No. 20-958

IN THE

Supreme Court of the United States

RICKEY LEON SCOTT,

Petitioner,

v.

ERIC ARNOLD, warden

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE DUE PROCESS INSTITUTE, THE CATO INSTITUTE, AND THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

L. BARRETT BOSS
Counsel of Record
KARA L. KAPP
CATHERINE C. YUN
SAMUEL M. DEAU
COZEN O'CONNOR
1200 19th St., NW
Washington, DC 20034
bboss@cozen.com
(202) 912-4818

SHANA TARA O'TOOLE
DUE PROCESS INSTITUTE
700 Pennsylvania Ave., SE
Suite 560
Washington, D.C. 20003
shana@idueprocess.org
(202) 558-6683

Counsel for Amici Curiae Due Process Institute, the Cato Institute, and the National Association for Public Defense

EMILY A. HUGHES
NATIONAL ASSOCIATION
FOR PUBLIC DEFENSE
Professor of Law
College of Law
University of Iowa
290 Boyd Law Building
Iowa City, IA 52242
Emily-hughes@uiowa.edu

CLARK M. NEILY III
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, D.C. 20001
cneily@cato.org
(202) 216-1461

QUESTIONS PRESENTED

When a Justice contributes the necessary fifth vote to a majority opinion but also writes a concurrence interpreting that opinion, should lower courts disregard the concurrence and rely exclusively on the majority opinion to discern the holding in the case? And should the concurrence be granted precedential weight only if it is "narrower" than the majority opinion, per the rule in *Marks v. United States*, 430 U.S. 188, 193 (1977)?

For purposes of applying the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), did this Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984)—when read in light of the concurrence by Justice Blackmun, who also provided the fifth vote for the majority opinion—"clearly establish" that a defendant must be granted a new trial when a juror's dishonest *voir dire* responses concealed information that would have given the defendant a valid basis to challenge that juror for implied bias?

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Due Process Institute is a non-profit, bipartisan, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Institute has participated as an amicus curiae before this Court in cases presenting important criminal justice issues, including *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); and *United States v. Haymond*, 139 S. Ct. 2369 (2019).

The Cato Institute is a non-partisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice focuses on, *inter alia*, the protection of constitutional safeguards for criminal suspects and defendants and citizen participation in the criminal justice system.

The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout the U.S. states. NAPD's members are

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[1] Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amici* note that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *Amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services.

This case presents an important issue—whether the California Court of Appeal and the Ninth Circuit wrongly denied Scott his fundamental right to trial by an impartial jury. *Amici* harbor deep concern that the decisions below—and their indifference to this obvious Sixth Amendment violation—must be corrected to guard and preserve the fundamental fairness of the Sixth Amendment jury trial right.

SUMMARY OF ARGUMENT

The Court should grant the writ of certiorari in this case for multiple reasons. First, the Ninth Circuit decided an "important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). The Ninth Circuit plainly misapplied the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in denying relief where the Sixth Amendment clearly required it. The Ninth Circuit's ruling was clearly contrary to the constitutional framework established by this Court in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

In *McDonough*, this Court held that a new trial is required whenever a party "demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a

challenge for cause." *Id.* The Court made clear that this rule was designed to reach dishonesty about "possible biases, *both known and unknown*, on the part of potential jurors." *Id.* at 554 (emphasis added).

In reversing the District Court's meticulously reasoned grant of habeas relief, the Ninth Circuit ignored *McDonough*'s plain text and its unmistakable reach to both "known" (actual) bias and "unknown" (implied) bias. It did so by holding that proof of a dishonest juror's implied bias does not require a new trial if the juror denies that bias, thus defeating a showing of *actual* bias. *Scott v. Arnold*, 962 F.3d 1128, 1130-31 (9th Cir. 2020); *see also* Pet. App. A, at 4-5. Of course, a dishonest juror's self-serving denial of actual bias does not and should not defeat a showing of implied bias. In endorsing this new standard, the Ninth Circuit contorted this Court's holding and violated its plain terms.

Second, the Ninth Circuit created a troubling new rule that threatens to indelibly stain the right to an impartial jury trial and undermine faith in this foundational institution. The Ninth Circuit wrongly held that *McDonough* does not require a new trial upon proof of juror dishonesty about a question giving rise to a for-cause challenge if that juror denies harboring a bias. In so ruling, the Ninth Circuit all but eviscerated *McDonough* and created a dangerous new precedent that must not be allowed to stand. Protecting the sanctity of impartial juries enshrined in the Sixth Amendment is of paramount importance. Accordingly, the grant of certiorari is manifestly warranted.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit unreasonably misapplied *McDonough* in reversing the District Court's well-reasoned grant of habeas relief under the Sixth Amendment.

The writ should be granted because the Ninth Circuit's Sixth Amendment determination was contrary to the clear and unmistakable holding of *McDonough*, 464 U.S. 548.

A. The Court's holding in *McDonough* was clear and unmistakable.

Under AEDPA, habeas relief is authorized where the state court's ruling upholding a conviction was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). In this case, there is no dispute that this Court's holding in *McDonough* sets forth the relevant rule. The only question is whether the relevant holding of *McDonough* is clearly established. There can be no doubt that in authoring the majority opinion, then-Justice Rehnquist laid out as clear a two-part test as this Court has ever issued.

In then-Justice Rehnquist's majority opinion in *McDonough*, the Court drew an unequivocal line reflecting what the constitutional right to an impartial jury requires. The Sixth Amendment expressly requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an impartial jury[.]" U.S. Const., Amend. VI. The Seventh Amendment likewise enshrines "the right of trial by jury" in civil cases. U.S. Const., Amend. VII. This Court has recognized that under both amendments, "[o]ne touchstone of a fair trial" in a jury system is the impaneling of "an impartial trier of fact[.]" *McDonough*, 464 U.S. at 554.

To ensure these fundamental rights, the *McDonough* Court established a clear and sensible test—that a new trial is required whenever a party "[1] demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then [2] further show[s] that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. By distinguishing the facts before it, which involved a challenge only to "a juror's mistaken, though honest, response to a question[,]" the Court clarified that the required "fail[ure] to answer honestly" a material question must involve a lie, rather than a mere misstatement. *Id.* It thus made plain that a new trial would be manifestly warranted where a juror gave an intentionally false response by "concealing information" requested by counsel, and that lie provided a valid basis for a for-cause challenge. *Id.*

The Court reaffirmed this clear and unmistakable reading in *Warger v. Shauers*, where it summarized *McDonough*'s two-part holding as this: "a party may 'obtain a new trial' if he 'demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and . . . that a correct response would have provided a valid basis for a challenge for cause.'" 574

U.S. 40, 43 (2014) (quoting *McDonough*, 464 U.S. at 556). This Court then reiterated *McDonough*'s plain two-part holding and mandate: "If a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated[.]" *Id.* at 45.

Moreover, the *McDonough* Court plainly encompassed both actual and implied biases within the scope of this two-part test by expressing concern for eliminating biases both "known and unknown". Specifically, the Court wrote that "*[v]oir dire* examination serves to protect th[e] right [to a fair trial] by exposing possible biases, *both known and unknown*, on the part of potential jurors." *McDonough*, 464 U.S. at 554 (emphasis added). If these words—"both known and unknown"—are to have any meaning at all, they naturally and necessarily must include both biases that are explicitly "known" *and* those that remain "unknown" but are established as implied. As Petitioner explains, actual bias turns on proof that makes "known" that a juror was subjectively biased, or "disposed to cast a vote against" the defendant. *Dyer v. Calderon*, 151 F.3d 970, 981 (9th Cir. 1998) (en banc). As this Court has stated, simply put, "actual" bias is "bias in fact[.]" *United States v. Wood*, 299 U.S. 123, 133 (1936). This is just *one* of the biases the *McDonough* Court identified within its panorama of concerns.

In addition, the Court identified "unknown" biases as a second pernicious concern. That concern is captured through implied bias for-cause challenges.

Indeed, implied bias encompasses precisely those situations where it remains "unknown" whether the juror harbors a concrete subjective bias, but where objective circumstances create an unacceptable risk that the juror may be infected with such bias, thus giving rise to a for-cause challenge. *Dyer*, 151 F.3d at 981. As this Court explained in *Wood*, "implied" bias encompasses those "bias[es] conclusively presumed as matter of law" even though not established in fact. *Wood*, 299 U.S. at 133. This Court further made clear that implied bias is distinct from actual bias, writing that implied bias is "a bias attributable in law to the prospective juror *regardless of actual partiality*." *Id.* at 134 (emphasis added). It thus follows rationally and ineluctably from the Court's express inclusion of both "known" and "unknown" biases within the scope of targeted ills that its holding reaches both actual and implied bias.

Justice Blackmun's concurrence adds additional context that crystallizes the correctness of this reading. As he wrote: "I agree with the Court that the proper inquiry in this case is whether the plaintiffs had the benefit of an impartial trier of fact. I also agree that, in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial. I therefore join the Court's opinion[.]" *McDonough*, 464 U.S. at 556. Justice Blackmun's revealing concurrence captures the very essence of why proof of the juror's honesty or dishonesty in making the inaccurate statement is the critical test. As he wrote, and as the Court expressly recognized, a juror's act of

concealment provides a telling indicator that the juror suffers from pernicious bias.

In crafting a test that would serve as a reliable bulwark against the perils of jury bias, it is no surprise that the *McDonough* Court included both actual and implied biases within the scope of biases that would give rise to a new trial. Indeed, this Court had *already* recognized implied bias as a basis for a new trial in *Wood*, 299 U.S. at 133. In *Wood*, in interpreting the Sixth Amendment right to a trial "by an impartial jury," the Court specifically recognized that "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." *Id.*; *see also id.* at 136 (holding that the proposed form of presumed bias—a juror's government service—was not of the type giving rise to a for-cause challenge).

The Court in *Wood* further recognized that state "legislatures enjoy a reasonable freedom" in safeguarding this right by defining what type of implied biases should categorically give rise to a for-cause challenge. *Id.* at 145-46. The California legislature exercised *precisely* that discretion here, as it is undisputed that the state legislature has expressly provided that "[a] challenge for implied bias may be taken for one or more of the following causes . . . [including] having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with . . . the attorney for either party." Cal. Code Civ. Proc. § 229(b). Nor is there any question that the California Court of Appeal

found this circumstance satisfied here. *People v. Scott*, Pet. App. C, at 15-16.

Indeed, even as far back as in the Founding era, Chief Justice Marshall recognized the deleterious effects of certain implied bias, and that our Constitution, by design, prohibits jurors exhibiting such implied biases from serving on juries. *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807). In *Burr*, Chief Justice Marshall was guided by a single polestar—"[t]he great value of the trial by jury certainly consists in its fairness and impartiality." *Id.* at 50. In applying this foundational principle, he recognized that a situation may arise where a juror "may declare that he feels no prejudice in the case[.]" *Id.* at 51. In addressing this scenario, Chief Justice Marshall wrote that despite the absence of proof of actual bias, "the law cautiously incapacitates him from serving on the jury because it suspects prejudice, [where] in general persons in a similar situation would feel prejudice." *Id.*

There is no dispute that the challenged juror here acted to conceal critical information from the defense and gave a blatantly dishonest answer during *voir dire*. This is *precisely* the pernicious conduct that the *McDonough* test expressly aims to prevent, as reflected both in the majority opinion and Justice Blackmun's concurrence. Moreover, the juror's conduct here qualified as statutorily recognized implied bias, which constitutes a "valid basis for a challenge for cause" under *McDonough*. Indeed, the California implied-bias statute explicitly provides that the juror's conduct in just this scenario qualifies

as the type of implied bias that gives rise to a for-cause challenge to disqualify a juror—without requiring any evidence that the juror harbors a "known" actual bias. Cal. Code Civ. Proc. § 229(b).[2]

Thus, the only question to be answered is whether *McDonough*'s clear directive means what it says in holding that our Constitution will not turn a blind eye to the seating of jurors who have lied about matters that speak to relevant biases. This case provides the Court with a clean vehicle to address this singular question—whether the clear holding of *McDonough* encompasses *all* dishonest answers to material questions that give rise to a for-cause challenge, or only captures a narrow subset of such dishonest answers—where there is also proof of the juror's "known" (i.e. actual) bias.

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[2] S*ee also* Cal. Code Civ. Proc. § 225 (providing that a juror may be challenged for cause based on *either* "[i]mplied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror" (as enumerated in Section 229) *or* "[a]ctual bias", shown by proof of the juror's "state of mind").

B. The California Court of Appeal's holding was contrary to the clear reach of *McDonough*, and the Ninth Circuit wrongly disregarded that unreasonable error.

1. The California Court of Appeal and the Ninth Circuit erred by not applying *McDonough* to implied bias.

In affirming the conviction in this case, the California Court of Appeal wrongly held that *McDonough* does not require a new trial "whenever a juror has concealed a material fact during voir dire and a correct response would have provided grounds for a challenge for cause under state law." Pet. App. C, at 17. That holding is clearly wrong. *See* Part I.A, above. It erroneously held that even where a juror's implied bias under state law is unequivocally established, if the court accepts the dishonest juror's denial of actual bias, no new trial is warranted. Pet. App. C, at 12-13, 15, 20. The court's announced rule both makes no sense and is clearly contrary to the dictates of *McDonough*.

The Ninth Circuit further compounded this error by concluding that the state court could reasonably have read *McDonough* as not requiring a new trial upon proof of (1) juror dishonesty (2) as to a matter that provided grounds for a for-cause challenge, as long as the juror caught in a lie subsequently denies actual prejudice. *Scott*, 962 F.3d at 1131. This erroneous and constitutionally harmful holding ignores the unambiguous dictates of *McDonough*.

Justice Rehnquist announced a clear standard in *McDonough*—that a new trial is required whenever a party "demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause." 464 U.S. at 556; *see also* Part I.A. There are thus two critical elements giving rise to this constitutional relief—(1) a juror's dishonesty in *voir dire* (2) as to a matter that would have provided a valid basis for a for-cause challenge.

Reading *McDonough* as only addressing actual bias—as the California Court of Appeal and Ninth Circuit did—is manifestly unreasonable and contrary to the clear reach of *McDonough*. Indeed, in limiting the reach of *McDonough* to only proof of actual bias, these courts' reading would render largely meaningless this Court's inclusion of biases "both known and unknown" within the scope of its holding. Such a reading cannot be permitted to stand.

This Court crafted its test around proof of deception as a fair proxy for both "known and unknown" biases. Implied bias may manifest through a juror's intentional "conceal[ment] [of] information" just as readily as actual bias.[3] Thus, the lower courts'

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[3] *See, e.g.*, *English v. Berghuis*, 900 F.3d 804, 817-18 (6th Cir. 2018) (juror's concealment of history of sexual abuse in a sexual assault case gave rise to "inference of bias" though proof of actual bias was absent); *Burton v. Johnson,* 948 F.2d 1150, 1159 (10th Cir. 1991) (juror who lied in *voir dire* about matter giving rise to for-cause challenge was impliedly biased); *United States v. Scott*, 854 F.2d 697, 698-700 (5th Cir. 1988) (in marijuana importation

exclusion of an entire category of biases that fall within the clear scope of *McDonough* is unreasonable.

In this case, the defense indisputably established that a juror gave a dishonest answer about a material question that would have given rise to a for-cause challenge under state law based on implied bias. That should end the matter.

It is plainly unreasonable for a court applying *McDonough*, as here, to limit the Court's test and retrial mandate to *some but not all* lies in *voir dire* that would give rise to a for-cause challenge under state law. Nothing in the Court's opinion invites such an arbitrary limitation. And it is *particularly* unreasonable to have selected a subset that captures only the most egregious manifestations of forbidden biases. The lower courts wrongly concluded that *McDonough*'s terms only apply to actual bias. But proof that a juror manifested actual bias is in no sense a close or meaningful proxy for whether a juror's misstatement in *voir dire* was dishonest, rather than the result of an honest mistake. Indeed, proof of actual

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conspiracy, juror found impliedly biased who was the brother of deputy sheriff in the case, even though juror denied actual bias); *United States v. Eubanks*, 591 F.2d 513, 516, 517 (9th Cir. 1979) (in heroin distribution conspiracy case, juror who lied about having family members incarcerated for heroin-related crimes was found impliedly biased); *United States v. Sampson*, 820 F. Supp. 2d 151, 197 (D. Mass. 2011) (applying *McDonough* to juror dishonesty where no actual bias shown, but bias could be inferred).

bias only covers a much smaller subset of conduct[4]—where the taint of a juror's bias is so encompassing that the juror simply cannot, or cannot be bothered to, conceal it from the court. A bias can only be "known" or proven as actual where the juror has made it explicit by expressly endorsing or admitting to that bias. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *SYMPOSIUM ON BEHAVIORAL REALISM: Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 946 (2006).

Examples of jurors expressing explicit (actual) bias during *voir dire* are therefore exceptional occurrences.[5] Actual bias is often suppressed during *voir dire* and an expression of actual bias manifests only later, when jurors are in more private settings.[6] For example, in *United States v. Villar*, 586 F.3d 76, 82 (1st Cir. 2009), shortly after a defendant's verdict was announced, one impaneled juror sent an email to defense counsel reporting that another juror had stated, during deliberations, with reference to the Latino defendant, "I guess we're profiling but they cause all the trouble."

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[4] Jerry Kang et al, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1126 (2012).

[5] *See, e.g.*, *Miller v. Webb*, 385 F.3d 666, 674, 675 (6th Cir. 2004) (finding actual bias where juror unequivocally stated she would be partial to key government witness, who was the victim in the case); *United States v. Torres*, 128 F.3d 38, 43-44 (2d Cir. 1997) (finding actually biased juror who stated he could never believe the testimony of a drug dealer).

[6] *See* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 170 (2011).

Likewise, in *United States v. Benally*, jurors' lies in *voir dire* about their experiences with Native Americans in a case involving a Native American defendant were only discovered after the verdict was announced. 546 F.3d 1230, 1232 (10th Cir. 2008) (denying hearing under Rule 606(b)), *overruled by Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865, 869 (2017). The disclosing juror revealed that during deliberations, the foreman had insisted that "'[w]hen Indians get alcohol, they all get drunk' and that when they get drunk, they get violent." *Id.* at 1321. Other jurors apparently likewise, in private only, discussed the need to "send a message back to the reservation." *Id.* at 1232. The district court found that two jurors had lied about their experiences with Native Americans, based on these unfiltered comments only made in a private setting. *Id.*[7]

These instances, of course, cover only the most extreme examples of juror dishonesty, and thus cannot be understood to fairly capture the problem the Court quite pointedly aimed to address. As the Sixth Circuit explains, "[a]lthough bias can be revealed through a prospective juror's express admission, more frequently, jurors are reluctant to admit actual bias and the trial court must discover their biased attitudes through circumstantial evidence." *Miller v. Webb*, 385 F.3d 666, 673-74 (6th Cir. 2004).

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[7] *See also United States v. Heller*, 785 F.2d 1524, 1526 (11th Cir. 1986) (reversing jury verdict based on false *voir dire* statements of jurors discovered after jury deliberations, during which the jurors made anti-Semitic comments).

2. Implied bias is every bit as pernicious as actual bias.

Implied bias is much more pervasive, but just as insidious, as actual bias. One form of implied bias is implicit bias, which is "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. 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, 149 (2010). Both case law and scholarship reflect the pervasiveness of implicit bias. As Judge Bennett explains, after seven years of testing, a study of implicit bias run by several universities concluded that "[i]mplicit biases are pervasive [and] appear as statistically 'large' effects that are often shown by majorities of samples of Americans[.]" *Id.* at 153. Judge Bennett adds that these "[i]mplicit biases predict behavior . . . . [T]hose who are higher in implicit bias have been shown to display greater discrimination[.]" *Id.* Judge Bennett further notes that "empirical evidence from other social science studies [likewise] show that implicit bias is pervasive in our society." *Id.* at 154; *see also* Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J. F. 406, 408-10 (2017).

Actual biases manifest overtly less frequently than implied bias because people harboring the most pernicious biases—including religious and racial

biases—do not typically announce their biases loudly.[8] This behavior is entirely predictable, as members of society are acutely aware of the moral opprobrium that awaits should they explicitly endorse or admit to harboring a bias that is condemned by society.[9]

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[8] *See, e.g.*, Laurie A. Rudman et al., *Measuring the Automatic Components of Prejudice: Flexibility and Generality of the Implicit Association Test*, 17 Soc. Cognition 437, 460 (1999) (finding "strong evidence for implicit prejudice" based on religion (Jewish vs. Christian), age (young vs. old), and nationality (American vs. Soviet), and the effect size of implicit prejudice was larger than for self-reported measures of prejudice). Biases are still held, but "[people] inhibit expression of this prejudice when the possibility of negative consequences is great." Crosby, Bromley & Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 Psychological Bull. 546, 549 (1980) (positing that prejudicial beliefs remain prominent, but are less likely to be outwardly expressed); *see also* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016, 1027-28 (1988) (observing that racial biases have not disappeared even though they have largely been condemned in modern society. Instead, individuals now are more likely to express their prejudice "indirectly, covertly, and often unconsciously"). *Cf. United States v. Hazelwood*, 979 F.3d 398, 411 (6th Cir. 2020) (finding that indisputably racist remarks made by CEO at a private company retreat were never expected to become public and were not anticipated by CEO to put the company's reputation at risk).

[9] *See* Jerry Kang et al, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1132 (2012) ("If no social norm against [a] bias[] exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. . . . An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. . . . [O]ne can often easily conceal one's explicit bias as measured through an explicit

Indeed, as to one such morally condemned bias, racial bias, this Court has recognized that "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Pena-Rodriguez*, 137 S. Ct. at 869.

For these reasons, implied bias is as likely as actual bias, if not more likely, to manifest through dishonesty. *See, e.g.*, cases cited in note 3, *supra*; *see also Burton*, 948 F.2d at 1158 (holding that a juror's "dishonesty, itself" was evidence of implied bias); *Sampson*, 820 F. Supp. 2d at 165 ("[D]ishonest answers are a factor that can contribute to a finding of implied bias.").

One example of the perniciousness of implied biases is evident in gender bias by some jurors against male defendants in criminal prosecutions. For example, in his book, Professor of Sociology Mark Warr documented the bias held by some individuals surveyed at the time of publication that males are more dangerous than females. Mark Warr, *Public Perceptions and Reactions to Violent Offending and Victimization, in* 4 Understanding and Preventing Violence: Consequences and Control 13, 20-21 (1994). For example, Professor Warr documents how among

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instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue."); *see also, e.g.*, *Pena-Rodriguez*, 137 S. Ct. at 869 ("The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations.").

those surveyed, a predominant personal attribute identified by those surveyed as corresponding to the image of a dangerous person was being male. *Id.* at 18. Professor Warr further reports findings that among the subjects surveyed, females tended to fear criminal victimization more than men, despite the fact that men were at higher risk of victimization than females. *Id.* at 11-12. Likewise, Warr reports that a study of 60,000 individuals showed that certain violent crimes committed by men were perceived to be more dangerous than the same crimes committed by women. *Id.* at 47.

Likewise by way of example, jurors in civil trials may harbor anti-corporate sentiments, which they may be reluctant to admit during *voir dire*. For example, in a mock jury verdict analysis, jurors tended to treat corporate defendants worse than individual defendants. Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DePaul L. Rev. 327, 343-44 (1998). In one mock jury experiment, participants "were significantly more likely to hold the [corporate] defendant morally and legally responsible" for the injuries alleged than the individual defendant. *Id.* at 344. In a second experiment, mock jurors were more likely to attribute more fault to the corporate defendant than to the individual defendant. *Id.* at 345. Further, the studies found "a statistically significant relationship between attitudes toward business and judgments of negligence and awards[.]" *Id.* at 346. Of course, "virtually no jurors [interviewed] stated that

their own biases against business led them to treat a business corporation differently." *Id.* at 351.

Thus, the inclusion of implied bias must be understood as an indispensable pillar to the Court's opinion in *McDonough*. Indeed, any other reading of *McDonough* would leave courts powerless to uncover these and other pernicious biases overtly denied by jurors, which can indelibly taint criminal trials and undermine their integrity. *See* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 166 (2011) (observing that "[w]hen information comes to light that a juror has expressed racial, ethnic, religious, or gender bias during deliberations, a pall is cast not only on the verdict, but on these underlying precepts" of a fair trial by an impartial jury).

II. The Ninth Circuit created a troubling new rule that threatens to indelibly stain the right to a jury trial and undermine faith in this critical institution.

The Ninth Circuit held that proof of a juror's implied bias does not require a new trial if the juror denies that bias, thus defeating proof of actual bias. *Scott v. Arnold*, 962 F.3d 1128, 1130-31 (9th Cir. 2020). Of course, a juror's denial of bias does not and cannot defeat evidence of implied bias, as discussed above. *See* Part I.B. In unreasonably cabining *McDonough* to only requiring retrial upon proof of actual bias, the Ninth Circuit announced a dangerous new rule that puts in peril the integrity of the right to trial by an impartial jury.

This rule would allow lower courts to freely ignore implied biases and uphold jury verdicts despite proof that a juror harbored even a morally reprehensible bias, as long as the juror denied being biased. Such a rule threatens to indelibly stain the hallowed Sixth Amendment right to a jury trial and thus cannot be permitted to stand.

The "fairness of the trial—the very integrity of the fact-finding process"—is foundational to the scheme of American justice. *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (quoting *Linkletter v. Walker*, 381 U.S. 618, 639 (1965)); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Indeed, the Court in *McDonough* observed that a core "touchstone of a fair trial is an impartial trier of fact[.]" 464 U.S. at 554. Chief Justice Marshall's words at the time of the Founding mark the importance of jealously safeguarding this right, and they bear repeating: "Those who most prize the institution [of trial by jury], prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind." *Burr*, 25 F. Cas. at 50.

Protecting the integrity of the right to an impartial jury is thus paramount to protecting our system of justice. As this Court has recently recognized:

> [t]he jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired,

> trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

Pena-Rodriguez, 137 S. Ct. at 860.

Importantly, *voir dire* is critical to protecting this foundational institution's integrity—it is the very mechanism by which we weed out bias from juries. As the *McDonough* court wrote, "*Voir dire* examination serves to protect th[e] right [to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough*, 464 U.S. at 554. The Court thus identified *voir dire* as a core pillar erected to weed out "biases, both known and unknown" and expel jurors tainted by bias. *Id.* The Court went on to stress that "[t]he necessity of truthful answers by prospective jurors if this [voir dire] process is to serve its purpose is obvious." *Id.*

Pernicious implied biases, such as racial or religious bias, can have devastating impacts on outcomes in criminal cases, if they are not properly filtered out in *voir dire*.[10] Verdicts marred by such

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[10] *See* Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 Law & Hum. Behav. 621, 627 (2005) (finding that "participants were more likely to render guilt judgments for other-race defendants than for defendants of their own race"); *see also* Kang

biases can cause ordinary citizens to question the integrity of the jury system as a whole. The strength and resilience of the core institutions erected by our Constitution, including the jury trial, are fed and fortified by the strength of faith that our fellow citizens retain in the fairness and reliability of these institutions. When courts are allowed to neglect their critical role as vigilant gatekeepers guarding the impartiality of our juries, the integrity of our jury verdicts are marred, and the people's faith in this institution begins to slowly crumble. *Cf. Heller*, 785 F.2d at 1527 (holding that because the "religious prejudice displayed by the jurors . . . [was] so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible harmful effects").

Were this Court to deny certiorari, and thus allow the lower courts here to ignore the plain dictates of *McDonough*, it risks signaling to other courts that they are welcome to do the same. Such a result would

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et al, *supra* n.9, at 1143-44 (concluding that Mitchell study's "findings are more consistent with an implicit bias than a concealed explicit bias explanation"); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 309 (2010) (finding that "jurors automatically and unintentionally evaluate[d] ambiguous trial evidence in racially biased ways"); Justin D. Levinson et al, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. Law 187, 190, 204, 206 (2010) (finding that people implicitly associate Black and Guilty compared to White and Guilty, and these associations predicted how mock jurors evaluated ambiguous trial evidence).

leave lower courts free to blatantly and dangerously ignore implied bias, which, if left unchecked, would insidiously weaken the institution of impartial jury trials from the inside out.

This Court plays a pivotal role in protecting the integrity of the jury trial right, and with it, the strength of this critical institution in our criminal justice system. This case presents the Court with a clean and important opportunity to reinforce the clear holding of *McDonough*, and in so doing, strengthen the integrity of this fundamental right at a time when renewed faith in our institutions is needed more than ever.

CONCLUSION

For the foregoing reasons this Court should grant the petition for a writ of certiorari.

L. BARRETT BOSS
Counsel of Record
KARA L. KAPP
CATHERINE C. YUN
SAMUEL M. DEAU
COZEN O'CONNOR
1200 19th St., NW
Washington, DC 20034
bboss@cozen.com
(202) 912-4818

CLARK M. NEILY III
CATO INSTITUTE
1000 Mass. Ave., NW

SHANA TARA O'TOOLE
DUE PROCESS INSTITUTE
700 Pennsylvania Ave., SE
Suite 560
Washington, D.C. 20003
shana@idueprocess.org
(202) 558-6683

EMILY A. HUGHES
NATIONAL ASSOCIATION
FOR PUBLIC DEFENSE
Professor of Law
College of Law
University of Iowa

Washington, D.C. 20001
cneily@cato.org
(202) 216-1461

290 Boyd Law Building
Iowa City, IA 52242
Emily-hughes@uiowa.edu

Counsel for Amici Curiae Due Process Institute, the Cato Institute, and the National Association for Public Defense