No. 17-9100

IN THE
Supreme Court of the United States

NOAH KLEINMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

MOTION OF FULLY INFORMED JURY ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE FULLY INFORMED JURY ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a trial court's coercive anti-nullification instruction strip the jury of its essential power to nullify and the criminal defendant of his constitutional right to an independent jury, and does such an error constitute structural error?

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MOTION OF THE FULLY INFORMED JURY ASSOCIATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the Fully Informed Jury Association (FIJA) moves for leave to file the attached *Amicus Curiae* brief in support of Petitioner. FIJA timely notified the parties of its intention to submit its *amicus* brief more than 10 days prior to filing. Counsel for Petitioner, Noah Kleinman, has consented to the filing of this brief while Respondent, the U.S. Solicitor General, has given no response.

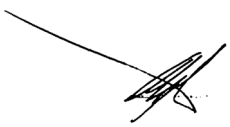
FIJA is the premier (and possibly the only) nonpartisan, educational outreach organization dedicated to informing the public of the full function of the jury. For more than 25 years, FIJA has conducted research, publishing, and educational outreach programs nationwide to inform everyone of their rights and responsibilities—including the right of conscientious acquittal by jury nullification—in delivering just verdicts when serving as jurors.

The Fully Informed Jury Association was first organized in 1989 and has operated strictly as an educational organization since 1992. Its efforts have included substantial research and public dissemination of this information regarding the history of jury nullification and the Constitutional right to trial by jury in the American legal system.

As such, the Fully Informed Jury Association is well suited to assist this Court's consideration of the matter regarding anti-jury nullification instructions. FIJA, therefore, respectfully requests leave to file the attached *amicus* brief urging this Court to grant to the petition.

This *amicus* brief is appropriate and will aid the Court in its consideration of the second question presented by Petitioner regarding the effect of anti-jury nullification instructions given to the jury on the Petitioner's right to trial by jury.

Respectfully submitted,



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STATEMENT OF IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE[1]

The Fully Informed Jury Association (FIJA) is a corporation, duly registered and headquartered in the state of Montana. FIJA is a nonprofit, nonpartisan, educational outreach organization, pursuant to IRC §501(c)(3). Its mission is to preserve the full function of the jury by informing everyone of their rights and responsibilities—including the right of conscientious acquittal—in delivering just verdicts when serving as jurors. FIJA conducts its educational efforts through a variety of programs and materials, research and publication on jury-related issues, outreach via an array of media, both traditional and modern, and other appropriate

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[1] STATEMENT OF COMPLIANCE

This brief is wholly the product of the Fully Informed Jury Association ("FIJA") and its counsel. No counsel for any party authored this brief in whole or in part, and no person or entity, brief other than the *amicus curiae* or its affiliates, made a monetary contribution intended to fund the preparation or submission of this brief. The brief is also in compliance with Supreme Court Rule 33, being under 6,000 words. Counsel for FIJA duly contacted counsel for the parties more than ten (10) days prior to the filing of this petition and brief pursuant to Rule 37. Counsel for Noah Kleinman has consented to the filing of this brief while the U.S. Solicitor General has given no response.

means. The group also maintains a website, www.FIJA.org, which provides information and materials in furtherance of its mission and purpose at no charge to the public.

It is not within the scope of FIJA's mission or activities to advocate for specific jury verdicts in any case in progress. Rather, FIJA educates the general public, which includes potential jurors, regarding the historic and constitutional role of the jury as a protector of criminal defendants (and hence the community) from unjust laws, malicious prosecutions and government abuses. As part of its educational mission, FIJA sometimes files *amicus* briefs when matters regarding the jury are at issue to clarify and illuminate jurors' full constitutional authority and the crucial role of the jury in protecting human rights and restraining government.

FIJA submits that the jury instructions given in the District Court below were among the most unnecessarily overbearing, abusive and intimidating jury instructions ever administered in a federal trial. Trials by jury are already in danger of extinction, with well over 90% of criminal charges being adjudicated unilaterally by the government. The Sixth Amendment guarantee of jury trial will be further eroded if such instructions are upheld as lawful or become a norm in this Circuit.

STATEMENT OF THE CASE

On June 16, 2017, a three-judge panel of the Ninth Circuit, led by Judge Milan D. Smith, Jr., held that the jury instructions given by the District Judge in this case unlawfully instructed the jurors regarding "jury nullification," but that the unlawful

jury instructions were harmless error. Appellant Noah Kleinman continues serving his lengthy prison sentence for nonviolent medical marijuana cultivation and distribution.

As Friend of the Court, FIJA hopes to inform the Supreme Court that such fundamentally flawed jury instructions cannot be harmless error, as such an error misdirects jurors regarding their fundamental powers. The erroneous instructions in this case were the most basic of structural errors.

The panel was correct in finding that the jury instructions were unlawful but was incorrect in failing to reverse Kleinman's conviction and remand this case for a new trial.

FACTUAL BACKGROUND

From virtually the onset of the prosecution in this case, the government and the District Court expressed concern over the threat of "jury nullification." The topic was the focus of at least one pretrial hearing, prosecution motions and several trial interludes during the proceedings.

The District Court addressed the jurors themselves regarding the issue of jury nullification at least three times during *voir dire*. The Court repeatedly asked whether or not the jurors could follow the law even if they disagreed with it and lectured the jurors that they were not to question the law.

In response to reports during trial that there were jury rights educators demonstrating outside the courthouse, the District Court held a bizarre early-morning hearing on June 4, 2014. The District Court repeatedly implied that Kleinman or his attorneys were responsible for or even controlling a

demonstration outside. It openly hinted that defense counsel or Kleinman might need the protections of the "Fifth Amendment" and told defense counsel that the "appearance now is that this is something you all staged . . ." Tr. Transcript 6/4/14 at 7.

The District Court suggested that jury rights educators might influence the jury to render a "wrong" verdict and hinted that there would be repercussions to defense counsel if such a "wrong" verdict were produced:

> THE COURT: Okay. You know, at the end of the day if this thing goes wrong, there's only one person to pay. That person needs to do whatever it is in his power to make things right.

Tr. Transcript 6/4/14 at 8.

From the context of these remarks, it is clear that the District Court meant that a "wrong" outcome would be a failure of the jurors to find Noah Kleinman guilty. A "correct" outcome would be conviction.

Faced with a suggested involvement of the defense with jury nullification demonstrators, the District Court aligned itself with the prosecutor to root out the alleged threat of jury nullification. Assistant U.S. Attorney MS. SHEMITZ stated that "I think that the -- this is a very important inquiry that we're about to embark on and it is critical that they understand the gravity of what they're doing . . ." Tr. Transcript 6/4/14 at 9-10.

The District Court, agreeing with the prosecution that "gravity" and "seriousness" needed to be impressed upon the jurors, remarked that jurors "lie like hell." "First they lie not to get in that seat; now

they will lie to keep that seat" (p 10). The government agreed, and the District Court and the prosecution devised a plan to relax the jurors and then individually ply out "the truth" from them. From the context, the obvious meaning was any indication that the "lying" jurors might be inclined to exercise any jury nullification.

But the District Court had difficulty identifying any juror who actually possessed the forbidden knowledge of jury nullification. Most of the jurors hadn't even noticed any demonstrators or read their signs. Of those who read any signs, most didn't even know if the signs were intended for them or involved the Kleinman trial. Tr. Transcript 6/4/14 at 11-23. Only Juror Christina interpreted the protestors' signs to be "pro-pot" and "guessed" the signs were trying to sway readers "towards the legalization of marijuana, which has nothing to do with this case" (p. 15-16). Juror Casey came closest to admitting the top secret knowledge, saying he assumed the signs referred "to juries being able to say no to a law even if, like, that's what the law says, if they feel that it's an unjust law" (p. 17-18). But the juror indicated that the taboo information couldn't be directed toward the Kleinman jury because no unjust laws were at issue in the Kleinman trial (p. 18).

The District Court continued to badger the jurors regarding their lowly role as mere fact-finders throughout the trial. Finally, at trial's end, the District Court delivered several jury instructions repeating the catechism that jurors are to obey the interpretations of the Court, including the following jury instruction:

> You cannot substitute your sense of justice, whatever that means, for your

> duty to follow the law, whether you agree with it or not. It is not your determination whether a law is just or whether a law is unjust. That cannot be your task. There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.

ER 21-22.

SUMMARY OF FIJA'S ARGUMENT

"Jury nullification" is popular nomenclature for the exercise of conscientious acquittal by jurors: the declaration by jurors that a defendant is "not guilty" even in circumstances where the defendant may have technically violated some statute. Jurors typically consider this in cases where a law is unjust, a prosecution is abusive, or when other circumstances may forgive or justify the defendant's actions or inactions. Of course, conscientious acquittal cannot "nullify" any law; the law will continue to be in effect after a verdict in any given case.

Contrary to the extreme prosecutorial ideology and culture that prevails in contemporary court practice, juror knowledge of jury nullification power is in no way improper, unethical or destructive of justice. In fact, juror knowledge that juries may use "jury nullification" to protect Americans from tyrannical government is the true purpose for the constitutional right and enshrinement of trial by jury. Courts should celebrate, embrace and openly inform jurors of their absolute right to acquit rather than seeking

to deceive jurors or to conceal this knowledge and power from them.

The Appellant, Noah Kleinman, may have made many technical and legal mistakes during his participation in a medical marijuana-growing operation. Yet the jury that convicted him was deprived of its right to provide Kleinman with any grace or mercy. The District Court's approach and treatment of the jury, and its jury instructions, so deprived the jury of its ability to deliberate over Kleinman's fate that Kleinman was utterly deprived of trial by jury.

The entirety of these instructions, together with the repeated nagging of the District Court, communicated harmful messages to the jury. First, it told jurors that the District Court and prosecutor were closely monitoring the jurors for signs of the forbidden knowledge of jury nullification. It further conveyed to them that the court was overly concerned with detecting, dampening and deadening any sign that they might forgive any of Mr. Kleinman's errors, particularly in light of the clear trend of Californians favoring decriminalization of medical marijuana. The jury understood that they were expected to deliver a verdict of exacting compliance with the most technical aspects of federal drug laws from a prosecution perspective.

Under the Constitution's original intent, jurors were to act as a check against the power of government rather than as a mere fact-finding device. All of the principal Constitutional Framers, including Madison, Adams, Jefferson, Hamilton, and others, are on record stating that juries are to protect the community from the abusive acts and encroachments of prosecutors, judges and legislators.

THE THREE-JUDGE PANEL OPINION

The panel composed of Judges David M. Ebel (a Tenth Circuit Judge sitting by designation), Milan D. Smith, Jr., and N. Randy Smith rendered an insightful analysis of the jury instructions in the District Court below. The panel opinion (authored by Milan D. Smith Jr.) concluded that the "last two sentences of the [most threatening] jury instruction were erroneous." (Those sentences instructed the jury that "There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.")

However, the panel found that the instructions as a whole were harmless error, and the panel upheld Noah Kleinman's conviction and sentence. FIJA argues below that the wholly inaccurate warning to jurors that they 'would violate the law if they willfully brought a verdict contrary' to the District Court's instructions were structural error of the most egregious level. Moreover, even the remaining 3 sentences of the District Court's [most threatening] jury instruction ("You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not your determination whether a law is just or whether a law is unjust. That cannot be your task.") is equally as inaccurate as the last two sentences.

ARGUMENT

I. THE DISTRICT COURT'S JURY INSTRUCTIONS INTRUDED UPON THE JURY'S MOST FUNDAMENTAL PROVINCE, AND CANNOT BE HARMLESS ERROR

Over the past forty years, America's criminal courts have gradually moved from "may convict" to "must convict" jury instructions. This is consistent with an ascendance of certain theories of the prosecution bar that jurors are to be considered mere fact-finders and are never to be informed of their true constitutional role as a check on government power. Such "must convict" instructions are wholly alien to constitutional law, without sanction in constitutional history, wholly divorced from Framers' intent, and divorced from the jurisprudence of the Supreme Court.

While jury instructions have increasingly taken on a tone and orientation reflecting the prosecution bar's desire to repress jury discretion. Yet never before has a jury been instructed in such an overtly ham-fisted manner as the jury in Noah Kleinman's trial below.

Appellant Noah Kleinman was subjected to a jury "trial" in which the jurors were repeatedly nagged regarding their subservience to the District Court and the supposed unlawfulness of jurors applying any discretion regarding the application of criminal law. Under such circumstances, it would only be natural if they surmised that "not guilty" verdicts would need to be delivered in a chilled moment of awkwardness, anxiety and discomfort, or else that the trial might be followed by interrogation, investigation, or detention of the jurors. The jury did

what was easiest and safest in these circumstances. They convicted Kleinman on every count rather than provoking the wrath of the court and the prosecution team.

Under the pretense of seeking to ward off any influence of jury nullification demonstrators holding signs near the courthouse, the District Court offered the most extreme anti-jury nullification instruction ever given in a federal trial:

> You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not your determination whether a law is just or whether a law is unjust. That cannot be your task. There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.

ER 21-22.

This extreme language appears to have descended from language in a notorious case, *United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988), in which a split panel of the Sixth Circuit upheld (over a vigorous dissent) the delivery of an instruction that "[t]here is no such thing as valid jury nullification" and told a jury that its "obligation is to follow the instructions of the Court as to the law given to you." But the *Krzyske* language was in response to a note passed from jurors asking about jury nullification, whereas Kleinman's trial featured not a trace of evidence of juror interest in nullification. The Kleinman instructions also extended the extreme

Krzyske language significantly with additional instructions that "You cannot substitute your sense of justice, whatever that means, for your duty to follow the law," and that jurors are not to determine "whether a law is just or . . . unjust."

II. A JURY'S APPLICATION OF ITS "SENSE OF JUSTICE" IS THE VERY PURPOSE AND ESSENCE OF TRIAL BY JURY

Unleashing a jury's sense of justice is precisely the constitutional design behind the right to trial by jury. Even a casual glance at the statements of the Constitution's Framers regarding jury independence yields a record that belies the District Court's marginalization of the jury as a body of submissive robotic citizen fact-finders. See William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 *Mich L. Rev.* 893, 904 (1978) ("juries rather than judges spoke the last word on law enforcement in nearly all, if not all, of the eighteenth-century American colonies").

The Founders viewed jurors as participants in the political system no less than senators or congressional representatives. See Akhil R. Amar, *The Bill of Rights: Creation & Reconstruction* 83-94 (1998). Some Framers suggested the jury "could function like a sitting constitutional convention, an authoritative interpreter of the meaning of constitutional documents." See Roger Roots, *The Rise and Fall of the American Jury* 8 *Seton Hall Circuit Review* 113 (2011). The Framers repeatedly spoke of juries as playing a role of spoiler in the judicial

branch, protecting local citizens against arbitrary acts of government power. Id.

A jury's absolute right to act as a check on government is plainly implied in the language of Article III, Section 2 (in which the right to jury trial makes its entrance in the Constitution as the "lower chamber" of the Judicial Branch—and the most important limitation on the Judiciary). See Akhil R. Amar, *The Bill of Rights: Creation & Reconstruction* 94 (1998).

By contrast, there are no provisions in Article III, or anywhere in the Constitution, which say that judges are to have the final power of interpreting the law. Article III speaks only of "the judicial Power" and indicates in Section 2 that juries—as much as or more than judges—wield this power in the "trial of all crimes."

The double jeopardy clause of the Fifth Amendment also places in the jury's hands the ability not only to nullify a law's application but to effectively end the government's prosecutorial attack on a fellow countryman altogether. "[T]he hard core of the double-jeopardy clause is the absolute, unquestionable finality of a properly instructed jury's verdict of acquittal," writes Professor Amar, "even if this verdict is egregiously erroneous in the eyes of judges." See Akhil R. Amar, *The Bill of Rights: Creation & Reconstruction* 97 (1998).

III. THE DISTRICT COURT'S INSTRUCTION DEFIED WELL-SETTLED CONSTITUTIONAL LAW

It is not the law that juries must find a defendant guilty when the Government meets its burden of

proof, though they may do so. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) (trial judges are prohibited from "directing the jury to come forward with [a guilty] verdict, regardless of how overwhelming the evidence may point in that direction"); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (saying any legal system that would rob jurors of their discretion to acquit against the evidence would be "totally alien to our notions of criminal justice"); *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947) ("a judge may not direct a verdict of guilty, no matter how conclusive the evidence"); *United States v. Mentz, 840 F.2d 315, 319 (6th Cir. 1988)* ("Regardless of how overwhelming the evidence may be, the Constitution delegates to the jury, not to the trial judge, the important task of deciding guilt or innocence"); *Konda v. United States*, 166 F.91, 93 (7th Cir. 1908) (an accused has a right to a chance of a jury acquittal even where "the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting"); *Buchnanan v. United States*, 244 F.2d 916 (6th Cir. 1957) (a trial judge cannot instruct a jury to convict even if the facts of guilt are undisputed); *Dinger v. United States*, 28 F.2d 548, 550, 551(8th Cir. 1928) (trial judge's instruction that "if you believe the testimony of these agents . . . you would be justified, and in fact required, to find the defendant Dinger guilty" was a "most serious error" "not permissible in a criminal case"); *Billeci v. United States*, 184 F.2d 394, 399 (D.C. Cir. 1950) (must-convict instruction "is not the law. The law is that if the jury believes beyond a reasonable doubt

that the defendant has committed the alleged offense it should find a verdict of guilty").

Never has the Supreme Court issued a decree that jurors must abandon their senses of justice, their assessment of the justness of laws, or their consciences if the government proves its case beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) (referring to the jury's "unassailable" power to issue an "unreasonable verdict of 'not guilty'"); *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (criminal juries have an inherent discretionary power to "decline to convict," and such "discretionary exercises of leniency are final and unreviewable"); *Batson v. Kentucky*, 476 U.S. 79, 86-87 n.8 (1986) (the jury's role "as a check on official power" is in fact "its intended function"); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (discussing jurors' well-established "power to follow or not to follow the instructions of the court"); *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) ("a jury is entitled to acquit the defendant because it has no sympathy for the government's position. It has a general veto power"); *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969) ("the jury, as the conscience of the community, must be permitted to look at more than logic . . . . The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly"). See also *State v. Koch*, 85 P. 272, 274 (Mont. 1906) ("the jury has power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and . . . the court or judge has no power to punish them for such conduct"); *Titus v. State*, 7 A. 621, 624 (N.J. 1886)

("some of the jurors were called as witnesses, . . . to prove their own official misconduct, or that of their fellows. Such course was conspicuously illegal.").

The only Supreme Court justice ever impeached, Samuel Chase, was impeached in part for "endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give" during a 1798 treason trial. See William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 59-60 (1992). (Chase later recanted and acknowledged that the jury had power to deliberate upon matters outside the limited scope of his instructions, and the U.S. Senate declined to convict and remove Chase.)

Since Bushell's Case in 1670 (*Howell's State Trials*, Vol. 6, Page 999 (6 How. 999)), Anglo-American law has enshrined the principle that no juror can ever be punished for his verdict, no matter how nonsensical or seemingly illogical the verdict might seem to presiding judges or prosecutors. Jurors have had the common law and constitutional right to deliberate freely and to exonerate any defendant regardless of the seeming appearance of great weight of evidence.

The District Court defied all of these standards in instructing Kleinman's jury. And by finding these errant instructions to be harmless, the Ninth Circuit has essentially written a blank check for judges to continue falsely instructing jurors in federal trials.

IV. THE DISTRICT COURT'S ERRORS IN INSTRUCTING THE JURY CANNOT BE HARMLESS ERROR

In a close case, an erroneous jury instruction can mean the difference between acquittal and conviction. See *United States v. Wisecarver*, 598 F.3d 982 (8th Cir 2010) (reversing conviction "because the jury instruction was given in a close case, in which [jury found guilt] . . . only after the erroneous supplemental instruction was given"). In Kleinman's case, not only were the instructions erroneous; they were the primary focus and emphasis of the District Court's statements to the jury. Thus the instructions must have impacted the jury's deliberations and cannot be considered harmless. See *United States v. Rush-Richardson*, 574 F.3d 906, 913 (8th Cir. 2009) (noting that a plainly erroneous jury instruction that was highlighted to the jury in a close case seriously affected the fairness and integrity of the trial).

The Supreme Court has repeatedly stated that the scope and meaning of "trial by jury" must be construed in accordance with their scope and meaning under the common law of 1789-1791. See, e.g., *United States v. Bailey*, 444 U.S. 394, 415 n. 11 (1980). As already described, the District Court's approach to the jury, and the Court's jury instructions, were far removed from the "trial by jury" intended by the Framers of the Constitution and Bill of Rights.

Jurors who deliberate in fear that 'not guilty' verdicts might be considered illegal or a violation of their oaths are not deliberating freely. Cf., *Weare v. United States*, 1 F.2d 617, 619 (8th Cir. 1924) ("In reading portions of the instructions, it would be

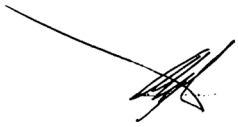
difficult to tell whether one were reading the instructions of a court or the argument of a prosecutor. . . . The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty.")

Such a fundamental error of due process cannot be harmless error. See *Rose v. Clark*, 478 U.S. 570, 578 (1986) (harmless-error analysis presumably inapplicable where court has invaded the province of the jury, as "the wrong entity judged the defendant guilty").

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit in this matter should be vacated, overturned and set aside. Noah Kleinman is entitled to a new trial with a jury properly instructed.

Respectfully submitted,



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