CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,
Petitioner,

v.

STATE OF SOUTH DAKOTA,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of the State of South Dakota

PETITION FOR A WRIT OF CERTIORARI

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Dated: May 2, 2018

QUESTION PRESENTED

CAPITAL CASE

In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), this Court held that, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule [under a state rule of evidence] give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869.

In the wake of *Peña-Rodriguez*, Charles Rhines, a gay man, sought to introduce in the South Dakota Supreme Court the statements of three of the jurors who had voted to sentence him to death. One juror stated that the jury "knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison." Two other jurors indicated that another deliberating juror had said that locking Mr. Rhines up with other men for life imprisonment without parole "would be sending him where he wants to go," and that there had been "lots of discussion of homosexuality" and "a lot of disgust." The state court ruled that *Peña-Rodriguez* did not require its no-impeachment rule to give way.

The question presented is whether *Peña-Rodriguez* applies to Petitioner's evidence that at least one juror relied on anti-gay stereotypes and animus to sentence him to death.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Russell Rhines respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Dakota.

OPINIONS BELOW

The January 2, 2018, order of the Supreme Court of South Dakota is unpublished and appears in the Appendix[1] at App. 1. The May 15, 1996, opinion of the Supreme Court of South Dakota is published at 548 N.W.2d 415 (S.D. 1996), and appears in the Appendix at App. 3–50.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the Supreme Court of South Dakota was entered on January 2, 2018. App. 1–2. On March 27, 2018, Justice Gorsuch extended the time to file this petition for a writ of certiorari until May 2, 2018.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the U.S. Constitution provides, in part: "nor shall any State deprive any person of life, liberty, or property, without due process

[1] This petition cites pages in the Appendix with "App. [page number in appendix]."

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Charles Rhines is a gay man, and the jurors at his capital trial knew it. Both the jury selection and the trial testimony addressed his sexual orientation. During penalty phase deliberations, the jurors sent out a note asking whether he would be allowed to "mix with the general inmate population," "create a group of followers or admirers," "brag about his crime to other inmates, especially new and[/]or young men . . . ," "marry or have conjugal visits," or "have a cellmate." The trial judge told them that he could not give them any further information. On direct appeal, the South Dakota Supreme Court reviewed for the influence of "passion, prejudice or any other arbitrary factor." Relying on the jurors' assurances during voir dire that they could be fair despite Mr. Rhines's sexual orientation, the court rejected Mr. Rhines's claim that the jurors' note showed that anti-gay bias had affected their decision. *See* App. 29–30, 41–42.

Until 2017, Mr. Rhines had no way to present other evidence of the jurors' bias because South Dakota Rule of Evidence 606(b)(1), like similar rules in other jurisdictions, forbade the impeachment of jury verdicts with evidence of statements during deliberations or the jurors' mental processes. In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), however, this Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule

give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869.

Recognizing that *Peña-Rodriguez* could provide an avenue for proving the influence of bias in his own case, Mr. Rhines sought relief from the state court's judgment on passion, prejudice, or an arbitrary factor, and requested a hearing and briefing in light of three juror statements to show that his sexual orientation indeed had been a focal point of sentencing deliberations. One juror stated that jurors "knew that [Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison." A second recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for [life imprisonment without the possibility of parole]." A third confirmed that "'[t]here was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community. . . .' 'There were lots of folks who were like[,] Ew, I can't believe that.'"

The South Dakota Supreme Court denied Mr. Rhines's motion, ruling that "neither Appellant's legal theory (stereotypes or animus relating to sexual orientation) nor Appellant's threshold factual showing is sufficient to trigger the protections of *Peña-Rodriguez*[.]"

I. Pertinent Facts From Trial

In January 1993, Charles Russell Rhines stood trial in the Seventh Judicial Circuit Court of Pennington County, South Dakota, for the murder of Donnivan Schaeffer.

During jury selection, Mr. Rhines's lawyers asked all but one of Mr. Rhines's jurors whether they would harbor any bias against him because he is a gay man. *See, e.g.*, Tr. Vol. 2 (1/5/1993) at 99.[2] "Ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making." App. 30. One juror "stated that she regards homosexuality as sinful. However, she also stated Rhines'[s] sexual orientation would not affect how she decided the case. . . ." App. 30.

All of the jurors learned of Mr. Rhines's homosexuality during the state's guilt phase presentation. For example, one witness, Heather Harter, testified that she had seen Mr. Rhines "cuddling" with her husband, Sam Harter. *See* Tr. Vol. 11 (1/19/1993) at 2362 (Testimony of Heather Harter). She further testified that Mr. Rhines had told her that he hated her because Mr. Harter loved her instead of Mr. Rhines. *See id.* at 2364. A former partner of Mr. Rhines also testified that he had a "sexual" relationship with Mr. Rhines at one point in time. *See id.* at 2292 (Testimony of Arnold Hernandez).

The jury found Mr. Rhines guilty of first-degree murder and third-degree burglary. Tr. Vol. 12 (1/22/1993) at 2530. The state's penalty phase case consisted of an incorporation of its guilt phase evidence and victim impact testimony. Tr. Vol. 13 (1/25/1993) at 2585–91; *id.* at 2621–22. Mr. Rhines presented his case for a life sentence through the testimony of his two sisters. *Id.* at 2591–2620. One of his

[2] The transcripts from trial are cited as "Tr. [volume number] ([date]) at [page number]."

sisters testified that he was gay and had "struggl[ed] with his sexual identity . . . ." *Id.* at 2613–17.

The jurors began deliberating at 4:10 pm on January 25. *Id.* at 2697. On the morning of January 26, they sent a three-page note to the trial court about what would happen to Mr. Rhines if he were sentenced to life without the possibility of parole:

> Judge Kon[en]kamp,
>
> In order to award the proper punishment we need a clear p[er]spective on what "Life In Prison Without Parole" really means. We know what the Death Penalty means, but we have no clue as to the reality of Life Without Parole.
>
> The questions we have are as follows:
>
> 1. Will Mr. Rhines ever be placed in a minimum security prison or be given work release.
> 2. Will Mr. Rhines be allowed to mix with the general inmate population.
> 3. [A]llowed to create a group of followers or admirers.
> 4. Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and[/]or young men jailed for lesser crimes (ex: Drugs, DWI, assault, etc.)
> 5. Will Mr. Rhines be allowed to marry or have conjugal visits.
> 6. Will he be allowed to attend college.
> 7. Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex[:] TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment).
> 8. Will Mr. Rhines be jailed alone or will he have a cellmate.
> 9. What sort of free time will Mr. Rhines have (what would his daily routine be).
>
> We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one hand there is Death, and on the other hand what is life in prison w/out parole.

Jury Note, App. 51–53. *See also* Tr. Vol. 13 (1/26/1993) at 2697 (receiving note and marking as Court's Exhibit Number 5 at trial).

The trial court instructed that "[a]ll the information I can give you is set forth in the jury instructions," Tr. Vol 13 (1/26/1993) at 2698–2700, after declining to follow a defense request to instruct the jury not to base its "decision on speculation or guesswork," *id.* at 2699.

Roughly eight hours later, at 6:40 pm, the jury returned a sentence of death. *See id.* at 2701–02.

II. Pertinent Facts From Direct Appeal

The South Dakota Supreme Court affirmed the conviction and sentence. *See* App. 3–50. Among other claims, Mr. Rhines raised the issue of anti-gay juror bias, relied on the contents of the jury's note, and argued that the jury had sentenced him to death under the influence of passion, prejudice, and other arbitrary factors. The South Dakota Supreme Court rejected Mr. Rhines's claims on the basis of the record at trial and on voir dire, specifically finding that the jury's note did not reflect anti-gay bias. *See* App. 42 (citing S.D. Codified Laws § 23A-27A-12 and *Tuilaepa v. California*, 512 U.S. 967, 973–75 (1994));[3] App. 29–30 (reviewing underlying facts when deciding whether trial court abused discretion in refusing to appoint a forensic communication expert because of bias against homosexuality).

[3] South Dakota had passed S.D. Codified Laws § 23A-27A-12 in 1979 in response to *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). *See, e.g.*, *Rhines v. Young*, No. 5:00-CV-05020-KES, 2016 WL 615421, at *49 (D.S.D. Feb. 16, 2016) (discussing the procedure applied in this case in relation to the South Dakota requirement and *Gregg*).

III. Pertinent Facts From State And Federal Postconviction Proceedings Before *Peña-Rodriguez*

Mr. Rhines unsuccessfully sought state and federal habeas relief through litigation that included review by this Court. *See Rhines v. Weber*, 544 U.S. 269 (2005); *Rhines v. Weber*, 608 N.W.2d 303 (S.D. 2000); *Rhines v. Young*, No. 5:00-CV-05020-KES, 2016 WL 615421 (D.S.D. Feb. 16, 2016). In 2016, Mr. Rhines appealed the denial of his federal petition for a writ of habeas corpus. This appeal is pending before the Eighth Circuit Court of Appeals. *See Rhines v. Young*, No. 16-3360 (8th Cir. filed Aug. 3, 2016). He has argued in that appeal that the trial court's refusal to grant a curative instruction in response to the juror note violated the Eighth and Fourteenth Amendments.

Mr. Rhines's assertions of anti-gay bias previously had been limited to suspicions arising from the jury's note because of South Dakota's no-impeachment rule. But recent juror interviews provided compelling evidentiary support for his long-held suspicions.[4]

[4] In March 2016, Mr. Rhines filed a motion to alter or amend the district court's judgment in his federal habeas case and included under seal two juror declarations. *See* Pet'r's Mot. Alter or Amend J. 5:00-CV-05020-KES, ECF No. 323. He argued, in relevant part, that two jurors had considered anti-gay bias in sentencing him to death, violating his right to an impartial jury. *See id.* at 4–7. The filing specifically alleged that one juror had referred to Mr. Rhines as "'[t]hat SOB queer,'" *id.* at 4, and that this reference made other jurors "'fairly uncomfortable,'" *id.* That filing also quoted another juror's statements: "'One of the witnesses talked about how they walked in on Rhines . . . fondling a man in a motel room bed. I got the sense it was a sexual assault situation and not a relationship between the two men,'" *id.* at 6, and that, if sentenced to life imprisonment, Mr. Rhines might be "a 'sexual threat to other inmates and take advantage of other young men in or outside of prison,'" *id.* The district court, however, held that, "regardless of whether the juror affidavits are

In particular, one juror has declared under penalty of perjury that the jury "also knew that [Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison." App. 54. A second juror similarly has declared under penalty of perjury that "[o]ne juror made . . . a comment that if he's gay, we'd be sending him where he wants to go if we voted for [life imprisonment without the possibility of parole]." App. 55. A third juror has said, "'There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community.' . . . ¶ 'There were lots of folks who were like[,] Ew, I can't believe that.'" App. 56 (quoting the third juror) (some quotation marks omitted).

IV. Pertinent Facts From State Proceedings After *Peña-Rodriguez* In Which Mr. Rhines Raised The Federal Question

Following this Court's decision in *Peña-Rodriguez*, Mr. Rhines sought in the South Dakota Supreme Court relief from judgment, reconsideration of that court's prior review of the death sentence for "passion, prejudice or any other arbitrary factors," and a hearing. App. 57–82. He cited the Sixth and Fourteenth Amendments and asserted that South Dakota's no-impeachment rule, *see* S.D. Codified Laws § 19-19-606(b)(1), must give way to consider "compelling evidence" of jurors' "clear and explicit statements" that anti-gay animus and stereotypes

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admissible," Mr. Rhines's motion failed on procedural grounds. *See* Order Denying Mot. Alter or Amend J. 5:00-CV-05020-KES, ECF No. 348 at 5–9.

constituted "a significant motivating factor" in their penalty phase deliberations and decision making. App. 73–79 (quoting *Peña-Rodriguez*, 137 S. Ct. at 861).[5]

The state submitted its own evidence in the form of an investigator's accounts of interviews with nine jurors in 2017. *See* App. 83–92. These jurors, including those identified above, provided self-assessments denying that they had based the death sentence on Mr. Rhines's homosexuality, but no juror retracted his or her earlier statements. For example, the third juror quoted above asserted that his deceased brother had been gay, App. 91, that he "d[id]n't even see how the sexual orientation of the man came into play in this case," App. 91 (quotation marks omitted), and stated: "I don't care if he's queer or not, it didn't matter, the crime was committed as far as I'm concerned," App. 91 (quotation marks omitted). And this juror, along with the second juror, again "recalled a comment to the effect that Rhines might like life in the penitentiary among other men." App. 87. According to the investigator's affidavit, the second juror also said that "one juror made a joke that Rhines might enjoy a life in prison where he would be among so many men." App. 86. The second juror also denied that the statement and Mr. Rhines's sexual orientation had impacted the jurors' decision, submitted a journal from the trial, and asserted that the joke "did not go over well." *See* App. 86 (quotation marks omitted).

[5] On September 28, 2017, Mr. Rhines also filed a motion to amend his petition for federal habeas corpus relief or, alternatively, a motion for Fed. R. Civ. P. 60(b)(6) relief, and attached the evidence of juror bias described here. That motion is still pending. *See* Pet'r's Mot. Amend 5:00-CV-05020-KES, ECF No. 383.

The investigator's affidavit also described an interview involving him, an attorney for the state, the first juror, and that juror's wife, who said that her husband had problems with memory and dementia. App. 91–92. The juror reported that he had been honest during voir dire and denied that he had voted for death because Mr. Rhines is gay. App. 91–92. The affidavit also described the views and opinions of the juror's wife. App. 91. The juror did not retract his statement that "[w]e also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison," App. 54.

On January 2, 2018, the South Dakota Supreme Court squarely held, on the merits, that *Peña-Rodriguez* does not apply to bias on the basis of sexual orientation or require consideration of this evidence: "It is this Court's view that neither [Mr. Rhines]'s legal theory (stereotypes or animus relating to sexual orientation) nor [his] threshold factual showing is sufficient to trigger the protections of *Peña-Rodriguez*[] . . . ." App. 2.[6]

[6] *Compare* App. 1–2 (declining to address procedural issues raised by the state) *with Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.") *and Cone v. Bell*, 556 U.S. 449, 468–69 (2009) ("Although we have an independent duty to scrutinize the application of state rules that bar our review of federal claims, we have no concomitant duty to apply state procedural bars where state courts have themselves declined to do so." (citation omitted)).

REASONS FOR GRANTING THE WRIT

I. Refusing To Consider Disturbing Evidence That Jurors Relied On Anti-Gay Stereotypes And Animus To Sentence A Man To Death Rather Than Life Imprisonment Without Parole Would Undermine Confidence In The System Of Impartial Capital Sentencing.

The logic and principles of *Peña-Rodriguez* regarding jurors' racial bias when deliberating over a guilty verdict apply equally to anti-gay bias that motivates a choice of death instead of life imprisonment without parole. Whether the exception recognized in *Peña-Rodriguez* should extend to compelling evidence of anti-gay stereotyping and animus, at least in a capital case, is an important federal question this Court should address. *See* U.S. Sup. Ct. R. 10.

Tasking jurors with the decision whether to sentence an individual to death and, then, precluding evidence that jurors relied on anti-gay animus and stereotypes violates the right to impartial jury sentencing. *See Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976) (explaining that both the Sixth Amendment and "principles of due process" guarantee an impartial jury). South Dakota's no-impeachment rule must not preclude consideration of this evidence.

South Dakota employs a rule that, like the corresponding federal rule, states:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

S.D. Codified Laws § 19-19-606(b)(1). The rule has several exceptions that do not apply in this case.

A. Providing Sentencing Discretion To Capital Jurors Creates A Special Risk That They Will Invoke Intolerable Bias During Their Deliberations.

This Court long has recognized the "special context of capital sentencing[.]" *Lockhart v. McCree*, 476 U.S. 162, 182 (1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Adams v. Texas*, 448 U.S. 38 (1980)). Inherent in this "special context" is that states have given juries "broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, ..." *Id.* (quoting *Witherspoon*, 391 U.S. at 519). "'Guided by neither rule nor standard, . . . a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.'" *Id.* (quoting *Witherspoon*, 391 U.S. at 519) (some quotation marks omitted). The South Dakota Supreme Court recognized the same. *See, e.g.*, App. 42 (noting jurors' "broad discretion in deciding whether to impose life imprisonment or a death sentence").

The Court, in turn, has been "convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding," *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986) (plurality opinion). *See also Caldwell v. Mississippi*, 472 U.S. 320, 340–41 n.7 (1985) (noting the "highly subjective" nature of the jury's sentencing decision (going on to quote *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in judgment)).

Given that recognition, to look away from evidence that jurors invoked deeply-rooted prejudice in exercising their discretion risks a "systemic loss of confidence" in capital jury sentencing. *See Peña-Rodriguez*, 137 S. Ct. at 869.

This Court's jurisprudence regarding constitutional requirements associated with voir dire reflects its particular concern that juror bias might operate more freely in capital cases. The Court has noted the difficulty in assessing voir dire on appeal, but "ha[s] not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." *Morgan v. Illinois*, 504 U.S. 719, 730 (1992) (citing *Turner*, 476 U.S. at 36–37; *Ham v. South Carolina,* 409 U.S. 524, 526–27 (1973)). In *Ristaino v. Ross*, 424 U.S. 589 (1976), a noncapital case, it explained that "questioning about racial prejudice" must be allowed as a matter of constitutional law under particular circumstances. *See id.* at 596–97 (discussing *Ham*). Subsequently, in *Turner*, it held that a defendant is entitled to question potential jurors about racial prejudice in a capital trial involving an interracial crime. *See Turner*, 476 U.S. at 36–37.

As discussed in this petition, the logic of *Peña-Rodriguez* cannot apply to racial bias in jury factfinding without applying to capital jury sentencing and comparably dangerous prejudice. Indeed, the Government of the United States conceded to this Court at oral argument for *Peña-Rodriguez* that "capital cases do present Eighth Amendment considerations . . . . The Court has often suggested under the Eighth Amendment different sets of rules apply, and there may be different considerations in that context," *Peña-Rodriguez*, No. 15-606, Tr. of Oral Arg. 51 (Oct. 11, 2016). Just as this Court considered Fourteenth Amendment principles in *Peña-Rodriguez*, *see* 137 S. Ct. at 867–68, here, it also should consider its "'recogni[tion] that the qualitative difference of death from all other punishments

requires a correspondingly greater degree of scrutiny of the capital sentencing determination,'" *Turner*, 476 U.S. at 35 (plurality opinion) (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

B. Anti-Gay Bias Poses A Threat To Impartial Jury Sentencing Comparable To That Posed By Racial Bias.

Peña-Rodriguez arose "at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system." *Peña-Rodriguez*, 137 S. Ct. at 868.[7] There, two jurors came forward to state that a third juror, during deliberations on guilt in a noncapital case, "had expressed anti-Hispanic bias toward [a] petitioner and [the] petitioner's alibi witness." *Id.* at 861. The Court distinguished instances of juror "drug and alcohol abuse" and "pro-defendant bias," *id.*, by stressing the "systemic injury to the administration of justice" that would result if juror-based racial discrimination were left unaddressed. *Peña-Rodriguez,* 137 S. Ct. at 868.[8] Whereas "attempt[ing] to rid the jury of every irregularity of [the former] sort would be to expose it to

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[7] The Court earlier had established that "the Constitution . . . prohibits the exclusion of defense evidence under rules of evidence . . . that are disproportionate to the ends that they are asserted to promote," *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). *See Rock v. Arkansas*, 483 U.S. 44, 62 (1987); *Davis v. Alaska*, 415 U.S. 308, 320 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. 14, 15, 23 (1967); Brief for Pet'r at 15–16, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606), 2016 WL 3453451.

[8] *Cf. McDonald v. Pless*, 238 U.S. 264, 268–69 (1915) (recognizing that "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' This might occur in the gravest and most important cases; . . . ." (quoting *United States v. Reid*, 53 U.S. 361, 366 (1851)); *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014) ("There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged."); *Peña-Rodriguez*, 137 S. Ct. at 864 (same).

unrelenting scrutiny," *id.*, the "effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy," *id.*

Like race-based bias, anti-gay bias causes systemic harm to the justice system and, in particular, capital jury sentencing.

Prejudice based on sexual orientation is just as long-standing and deeply rooted. "Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law." *Obergefell v. Hodges,* 135 S. Ct. 2584, 2596 (2015). "Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Id.*

Historically, "[g]ays and lesbians did not identify themselves as such because . . . being openly gay resulted in significant discrimination. The machineries of discrimination . . . were such that explicit exclusion of gay individuals was unnecessary—homosexuality was 'unspeakable.'" *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485 (9th Cir. 2014) (citing and quoting Kenji Yoshino, *Covering,* 111 Yale L.J. 769, 814–36 (2002)).

Among the "[s]tereotypes of gays and lesbians" that courts have recognized as having "pernicious effects," are that they are "promiscuous, . . . 'disease vectors' or child molesters." *Abbott Labs.*, 740 F.3d at 486 (citation omitted). "Empirical

research has begun to show that discriminatory attitudes toward gays and lesbians persist and play a significant role in courtroom dynamics." *Id.* (citing Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39:2 J. of Homosexuality 93 (2000)).[9]

In addition, as with race, the same pragmatic concerns the Court addressed in *Peña-Rodriguez* apply here. Jurors often are hesitant to reveal anti-gay bias, making it difficult to address through pretrial questioning. *Cf. People v. Peña-Rodriguez*, 412 P.3d 461, 474 (Col. App. 2012) (explaining that "while some prospective jurors may be hesitant to admit racial bias, prospective jurors may be hesitant to admit gender bias, . . . [and] bias based on sexual orientation, . . ."), *aff'd*, 350 P.3d 287, *rev'd and remanded sub nom. Peña-Rodriguez*, 137 S. Ct. 855.

This Court noted the challenges that arise when questioning potential jurors about racial bias: "Generic questions" might not result in revelations of bias, and "more pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'" *Peña-Rodriguez*, 137 S. Ct. at 869

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[9] In an analogous context, the Court has recognized that classifications other than those on the basis of race require court intervention during jury selection. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (applying *Batson v. Kentucky*, 476 U.S. 79 (1986), to peremptory strikes on the basis of gender, and distinguishing strikes "to remove from the venire any group or class of individuals normally subject to 'rational basis' review"). And Justice Kennedy's concurrence noted concerns about gender bias in jury deliberations: "We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own." *Id.* at 153 (Kennedy, J., concurring). Moreover, "[t]he wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath." *Id.* (Kennedy, J., concurring).

(quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring in result)). The same goes for anti-gay bias. Here, in fact, Mr. Rhines's lawyers asked nearly all of the jurors if they could treat him fairly after learning that he is gay. Despite the jurors' assurances of fairness, evidence now shows that the fact of Mr. Rhines's homosexuality and their perception of it played a significant role in their deliberations on a death sentence.

In addition, "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Peña-Rodriguez*, 137 S. Ct. at 869. That remains true for anti-gay bias, and the trial courts' usual safeguards doubly failed in this case. The jurors wrote a note to the trial court that suggested their improper consideration of sexual orientation, but did not report the inappropriate use of stereotypes and animus that had occurred. *See* App. 51–53. And the trial court told the jury to keep deliberating without addressing, let alone disapproving, the suggestion in the note that jurors inappropriately were discussing sexual orientation.

Lower courts have found that discrimination and stereotyping on the basis of one's sexual orientation are comparable to such actions on the basis of race.

For example, the Ninth Circuit has held that *United States v. Windsor*, 570 U.S. 744 (2013), compelled the conclusion that *Batson* applies when an attorney exercises peremptory strikes on the basis of a potential juror's sexual orientation, stressing that "in its words and its deed, *Windsor* established a level of scrutiny for

classifications based on sexual orientation that is unquestionably higher than rational basis review." *Abbott Labs.,* 740 F.3d at 481, 486.[10]

Other courts, considering the facts of each case, have reached conflicting results regarding whether a party must be permitted to question veniremembers about their potential anti-gay bias.[11] For example, in *United States v. Bates*, 590 F. App'x 882, 887 (11th Cir. 2014) (unpublished), the Eleventh Circuit held that a

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[10] The U.S. Attorney's Manual stated in February 2018: "The attorney for the government should oppose attempts by the court to impose any sentence that is: . . . (5) based on a prohibited factor, such as race, religion, gender, ethnicity, national origin, *sexual orientation*, or political association, activities, or beliefs." U.S. Dep't of Just., U.S. Atty's Manual No. 9-27.745, Unreasonable or Illegal Sentences (last updated February 2018) (emphasis added). And, in 2012, the U.S. Department of Justice adopted a policy that "[*Batson*] should be interpreted to extend to juror strikes based on sexual orientation." C.J. Williams, *To Tell You the Truth, Federal Rule of Criminal Procedure 24(a) Should Be Amended to Permit Attorneys to Conduct Voir Dire of Prospective Jurors*, 67 S.C. L. Rev. 35, 69 n.35 (2015) (quoting Memorandum to All Department Employees from Eric H. Holder, Jr., Attorney General, on Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples (Feb. 10, 2014)).

[11] The Supreme Judicial Court of Maine stated in 1982: "It is axiomatic that a juror who admittedly harbors anti-homosexual prejudice should be subject to inquiry at the trial of an individual who is or may be perceived to be a homosexual." *State v. Lovely*, 451 A.2d 900, 902 (Me. 1982). *Cf. State v. Rulon*, 935 S.W.2d 723, 726 (Mo. Ct. App. 1996) (noting that the "inextricably bound up" test applies to "[r]acial issues, and presumably other issues of potential prejudice by analogy," applying that test after stating, "[i]f we assume that the *Ham* requirements apply to prejudice against homosexuals," but concluding that the defendant could not satisfy the test). *But see United States v. Click*, 807 F.2d 847, 849–50 (9th Cir. 1987) (affirming trial court's denial of a homosexual defendant's request for questioning in a noncapital case regarding "bias against homosexuals," reasoning that "the effect of asking such a question is sufficiently problematic to justify its avoidance by the trial court"); *Kemp v. Ryan*, 638 F.3d 1245, 1262 (9th Cir. 2011) (concluding, in an AEDPA case in which a state court judge, not a jury, had sentenced the defendant to death: "[the petitioner] has not offered any case law holding that homophobia should be elevated to the same level as racial prejudice").

federal district court in a noncapital case had been constitutionally required to permit voir dire on bias when a defendant's "sexual activity and gender non-conforming conduct" were "'inextricably bound up' with the issues to be resolved at trial." *Id.* at 887 (quoting *Ross*, 424 U.S. at 597). Later, in *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017), the Eleventh Circuit reversed a federal district court for a similar failure when "the sexual orientation of [a plaintiff in a civil case] and his witnesses [were] central facts at trial and were 'inextricably bound up' with the issues to be resolved at trial," *id.* at 1358 (quoting *Rosales-Lopez*, 451 U.S. at 189). *See also id.* (explaining that the "facts and circumstances" of the case had created "a 'reasonable possibility that [sexual orientation bias] might have influenced the jury'" (quoting *Rosales-Lopez*, 451 U.S. 192)); *id.* (citing *Obergefell*, 135 S. Ct. at 2596–97, and the "the long history of cultural disapprobation and prior legal condemnation of same-sex relationships"). *Cf. State v. Jonas*, 904 N.W.2d 566, 571–75 (Iowa 2017) (discussing "cases in which potential jurors expressed bias related to gay people in cases with sexual context," and concluding that a trial court abused its discretion in denying a for-cause challenge when a veniremember had expressed "actual bias against gay people in the original questionnaire and during voir dire"); Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv. J. L. & Gender 407, 427–34 (2014) (discussing cases involving veniremembers' expressions of potential bias against homosexuality during voir dire).[12]

[12] Further, when jurors perceive a male defendant's relationship with another man with bias, stereotypes, or disgust and consider that perception in sentencing him to death, but they would not have that same perception for a female defendant's

C. Conclusion

For the reasons discussed above, this Court should grant the petition for a writ of certiorari. To allow a juror to vote for a man's death sentence on the basis of anti-gay animus and stereotypes unquestionably violates the Sixth and Fourteenth Amendments, along with the foundational principle that "[o]ur law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle," *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (applying the Sixth Amendment guarantee of effective assistance of counsel when an attorney injected race-based testimony into a jury's sentencing determination). Whether the exception the Court recognized in *Peña-Rodriguez* should protect against anti-gay bias, at least when twelve jurors assemble to decide whether a man should live or die, is an important question that this Court should answer.

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relationship with a man, then they are biased because of sex and applying gender stereotypes. *Cf. Peña-Rodriguez*, 137 S. Ct. at 869 (indicating that its decision involved "racial stereotypes" in addition to "animus"); *J.E.B.*, 511 U.S. at 146 ("When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized."). Two circuits sitting en banc now have concluded in Title VII cases that discrimination on the basis of sexual orientation is a form of sex discrimination, following reasoning from *Loving v. Virginia*, 388 U.S. 1 (1967), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), among other cases. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113–15, 124–28 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 342, 345–49 (7th Cir. 2017) (en banc); *see also Hively*, 853 F.3d at 341–42, 350 (collecting cases regarding this issue). *Cf. Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018) (panel decision concluding that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex").

II. The Evidence Mr. Rhines Has Presented Makes This Case Suitable For This Court's Intervention After The South Dakota Supreme Court Reached Its Judgment Without A Hearing Or Resolution Of Material Factual Disputes.

Three factors make this case suitable for this Court's review, particularly after the recent decision in *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam). There, a petitioner "moved to reopen his federal habeas corpus proceedings regarding his claim that the Georgia jury that convicted him of murder included a white juror . . . who was biased against [the petitioner] because he is black." *Id.* at 545. This Court explained that "[the juror's] remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that [the petitioner]'s race affected [the juror]'s vote for a death verdict." *Id.* at 546. It reversed a lower federal court's certificate-of-appealability decision and explained that "jurists of reason could debate whether [the petitioner] ha[d] shown by clear and convincing evidence that [a] state court's factual determination [that the petitioner's race affected the juror's vote for a death sentence] was wrong," *id.* at 545–46. Although the Court noted the "high bar" that the petitioner would face on remand, it granted the petition for certiorari, vacated the lower court's judgment, and remanded because of the "unusual facts of th[at] case" and the lower court's basis for its decision. *See id.* at 546–47.[13]

[13] On remand, the Eleventh Circuit has distinguished a "pre-*Peña-Rodriguez* Claim" from a "*Peña-Rodriguez* Claim." *See* Order on Remand at 2–5, *Tharpe v. Sellers*, No. 17-14027 (11th Cir. April 3, 2018). It denied without prejudice the petitioner's application for a certificate of appealability on the ground that the petitioner had not exhausted the latter claim in state court, noting that the denial "will enable [the

This capital case, like *Tharpe*, merits this Court's review.

First, Mr. Rhines presented statements from jurors reflecting animus and stereotypes aimed at an immutable characteristic, his homosexuality. The statements in this case also confirm his suspected interpretation of the jury note that had asked—and offered an apology for—"inappropriate," irrelevant, and troubling questions about Mr. Rhines's future ability to "mix" with other inmates, "marry or have conjugal visits," and be able to "brag" to "new and[/]or young men . . . [,]" if they had not sentenced him to death. *See* App. 51–53.

The jurors who provided evidence of anti-gay bias have not retracted their earlier statements. To the extent jurors now characterize statements as poorly chosen jokes or deny their effect on the deliberations, this Court should recognize that the nature of the statements and willingness to make them in deciding whether a man should live or die betrays any attempt now to limit their weight. As the Eleventh Circuit aptly explained in a similar context: "[A]nti-Semitic 'humor' is by its very nature an expression of prejudice on the part of the maker. . . ." *United States v. Heller*, 785 F.2d 1524, 1527–28 (11th Cir. 1986). Moreover, "[i]t is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism." *Id.* (footnote

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petitioner] to pursue the [latter claim] in a successive petition in the [state court]." *Id.* at 9–10.

omitted). At least, there are material disputes of fact that require a remand for a hearing.[14]

Second, jurors' statements in this case evidence a clear and disturbing nexus during deliberations between their biases and their choice of a death sentence to, in one juror's words, keep Mr. Rhines from "life with men in prison" or, as another commented with regard to his homosexuality, from "where he wants to go." *Compare* App. 51–56 *with Tharpe*, 138 S. Ct. at 553 (Thomas, J., dissenting) (noting that jurors "testified that they did not consider race and that race was not discussed during their deliberations").

Third, Mr. Rhines can demonstrate actionable bias, *see Phillips*, 455 U.S. at 215–16, and juror misconduct in the form of providing material false information during voir dire, *see McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 549 (1984).[15] Here, Mr. Rhines has evidence that at least two of the jurors whose statements he has proffered indicated during voir dire that Mr. Rhines's sexual orientation would not affect their decision. *See* Tr. Vol. 2 (1/5/1993) at 328 (first

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[14] Courts assess whether improper bias arose even when jurors do not expressly recognize or admit that they harbor such bias. *See, e.g.*, *Murphy v. Florida,* 421 U.S. 794, 800–03 (1975); *Smith v. Phillips*, 455 U.S. 209, 221–23 (1982) (O'Connor, J., concurring). Rather, assessing the role of bias involves factual determinations. *See, e.g.*, *Phillips*, 455 U.S. at 215 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has an opportunity to prove actual bias."); *see also Wellons v. Hall,* 558 U.S. 220, 221–26 (2010) (per curiam) (granting a petition for a writ of certiorari, vacating a judgment in light of an erroneous ruling on procedural default, and remanding to consider whether a petitioner would be entitled to discovery and a hearing regarding claims of juror and court bias and misconduct).

[15] Under *McDonough Power*, a new trial is necessary if (1) "a juror failed to answer honestly a material question on voir dire," and (2) "a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

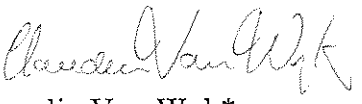
juror quoted in this petition) ("I guess a man or lady has to live their own lives the way they see fit . . . I don't see where that would have any variance on this case as far as I'm concerned."); Tr. Vol. 5 (1/8/1993) at 932 (third juror quoted in this petition) (answering "Not at all" when told about "evidence . . . that will show that Mr. Rhines is a homosexual, he's gay and one or two of the witnesses who might be called in this case are also gay and have had relationship[s] with Mr. Rhines," and asked whether "that cause[s] you to view Mr. Rhines differently at all?"). Yet Mr. Rhines has evidence that contradicts those voir dire statements and shows actionable bias: the jurors' later statements regarding Mr. Rhines's homosexuality. Had each answered the voir dire questions honestly, Mr. Rhines and his attorneys could have challenged each for cause.

In sum, that jurors in Mr. Rhines's case denied biases against homosexuals during voir dire, made suspicious statements in a note to the trial court, and only revealed the role of anti-gay animus and stereotyping in their deliberations in later interviews raises material factual disputes that implicate important constitutional claims. This Court should consider whether the state's no-impeachment rule must give way to allow the resolution of those claims before the state seeks to carry out this jury's death sentence.

CONCLUSION

For the reasons discussed above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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