black man of an impartial trial and thereby counteract a presumed hostility of white jurors toward black defendants. . . .

Richard Kluger, *Simple Justice* 62-64 (Vintage Books, 1977 ed.).[10]

Thus, the Colorado Supreme Court committed a serious error in refusing to consider the extreme and explicit evidence that racial prejudice played a role in the jury deliberations in this case. In doing so, it ignored this Court's instructions about the special salience of racial bias in the jury system and the constitutional imperative to remove racial animus—an "especially pernicious" form of bias—from the criminal justice system. *See Rose*, 443 U.S. at 555-56. The Colorado Supreme Court failed to acknowledge this Court's denunciation of how "racial animus" intolerably "distort[s] our system of criminal justice" *McCollum*, 505 U.S. at 58, and subverts the foundational purposes of the constitutional right to a jury trial, *see id.* at 49-51. In fact, only the dissent below noted that "[r]acial bias differs from other forms of bias in that it compromises institutional legitimacy." Pet. App. 25a. Instead, the decision below erroneously suggests that the Sixth Amendment has little, if any, import or impact on a case where explicit

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[10] Even the adversaries of the Fourteenth Amendment understood that it would apply specifically to racial discrimination in jury participation, Kluger, *supra,* at 426 (chronicling the opposition of Delaware), and thereby bolster Sixth Amendment rights, *see generally* Amicus Br. of Constitutional Accountability Center (discussing how the Framers of the Reconstruction Amendments viewed eliminating racial bias from jury deliberations as critical to vindicating the protections of both the Sixth and Fourteenth Amendments).

racial prejudice has tainted a jury verdict.[11] Such a position should not be tolerated by this Court.

B. Policy Concerns Underlying No-Impeachment Rules Cannot Override Constitutional Rights.

The Colorado Supreme Court's plain error in equating the constitutional right to a fair trial with an evidentiary rule invites this Court's reversal. Pet. App. 2a (comparing "two fundamental tenets": "a defendant's constitutional right to an impartial jury" and the protections of the state's "no-impeachment" rule); Pet. App. 18a (Márquez, J., dissenting) ("[T]he majority elevates general policy interests . . . [over the] fundamental constitutional right to a fair trial."). It is axiomatic that the United States Constitution is the supreme law of the land and has precedence over state rules of evidence, which cannot be accorded the same legal weight as constitutional mandates. *See* U.S. Const. Art. VI (Supremacy Clause); *see also Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("[W]e once again reject the view that the Confrontation Clause['s] . . . application . . . depends upon 'the law of Evidence for the time being.'"); 1 Edward J. Imwinkelreid & Paul C. Giannelli, Courtroom Criminal Evidence § 4 (Lexis Nexis, 5th ed. 2015) ("The first source of state law evidence [in the hierarchy] is the federal Constitution. . . . A fourth source is the state's statutes [including rules of evidence].").

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[11] It would be strange and troubling if other forms of misconduct provide grounds to revisit verdicts in criminal cases—but not racial prejudice. For example, the Tenth Circuit held that a verdict cannot stand when a stenographer emphasized parts of the jury instructions while reading them to the jury in the jury room. *Little v. United States*, 73 F.2d 861, 867 (10th Cir. 1934).

Thus, "[i]f the exercise of an evidentiary rule . . . impinges upon a criminal defendant's constitutional rights, . . . the evidence rule . . . must give way to the defendant's right to a fair trial . . . ." 3 Barbara E. Bergman et al., Wharton's Criminal Evidence § 11:6 (15th ed. 1999). *See also* Imwinkelreid & Giannelli, *supra,* § 6 (in the event of "a conflict between a provision of the federal Constitution and a state statute . . . . the Constitution prevails under the supremacy clause."); Wright & Gold, *supra,* § 6074 ("Evidentiary rules that insulate from discovery the violation of constitutional rights may themselves violate those rights."); 2 Federal Evidence § 5:10 (4th ed. 2016) ("Significant authority holds that [the] constitutional right [to present evidence] . . . occasionally overrides rules of exclusion.").

Legitimate policy concerns that animate "no-impeachment" rules are insufficient to displace the primacy of constitutional protections. The majority below reasoned that "'[p]rotecting the secrecy of jury deliberations'" invariably trumps "a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias." Pet. App. 27a (Márquez, J., dissenting). That holding is clearly wrong.

Courts should not apply "no-impeachment" rules "mechanistically to defeat the ends of justice." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). With respect to the Sixth Amendment right to a fair trial by an unbiased jury in particular, this case demonstrates that "it would not be safe to lay down any inflexible rule" in the name of secrecy or finality, "because there might be instances in which [a juror's testimony] could not be excluded without violating the plainest principles of justice." *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*,

53 U.S. (12 How.) 361, 366 (1851)) (internal quotations omitted).[12]

> [B]lanket rules either excluding all juror testimony of bias or admitting all such testimony are inappropriate. A balance must be struck, protecting parties from the most egregious cases of jury bias while leaving the jury free to decide most cases without fear of judicial intrusion. While lines may be difficult to draw in many cases, it should be clear that among the most serious cases of jury bias are those involving racial prejudice.

Wright & Gold, *supra*, § 6074 (footnotes omitted); *see also Perkins v. LeCureux*, 58 F.3d 214, 222 (6th Cir. 1995) (Jones, J., concurring) (quoting Wright & Gold), *cert. denied*, 516 U.S. 992 (1995). It would be particularly inappropriate to have a rule that bars the admissibility of evidence of racial bias because the underlying misconduct, if established, potentially constitutes a structural defect. The need for a complete inquiry into juror impartiality thus is heightened in cases involving racial bias. Conversely,

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[12] In other analogous contexts, members of this Court have recognized the desirability of having a post-conviction hearing "to determine whether a juror is biased." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1940) (O'Connor, J., concurring). Blackstone went even further, stating that "[c]auses of suspending the judgment by granting a new trial" included both extra-record influences and "*any gross misbehaviour* of the jury among themselves . . . ." 3 Blackstone, *supra*, at *387 (emphasis added). Moreover, LDF has long maintained that, in some instances, racial prejudice will—in light of its substance and context—be egregious enough to raise a presumption of bias. *See e.g.,* Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Petitioner, *Sterling v. Dretke*, 117 Fed. App'x 328 (5th Cir.) (unpublished), *cert. denied*, 544 U.S. 1053 (2005), 2005 WL 952252 at *7 (Apr. 22, 2005).

the policy of promoting the finality of judgments is gravely undermined when the court is precluded from considering evidence tending to show that the underlying judgment may be void.

The Colorado Supreme Court's policy justifications for tolerating the extreme racial prejudice in this case are deeply flawed.

First, concerns about attorneys engaging in fishing expeditions cannot alone support an unbounded application of Rule 606(b), because jurors can and do volunteer information about racial bias in deliberations, as demonstrated by the case at hand. 27 Wright & Gold, *supra* § 6072; Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187, 194 (1988) (noting the "evident willingness of jurors to volunteer information" and explaining Rule 606(b)'s exceptions arguably "permit[] good faith attempts to discover evidence relating to an 'outside influence'"). Recognizing "an exception for testimony pertaining to racist juror misconduct would not significantly impair rule 606(b)," yet "would promote universally accepted countervailing interests—the defendant's and society's interests in having a criminal justice system free of racial bias." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1599 (1988).

The Colorado Supreme Court's other concerns about the harassment of jurors are also misplaced, since judges have many tools to control the conduct of lawyers and protect the jury from unwanted contact. *See e.g.*, Nicholas S. Bauman, *"Extraneous Prejudicial Information": Remedying Prejudicial Juror Statements Made During Deliberations*, 55 Ariz. L. Rev. 775, 798, 802 & nn.245-47 (2013) (describing other rules some jurisdictions have adopted to protect

jurors from harassment); Benjamin T. Huebner, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1493-95 (2006) (noting that states place other limits on attorneys or their investigators contacting jurors after trial).

Second, while maintaining the secrecy of jury deliberations is certainly an important consideration, our judicial system rests ultimately on the fairness and impartiality of the process. "[T]he right to an impartial jury under the Sixth and Fourteenth Amendments," *Gray v. Mississippi*, 481 U.S. 648, 658 (1987), "goes to the very integrity of the legal system" *id.* at 668. Thus, it would be improper to blunt an explicit constitutional right because of a policy consideration that is implicitly rooted in common law rather than a competing—and overriding—constitutional mandate.

Third, the Colorado Supreme Court's decision seems to rest on the erroneous presumption that Sixth and Fourteenth Amendment rights no longer apply after the issuance of a jury verdict. Pet. App. 27a (Márquez, J., dissenting) (disagreeing with the majority's categorical suggestion that secrecy "must trump a defendant's opportunity to vindicate his fundamental constitutional right"). But claims under Sixth and Fourteenth Amendments are regularly litigated well beyond the exhaustion of direct appeals through post-conviction under the Anti-Terrorism and Effective Death Penalty Act. *See, e.g.*, *Foster,* 136 S. Ct. 1737 (Fourteenth Amendment claim brought thirty years after verdict); *Berghuis v. Smith*, 559 U.S. 314 (2010) (certiorari granted regarding Sixth Amendment claim ten years after verdict); *see also Duren v. Missouri*, 439 U.S. 357 (1979) (overturning conviction based on Sixth

Amendment claim two years after Missouri Supreme Court upheld verdict).

Fourth, the Colorado Supreme Court erroneously assumed that a policy of relying upon voir dire alone could root out racial bias in jury deliberations, *see* Pet. Br. 24-27, because jurors are unlikely to publicly admit to their own racial prejudices, Pet. 23-24, and jurors' unconscious biases may later manifest as explicit biases during deliberations.[13] *See also* Pet. Br. 21 ("None of the *Tanner* safeguards adequately protects defendants when a juror infects deliberations with racially biased assertions.").

On balance, courts are readily equipped to deal with extreme and extraordinary instances of juror bias, as in this case, and should not ignore an accused's constitutional right to an impartial jury due to nebulous policy concerns. *See* Pet. Br. 29-31, 38; (listing twenty jurisdictions that already allow courts to consider juror testimony that racial bias infected deliberations); *see generally* Amicus Br. of Retired Judges. Likewise, judges are certainly capable of addressing jury secrecy concerns by focusing any inquiries into jury misconduct on the prejudicial misconduct at hand.

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[13] *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 152 (2010) ("Implicit biases . . . are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful."); Pet. 23 (discussing observations of federal judge on unconscious bias).

II. EXCLUDING EXPLICIT EVIDENCE OF RACIAL DISCRIMINATION IN JURIES WOULD SERIOUSLY UNDERMINE PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

The jury exists, in part, to instill public confidence in our legal system. Almost two centuries ago, Alexis de Tocqueville observed that the jury "imbues all classes with a respect for the thing judged, and with the notion of right." Tocqueville, *supra*, at 112. This Court, too, has long recognized that "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413. Respect for the verdicts of our courts is, in part, responsible for ensuring the "continued acceptance of the laws by all of the people." *Id.*; *see also Edmonson*, 500 U.S. at 624 ("[T]he jury system performs the critical governmental functions of guarding the rights of litigants and ensuring continued acceptance of the laws by all of the people.") (quoting *Powers,* 499 U.S. at 407) (internal quotation marks omitted); *Williams v. Pennsylvania*, 579 U.S. __, No. 15-5040, 2016 WL 3189529 (U.S. June 9, 2016). That public confidence is undermined by jury verdicts tainted by the type of explicit racial prejudice evidenced in this case.

Moreover, this Court has emphasized that "[t]he need for public confidence is especially high in cases involving race related crimes," where, as in the case at hand, "emotions in the affected community will inevitably be heated and volatile." *McCollum*, 505 U.S. at 49. The heightened concern about public confidence in racially charged cases stems from the troubling history of all-white juries and anti-Black persecution, *supra* Part I.A. It also reflects this

Court's special solicitude for combating racial bias in the administration of justice, *supra* Part I.

A. Racial Prejudice in the Jury System Damages Individual Proceedings, Community Perceptions, and Democratic Principles.

The damage caused by racial bias in the jury system is "not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S 187, 195 (1946). Each of these harms supports reversal of the decision below.

First, racial prejudice within the jury system "create[s] the appearance of bias in the decision of individual cases, and . . . increase[s] the risk of actual bias as well." *Peters v. Kiff*, 407 U.S. 493, 503 (1972). *See also Powers*, 499 U.S. at 411 ("[R]acial discrimination in the selection of jurors . . . places the fairness of a criminal proceeding in doubt."); *Edmonson*, 500 U.S. at 628 (same).

Second, the harm caused by racial bias in the jury system "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87. *See also J.E.B.*, 511 U.S. at 140 ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes."); *Rose*, 443 U.S. at 556 ("The harm is not only to the accused . . . . It is [also] to society as a whole."); *McCollum*, 505 U.S. at 49-51 (arguing that bias in the jury system "undermine[s] the very foundation of our system of justice—our citizens' confidence in it."). The extent to which justice is *achieved* in a particular case or for a particular class (e.g., people of color charged with crimes) directly

shapes how the community *perceives* the criminal justice system. *See, e.g.*, *J.E.B.*, 511 U.S. at 140 (claiming that unredressed juror prejudice "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *Rose*, 443 U.S. at 555-556 ("Discrimination on the basis of race . . . casts doubt on the integrity of the judicial process [and] impairs the confidence of the public in the administration of justice.").

Third, a jury verdict tainted by racial prejudice "not only violates our constitution and the laws enacted under it but is [also] at war with our basic concepts of a democratic society and a representative government." *Rose*, 443 U.S. at 564 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). *See also Ballard*, 329 U.S. at 195 (recounting injury "to the democratic ideal reflected in the processes of our courts"). As Justice Thurgood Marshall explained:

> [I]nstitutions [of criminal justice] serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms. They reflect what we demand of ourselves as a Nation committed to fairness and equality in the enforcement of the law. That is why discrimination "is especially pernicious in the administration of justice," why its effects constitute an injury "to the law as an institution," why its presence must be eradicated root and branch by the most effective means available.

Hobby v. United States, 468 U.S. 339, 352 (1984) (Marshall, J., dissenting) (citations omitted).

B. A Court's Refusal to Consider Whether a Verdict is Tainted by Racial Prejudice Erodes Public Confidence.

The decision below failed to address the distinct ways in which racial prejudice in jury deliberations undermines public confidence in the criminal justice system. The majority below instead focused solely on the "potential" that investigation into claims of racial bias in juries "would shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a.

But disregarding evidence of overt racial or ethnic bias has "precisely the opposite effect." Pet. App. 18a (Márquez, J., dissenting). The majority below "ignores the demoralizing effect on public confidence caused by reports that jurors are racist, but [that] evidence of their racism is not admissible to overturn their verdicts." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. at 1600 (footnote omitted).[14] This Court rejected a similar argument in *Aldridge v. United States*, where it was asserted "that it would be detrimental to the administration of the law . . . to allow questions to jurors as to racial or religious prejudices." 283 U.S. 308, 314-15 (1931). There, the Court explained that "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred," *id.* at 315, and that there would be "[n]o surer way . . . to bring the processes of justice into disrepute," *id.*, than to

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[14] Moreover, in other contexts, this Court has recognized the "principle that justice cannot survive behind walls of silence [that] has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966).

insulate racial bias from judicial scrutiny or redress. The same conclusion is dictated here.

Without appropriate redress, the racial stereotypes and smears that infected the jury verdict in this case not only render Mr. Peña-Rodriguez's case fundamentally unfair, they also significantly impair public confidence in our system of justice. Less than 45 percent of all Americans believe that racial groups are treated equally in the criminal justice system. Those numbers plummet further among racial minorities, into the low teens for African Americans,[15] and have remained stagnant for over two decades.[16]

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[15] *See, e.g.*, *CNN/ORC Poll of December 22, 2014* at 6, http://i2.cdn.turner.com/cnn/2014/images/12/22/cnn.poll.12.22.pdf (only 41 percent of the American population thinks that the criminal justice system treats all groups equally; 50 percent of whites and 21 percent of non-whites); *Reason-Rupe Public Opinion Survey, October 2014 National Telephone Survey*, Reason-Rupe, http://reason.com/assets/db/1412808480505.xlsx (Oct. 9, 2014) (45 percent of the American population thinks that the criminal justice system treats all groups equally; 14 percent of African-Americans, 32 percent of Hispanics, and 53 percent of white respondents); Robert P. Jones, Daniel Cox & Juhem Navarro-Rivera, *Economic Insecurity, Rising Inequality, and Doubts about the Future: Findings from the 2014 American Values Survey*, 38 (Pub. Religion Research Inst. Sept. 23, 2014), http://publicreligion.org/site/wp-content/uploads/2014/11/PRRI-AVS-with-Transparancy-Edits.pdf (44 percent of all Americans think that blacks and other minorities receive equal treatment as whites in the criminal justice system; 16 percent of African-Americans, 40 percent of Hispanics, and 49 percent of white respondents).

[16] *Compare* George Gallup, Jr., *The Gallup Poll: Public Opinion* 51 (1996) (68 percent of African-American respondents felt that the American justice system was biased against African-Americans), *with King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities* 12, Pew Research Ctr. (Aug. 22,

This perception of racial unfairness in the administration of criminal justice is reinforced by cases of explicit racial epithets and stereotypes being used to justify convictions and sentences.[17]

A decision from this Court affirming the decision below would send an ominous signal that the American judiciary is, at best, indifferent to racial bias in jury verdicts. At worst, this Court would be seen as condoning the juror's abhorrent statements and blessing a "guilty" verdict it knows to be tainted. Mere disapproval of the juror's statements is not enough; this Court must affirm that the judiciary will take corrective action to ensure that verdicts are rendered based on facts, not racial biases.

2013), http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/ (same).

[17] *See also, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1147-48 (D.C. 2013) ("[A]ll 'blacks' are guilty regardless."); *United States v. Shalhout*, 507 F. App'x 201, 203 (3d Cir. 2012) ("[T]he defendants [were] guilty because they were of Arabic descent."); *United States v. Villar*, 586 F.3d 76, 81, 85-87 (1st Cir. 2009) ("I guess we're profiling but they [Hispanics] cause all the trouble."); *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) ("'[W]hen Indians get alcohol, they all get drunk,' and . . . when they get drunk, they get violent."); *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) ("All the niggers should hang."); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) ("Let's be logical. He's black and he sees a seventeen year old white girl – I know the type."); *United States v. Heller*, 785 F.2d 1524, 1526 (11th Cir. 1986) (juror "admitted making an anti-Semitic 'slur'" and jokes during trial of Jewish defendant). *See also Smith v. Brewer*, 444 F. Supp. 482, 485 (S.D. Iowa 1978) (juror strutted around the jury room imitating a black minstrel), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); *Commonwealth v. Laguer*, 571 N.E.2d 371, 375 (Mass. 1991) (stating, in an aggravated rape trial, that "spics screw all day and night").

This Court has expressed particular concern for the public's "impression that the judicial system has acquiesced" to certain forms of discrimination "or that the 'deck has been stacked' in favor of one side." *J.E.B.*, 511 U.S. at 140. Furthermore, this Court has recognized that allowing "[a]ctive discrimination" involving juries "condones violation of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers*, 499 U.S. at 412. This troubling result is further enhanced when the discrimination at issue, as in this case, takes place in the official forum of a court. *See, e.g.*, *McCollum*, 505 U.S. at 53 ("[T]he courtroom setting . . . intensifies the harmful effects of the . . . discriminatory act."*); Edmonson*, 500 U.S. at 628 ("[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."). This sort of "[r]acial prejudice . . . converts the jury itself [from a safeguard] into an instrument of oppression." Wright & Gold, *supra,* § 6074.

CONCLUSION

For over a century, this Court has strived to combat racial discrimination in the jury system. Relying on these precedents, the nation has made significant steps towards the constitutional goal of equality for all. Although more work remains to be done, this Court's commitment to racial fairness in criminal justice promotes trust in the rule of law, particularly for the communities of color that *amici* serve.

Unbridled racial prejudice, like that which infected the jury in Mr. Peña-Rodriguez's case, fundamentally undermines the integrity of our justice system and cannot be tolerated by our Constitution. "If our society

is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson*, 500 U.S. at 630-31. Neither precedent nor prudence support Colorado's strained stance to the contrary. This Court should not condone that position, and it should reverse.

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