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 FOR *AMICI CURIAE* THE HISPANIC NATIONAL BAR ASSOCIATION, LATINOJUSTICE PRLDEF, AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONER

Robert T. Maldonado
President
Hispanic National Bar Association
1020 19th Street, N.W.
Suite 505
Washington, D.C. 20036
(212) 278-0509

Peter Karanjia*
Jason Harrow
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 973-4200
peterkaranjia@dwt.com

Counsel for *Amici Curiae*
*Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

The membership of *amicus curiae* the Hispanic National Bar Association (the "HNBA") comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly petitions Congress and the Executive on behalf of all members of the communities it represents.

Amicus curiae LATINOJUSTICE PRLDEF ("LJP") is a national not-for-profit civil rights legal defense fund that has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. Since its founding in 1972 as the Puerto Rican Legal Defense & Education Fund, LJP's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate new Latino community leaders, and to engage in and support law reform cases around the country addressing basic civil rights in the areas of criminal justice, education, employment, fair housing, immigrants'

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[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

rights, language rights, redistricting and voting rights. LJP seeks to ensure that Latinos are not illegally or unfairly affected by discriminatory policies and practices, particularly by government actors.

Amicus curiae the Anti-Defamation League ("ADL") was founded in 1913 to combat anti-Semitism and all forms of bigotry, to defend democratic ideals, and to secure justice and fair treatment to all. ADL is vitally interested in protecting the civil rights of all persons and ensuring that each individual receives equal treatment under the law regardless of race, sex, sexual orientation, gender identity, ethnicity, or religion. Consistent with its mission, ADL is committed to working to eliminate racial bias in the criminal justice system.

SUMMARY OF ARGUMENT

Direct evidence in this case suggests that Petitioner Miguel Angel Peña Rodriguez may have been convicted by a jury not on the basis of the evidence presented at trial, but rather on the basis of at least one juror's racial prejudice. If true, allowing Peña Rodriguez's conviction to stand would be among the most grievous errors a State can inflict on an individual, as few rights are more central to our system of ordered liberty than everyone's right to a "fair trial in a fair tribunal." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

But a Colorado rule of evidence—shared by many other states—bars Peña Rodriguez from even attempting to make the case that his conviction was

structurally flawed due to racial bias. The Colorado Supreme Court's holding that this state rule of evidence trumps constitutional rights to a fair trial, free of racial bias, is constitutionally intolerable.

While this Court should hold that, under any standard, the state rule of evidence must yield to Petitioner's constitutional rights, the best analytical framework for addressing the question presented is the familiar strict-scrutiny standard that would normally apply to other claims of purposeful discrimination on the basis of race. That framework is the focus of this brief.

Strict scrutiny of Rule 606(b) is warranted in light of the uniquely pernicious role of racial discrimination in the criminal justice system. That requirement flows directly from the surpassing importance of ensuring the system is free of racial bias. Indeed, this Court has already recognized that "*all* of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (emphasis added). And this Court's cases addressing how to resolve collisions between state evidentiary rules and constitutional rights of criminal defendants—such as the right to present a fair defense or the right to confront to witnesses offering testimonial statements—have also subjected the state rules to searching review, or even presumed as self-evident that such conflicting evidentiary rules must be invalid. The most searching level of constitutional scrutiny therefore should apply to the sort of state evidentiary rule at issue in this case. Under that demanding standard, Colorado Rule 606(b) must

yield to Peña Rodriguez's fundamental constitutional rights.

Finally, this case is an ideal vehicle to announce such a rule. After all, Petitioner's plausible direct evidence of juror racial prejudice against Mexicans in particular and Latinos more broadly exemplifies the harmful consequences of the systemic underrepresentation of Hispanic people on American juries. Nationwide, the lack of Latino representation in jury pools and on juries exacerbates the risk that juries might use race—rather than the evidence presented—as the determining factor in depriving a Hispanic defendant of his liberty.

ARGUMENT

I. THIS COURT SHOULD APPLY STRICT SCRUTINY TO INVALIDATE THE APPLICATION OF RULE 606(b) IN THIS CASE.

A. Eliminating racial prejudice from the criminal justice system is a constitutional imperative of the highest order that reflects the unique role of race in the Nation's history.

Our Constitutional system provides criminal defendants with a number of important rights. But the right to a criminal proceeding free of racial discrimination is unique among them. That is because racial bias against a defendant not only affects the individual defendant, but more broadly "mars the integrity of the judicial system and prevents the idea of democratic government from

becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). For this reason, the Court has engaged in "unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987).

The Court's efforts to enforce the mandate of equal administration of justice have spanned the entire spectrum of criminal proceedings—and they have focused in particular on the critical role of the jury in the criminal justice system. *Strauder v. West Virginia*, 100 U.S. 303 (1880), for instance, held that the Equal Protection Clause is violated when African-Americans are purposefully excluded from juries on account of their race. *Id.* at 310. Over seventy years later, the Court expanded that protection to other groups—overturning the conviction of a Mexican-American man who was tried in a jurisdiction that had, for decades, excluded all Latinos from jury service. *Hernandez v. Texas*, 347 U.S. 475, 482 (1954); *see also Whitus v. Georgia*, 385 U.S. 545, 551 (1967) (reversing conviction because of purposeful discrimination in jury selection). The selection of a grand jury, too, must be free from racial bias. *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). And the Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) extended that logic to prohibit prosecutors from using peremptory strikes to eliminate jurors on the basis of their race. Thus, as the Court recently noted, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (quotation marks omitted).

This unyielding effort to eradicate racial bias as a factor in the composition of, and decisionmaking by, a jury is an outgrowth of the central role that juries play in a criminal trial. The jury is not a mere collection of private citizens tasked with assisting judges in determining guilt or innocence. To the contrary: "The jury exercises the power of the court and of the government that confers the court's jurisdiction." *Edmonson*, 500 U.S. at 624. With that great power comes the requirement that a jury must afford a defendant a "fair trial in a fair tribunal," *Irvin*, 366 U.S. at 722, and so must determine guilt or innocence without regard to the race of the defendant—or the prosecutor, attorneys, judges, or victims, for that matter. Instead, a defendant is entitled to "a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quotation marks omitted).

B. State justifications for evidentiary rules that categorically prohibit the introduction of direct evidence of racially discriminatory juror statements must be subjected to strict scrutiny.

While the process of selecting and instructing the petit jury is subject to many safeguards to protect against the pernicious effects of racial discrimination, jury deliberations themselves are not monitored by the court or the parties. That is because the jury is an independent decisionmaker. But when direct, reliable evidence suggests that even a single juror made a decision to convict based

on a discriminatory purpose, any evidentiary rule that would prohibit introduction of that evidence, like Colorado's Rule 606(b) or its federal equivalent, must be subjected to strict scrutiny.

This searching standard of review is required because this Court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (footnotes omitted). It is well established that the right to an impartial jury, free of racial bias, is a fundamental right of the highest importance. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *see also Hernandez*, 347 U.S. at 482 (reversing conviction of defendant where Latinos were systematically excluded from jury pool). To impose anything less than the most searching scrutiny on a rule of evidence that categorically bars a defendant from showing that he was, in fact, convicted by a jury that used his race as a determining factor would present an unacceptably high a risk that his right to an impartial jury would be rendered "nugatory and meaningless." *Morgan v. Illinois*, 504 U.S. 719, 733-34 (1992).

In particular, the reasoning of the *Batson* line of cases demands the application of strict scrutiny here. After all, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, *all* of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478 (emphasis added). Applying that principle, this Court recently considered evidence of the use of race in jury selection found in the

prosecution's file. "Despite questions about the background of [those] particular notes," the Court emphatically rejected "the State's invitation to blind [itself] to their existence." *Foster*, 136 S. Ct. at 1748. So too here: evidentiary rules that would force a court to "blind [itself]" to the existence of evidence of juror bias must be strictly scrutinized—at a minimum, where the claim is based on discrimination on the basis of race.

Two other complementary lines of cases support the application of strict scrutiny here: cases balancing courtroom rules against the rights of defendants, and cases governing racial classifications by the government. In the first line of cases, rules of evidence that have impinged on important rights of defendants have frequently been subjected to a careful and searching examination (albeit without the Court's expressly framing the inquiry as an application of "strict scrutiny"). In *Chambers v. Mississippi*, 410 U.S. 284 (1973), for instance, where state rules of evidence stood as an obstacle to the introduction of evidence that someone other than the defendant had committed the crime, the Court "closely examined" the relevant evidentiary rules because they conflicted with the defendant's right to put on a fair defense and have a fair trial. *Id.* at 295. Under that searching standard, the Court found that the evidentiary rules must give way, because their "mechanistic[]" application had "denied [the defendant] a trial in accord with traditional and fundamental standards of due process." *Id.* at 302; *see also Rock v. Arkansas*, 483 U.S. 44, 45 (1987) (applying a state evidentiary rule prohibiting the admission of

hypnotically refreshed testimony would violate petitioner's constitutional right to testify).

The Court likewise has held that state procedural rules that would permit the introduction of certain types of "testimonial" evidence are presumptively unconstitutional, because the introduction of that evidence would infringe the defendant's Sixth Amendment rights. Thus, in *Crawford v. Washington*, 541 U.S. 36, 68 (2004), this Court overruled its prior balancing test and held that a defendant's Sixth Amendment right to confront his accuser trumped a state rule of evidence that permitted the introduction of an out-of-court statement by the defendant's wife. *See also Bullcoming v. New Mexico*, 564 U.S. 647, 665 (2011) (Sixth Amendment required exclusion of forensic evidence permitted by state rule of evidence). Indeed, in *Crawford* and later cases applying that principle, it was unnecessary for the Court to articulate a level of scrutiny because state rules of evidence are presumptively unconstitutional to the extent they are applied to preclude the exercise of a defendant's right to confront witnesses offering "testimonial" evidence. Apparently, *no* justification for the state's evidentiary rules, no matter how persuasive, can overcome a defendant's right to confront witnesses making these statements.

Separately, cases in which a defendant alleges invidious discrimination on the basis of race are subject to strict scrutiny because that rule applies to "all racial classifications imposed by government." *Johnson v. California*, 543 U.S. 499, 505 (2005) (quotation marks and brackets omitted). In these

cases, strict scrutiny is a tool courts use to "smoke out illegitimate uses of race," *id.* at 506—illegitimate uses like a juror's conviction of a criminal defendant simply because he is Mexican.

The convergence of these two doctrines—the first related to evidentiary rules that directly conflict with certain constitutional rights, the second related to the presumptively unconstitutional nature of express racial classifications—supports the application of strict scrutiny to rules of evidence, like Colorado Rule 606(b), that prohibit the introduction of direct evidence that a defendant's fundamental right to be free from a racially-discriminatory jury has been infringed. After all, "[d]etermining whether invidious discriminatory purpose was a motivating factor [in a governmental decision] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). If state evidentiary rules are allowed to stand as an obstacle to such "sensitive inquir[ies]," *id.*, "the opportunity to prove actual bias," which is "a guarantee of a defendant's right to an impartial jury," could become little more than an empty formality. *See Dennis v. United States*, 339 U.S. 162, 171-72 (1950).

Under *amici*'s proposed framework, strict scrutiny would be triggered only when a defendant has obtained *direct and individualized evidence* tending to show that a juror voted to convict on the basis of the defendant's race. That evidentiary requirement distinguishes this case from others in which the Court has shown reluctance to allow

claims of bias based on statistical or indirect evidence to overcome neutral procedural rules. For instance, in *United States v. Armstrong*, 517 U.S. 456 (1996), the Court concluded that the defendants' bare allegation of selective and racially motivated prosecutions within the jurisdiction did not entitle them to prosecutorial materials whose disclosure was not otherwise authorized by Federal Rule of Criminal Procedure 16. *Id.* at 463. The sole basis for the defendants' allegation of bias in *Armstrong* was a study purporting to show general disparities in drug prosecutions according to race. The Court applied similar logic in *McCleskey* when it rejected a discrimination claim grounded on a study highlighting differential rates at which the death penalty is imposed, again depending on the defendant's race. 481 U.S. at 292. As in *Armstrong*, the fatal flaw in *McCleskey* was the defendant's failure to establish individualized evidence of racial bias: "[T]o prevail under the Equal Protection Clause," the Court explained, the defendant "must prove that the decisionmakers in *his* case acted with discriminatory purpose." 481 U.S. 279, 292 (1987) (emphasis in original).

By contrast, the claim here is fundamentally different from the kind of claim that *McCleskey* or *Armstrong* rejected. Rather, it is the very kind of claim that each of those cases implied *would* entitle defendants to make out a plausible case: one supported by direct, individualized evidence of invidious racial discrimination in jury decisionmaking. Any state or federal rule of evidence that prevents a defendant from pursuing such a claim therefore must be subjected to the most

careful scrutiny. If the rules preventing this inquiry were given anything less than this scrutiny, jurors whose prejudices slip through the cracks at jury selection could be permitted to render "nugatory and meaningless," *Morgan*, 504 U.S. at 733-34, the bedrock right to an impartial trial.

C. Rule 606(b) cannot survive strict scrutiny as applied here.

Under the familiar "strict scrutiny" standard, the government has the burden to prove that the challenged regulation is a "narrowly tailored measure[] that further[s] compelling governmental interests." *Johnson*, 543 U.S. at 505 (quotation marks omitted). Applying that standard here, Rule 606(b) must yield to Petitioner's constitutional rights, thereby allowing Petitioner to introduce direct evidence of purposeful racial discrimination.

First, Rule 606(b) and its federal and state counterparts are not narrowly tailored. Like the federal equivalent, Colorado Rule 606(b) is an avowedly sweeping provision that prevents introduction of virtually all evidence of jury deliberations, as it contains only three "narrow exceptions" to its blanket coverage—none of which covers juror racial bias. Pet. App. 7a. As this Court has already recognized, Rule 606(b)'s coverage is so broad that it would exclude evidence even in "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). A rule of evidence that sweeps this broadly is not narrowly tailored.

Second, the interests the Rule furthers are not compelling—especially when weighed against the critical constitutional right to be free from conviction based on purposeful juror discrimination. This Court has recognized two purposes behind the federal analogue to Colorado's evidentiary rule (Federal Rule 606(b)): the interest in ensuring finality in litigation, and the notion that "'fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.'" *Tanner v. United States*, 483 U.S. 107, 124 (1987) (quoting S. Rep. No. 93-1277, 13-14 (1974)). While those interests are valid as a general matter, they are obviously inapt where a verdict has been tainted by invidious racial prejudice. The government has *no* interest in the finality of a verdict reached in violation of a defendant's right to a fair trial, nor is there any legitimate interest in allowing jurors to have a "free debate" when that debate violates a defendant's constitutional right to a fair trial. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[I]n all equal protection cases . . . the crucial question is whether there is an *appropriate* governmental interest suitably furthered by the differential treatment.") (emphasis added).

Thus, trying to find any valid governmental interest here is as fruitless as trying to find an interest in applying a neutral procedural rule to require the admission of testimonial evidence in violation of a defendant's rights under the Sixth Amendment's Confrontation Clause. This Court has determined that the Sixth Amendment's protections are not to be left to the "vagaries of the rules of

evidence," no matter what the purpose of those rules might be. *Crawford*, 541 at 61. The Constitution trumps *whatever* vague justifications the state might offer. Similarly here, where a defendant has direct and individualized evidence that he or she was convicted on the basis of a juror's purposeful racial discrimination, the government has no valid interest in finality or secrecy that can overcome the strong interest in allowing the evidence to be admitted.

II. THE ACUTE PROBLEM OF UNDERREPRESENTATION OF THE LATINO COMMUNITY ON JURIES UNDERSCORES THE NEED FOR STRICT SCRUTINY.

Despite this Court's continuing efforts to prevent racial bias from infecting the criminal justice system, the unfortunate fact remains that many minority groups continue to be underrepresented on jury venires and, ultimately, on petit juries. Research shows this problem is particularly acute with respect to Latinos and other native Spanish speakers. Indeed, it was not so long ago that counties systematically excluded people with "Mexican or Latin-American surnames" from jury pools—a practice this Court definitively prohibited in *Hernandez v. Texas*, which was the first case to apply equal protection principles to people of Hispanic heritage. 347 U.S. at 480. Although jurisdictions may no longer openly discriminate on that basis, the reality of continued underrepresentation further justifies the application of the strictest of scrutiny to the state evidentiary rule in this case.

Surveys of the jury pools in New York, for instance, present a troubling picture. In Manhattan, a survey of over 14,000 prospective jurors found that, while people of color as a whole tended to be underrepresented, Hispanics were underrepresented by a stunning 77%. In other words, Hispanics comprised only 6.3% of the jurors assembling for new cases even though Hispanics were 27.2% of the population. Bob Cohen and Janet Rosales, *Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform* (June 2007).[2] Likewise, a survey of jurors in New York state found that Hispanics were underrepresented on juries in 58 of New York's 62 counties—and were at par with census demographics in the remaining four—indicating that the problem of underrepresentation persists in urban, rural, and suburban areas. *See* Ann Pfau, *First Annual Report Pursuant to Section 528 of the Judiciary Law* (Report of the Chief Administrative Judge of the State of New York, 2011) at Table C.[3]

This concern is by no means confined to the State or City of New York. In Harris County, Texas—Houston's home county—a newspaper investigation revealed that "there are three times more adult Hispanics living in Harris County than the [relative] number who serve on grand juries." Matt Dempsey and Karen Chen, "Hispanic Representation on

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[2] *See* http://www.law.cuny.edu/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf.

[3] *See* http://www.courts.state.ny.us/publications/pdfs/528_ReportNov2011.pdf

Harris County Grand Juries Far Below Population," *Houston Chronicle* (Dec. 19, 2014).[4] As the investigation noted, this underrepresentation is so drastic that it may well be unconstitutional on its own under *Castaneda v. Partida*, 430 U.S. 482, 501 (1977), which had reversed the conviction of a Texas man that resulted from an indictment by a grand jury composed of a similarly disproportionate number of Mexican-Americans to the results shown today.

Litigation in Colorado and elsewhere continues to reveal the depth of the problem. In 2008, the Colorado Supreme Court found that a "defect" in the "jury-selection process" in Arapahoe County—the same county in which Petitioner was tried in this case—caused "statistically significant underrepresentation" of Hispanics, as well as African-Americans, on the county's jury panels. *Washington v. People*, 186 P.3d 594, 601 (Colo. 2008). The court thus directed that one particular jury-selection practice that likely led to the disparity "be stopped immediately." *Id.* at 606.

Structural defects like these in the jury-selection process highlight why state evidentiary rules should not be allowed to require courts to blind themselves to probative evidence of actual racial bias that taints a conviction. This is confirmed by expert evidence submitted in a recent criminal case in Washington. That evidence revealed that Latinos made up 17.3%

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[4] *See* http://www.houstonchronicle.com/news/houston-texas/houston/article/Hispanic-representation-on-Harris-County-grand-5969524.php.

of the relevant qualified jury population, but only 10.5% of the jury pool. Br. for Appellant at *26 in *United States v. Burgess*, 9th Cir. No. 15-30261 (decision pending), *available at* 2016 WL 1003314; *see also Serena v. Mock*, 547 F.3d 1051, 1054 (9th Cir. 2008) (noting that the "statistical evidence that Hispanics have been underrepresented [on grand juries in a California county] by an absolute disparity of 13.5% over the past three years is troubling," but dismissing appeal on procedural grounds). Regardless of whether these disparities themselves trigger a constitutional violation, it remains the case that the number of available Hispanic jurors is not completely representative of their presence in the overall population.

The problem of demographic underrepresentation in jury pools is compounded by a language divide. Hispanic people who are called to jury duty often face a linguistic gauntlet on two fronts when it comes to actually serving on the petit jury: some may be excluded from service because they do not speak English, while others may be excluded precisely because they are bilingual, at least in cases where there could be testimony in Spanish translated into English. *See Hernandez v. New York*, 500 U.S. 352 (1991) (holding that using peremptory strikes to eliminate jurors who spoke Spanish did not violate the Equal Protection Clause). This problem means that even when Hispanics are summoned for jury service, they are unlikely to be chosen for service unless they speak English and *only* English. Perversely, this problem is most likely to occur where the defendant is also Hispanic.

Whatever the cause of the deep underrepresentation of Hispanic jurors, it has a clear effect: it makes it unlikely that the twelve people assigned to judge a defendant's guilt or innocence will contain any Hispanic people. That is particularly troubling given the empirical evidence that the absence of a member of a particular racial group on a jury makes it more likely that a juror will feel free to express racial bias without fear that it will elicit disapproval or protest from other jurors. "[S]ocial scientists have long understood that the presence of minority group jurors may inhibit majority group members from expressing prejudice, especially if the defendant is from the same group as the minority group jurors." Jessica West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, Harvard J. on Racial & Ethnic Justice 195 (Spring 2011) (discussing, among other studies, Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psych. 597, 606 (2006)).

Having more Hispanic jurors thus might temper the instincts of those jurors who would be inclined to convict on the basis of race and not the evidence. But since, for now, the problem of underrepresentation is particularly acute, the Court must allow defendants to attempt to remedy any violations of their fair-trial and equal-protection rights that plausibly have occurred in the jury room. Invalidating the application of rules of evidence under a strict-scrutiny framework in circumstances like these is the best way to do that.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

Robert T. Maldonado
President
Hispanic National Bar Association
1020 19th Street, N.W.
Suite 505
Washington, D.C. 20036
Tel: (212) 278-0509
Fax: (202) 503-3403

Peter Karanjia*
Jason Harrow
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, DC 20006
Tel: (202) 973-4200
peterkaranjia@dwt.com
Counsel for *Amici Curiae*
*Counsel of Record

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