No. 18-8029

IN THE

Supreme Court of the United States

CHARLES RHINES,

Petitioner,

v.

DARIN YOUNG

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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March 25, 2019

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The NAACP Legal Defense & Educational Fund, Inc. (LDF) respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as amicus curiae in support of Petitioner Charles Rhines.

All parties were timely notified of LDF's intent to file this amicus brief. Petitioner has consented to the filing of the brief. Respondent refused to consent. LDF thus files this motion seeking leave to file the amicus brief.

This case presents an issue of paramount importance to LDF—whether a court can review a death sentence when presented with evidence that the jury may have imposed the death sentence for discriminatory reasons. Specifically, whether the no-impeachment rule should give way in the face of compelling evidence that anti-gay bias infected the jury's verdict.

Since its founding by Thurgood Marshall, LDF has fought against the arbitrary and discriminatory imposition of the death penalty. Charles Rhines has presented evidence his death sentence was imposed in part for discriminatory reasons—that some jurors sentenced Mr. Rhines to die in part because he is gay. Yet no court has reviewed his claim on the merits. This case presents the kind of egregious arbitrariness in capital sentencing that LDF has consistently fought against. LDF seeks to file this brief to ensure that courts consider the compelling evidence that Mr. Rhines' capital sentence is inconsistent with both the antidiscrimination principle of the Fourteenth Amendment and Eighth Amendment's requirement of heightened reliability in death penalty cases.

Respondent argues that while the Court has held that the no-impeachment rule must give way in the face of evidence of racial bias infecting a jury's verdict, the same should not be true for claims of anti-gay bias because race is "unique." LDF also seeks to file this brief because it has led the fight against racial discrimination through legal advocacy generally, and against the discriminatory imposition of the death

penalty specifically. LDF has a unique voice in arguing that just as the Constitution does not permit a person to be sentenced to death because of his race, it should not permit a person to be sentenced to death because of his sexual orientation.

For these reasons, LDF respectfully asks the Court to grant the motion.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy,

[1] Counsel for amicus curiae authored this brief in its entirety and no party or their counsel, nor any other person or entity other than amicus or their counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of proposed amicus's intent to file this amicus brief. Petitioner consented to the filing of the brief. Respondent declined consent. Proposed amicus thus has moved for leave to file this amicus brief.

public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has a history of challenging the unconstitutional imposition of the death penalty. LDF has served as counsel of record or filed amicus briefs in numerous capital cases, including: *Furman v. Georgia,* 408 U.S. 238 (1972); *Coker* v. *Georgia,* 433 U.S. 584 (1977); *McCleskey* v. *Kemp,* 481 U.S. 279 (1987); *Banks v. Dretke,* 540 U.S. 668 (2004); *Roper* v. *Simmons,* 543 U.S. 551 (2005); *Buck* v. *Davis,* 137 S. Ct. 759 (2017), and *Peña-Rodriguez* v. *Colorado,* 137 S. Ct. 855 (2017). LDF has served as counsel of record in cases challenging unconstitutional bias in the jury system in *Swain v. Alabama,* 380 U.S. 202 (1965), *Alexander* v. *Louisiana,* 405 U.S. 625 (1972), and *Ham v. South Carolina,* 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission of Greene County,* 396 U.S. 320 (1970), and *Turner v. Fouche,* 396 U.S. 346 (1970); and appeared as amicus curiae in cases involving the discriminatory use of race in peremptory challenges, including *Johnson* v. *California,* 543 U.S. 499 (2005), *Miller-El* v. *Cockrell,* 537 U.S. 322 (2003), *Georgia v. McCollum,* 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991), and *Batson* v. *Kentucky,* 476 U.S. 79 (1986) (overruling *Swain*).

LDF also has a longstanding history of advocating for the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996).

Consistent with its opposition to the arbitrary or discriminatory imposition of the death penalty, and with its opposition more generally to discrimination of all forms, LDF submits this amicus brief in support of Charles Rhines' petition for writ of certiorari.

SUMMARY OF ARGUMENT

Peña-Rodriguez v. Colorado 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." 137 S. Ct. 855, 869 (2017). South Dakota argues against a similar exception to the no-impeachment rule for claims of "sexual orientation bias." Opp'n at 23-29. The State argues that *Peña-Rodriguez* was concerned with the "'distinct' role race has historically played in thwarting aspirations of equality in America." *Id.* at 26. And, argues the State, "[s]exual orientation does not implicate the same unique, historical, constitutional and institutional concerns as race." *Id.* (quotation marks omitted).

LDF is well aware of the unique role that race has played in "thwarting aspirations of equality in America." Since its founding by Thurgood Marshall, LDF has led the fight for racial equality. That said, our country's uniquely terrible history of racial discrimination does not obviate its sordid history of anti-gay discrimination. "For centuries, the prevailing attitude towards gay persons has been one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008) (quotation marks omitted). And although the histories of oppression endured by different minorities in America have varied, the "basic premise of our criminal justice system" must remain the same: "Our law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

Just as the Constitution does not permit a person to be sentenced to die because of his race, it should not permit a person to be sentenced to die because of his sexual orientation. And here, in light of the sworn declarations showing that at least some jurors thought that because Mr. Rhines is "a homosexual . . . he shouldn't be able to spend his life with men in prison," and that because Mr. Rhines is gay, they would "be sending him where he wants to go if [they] voted for [life imprisonment]," Pet. at 3, there is ample evidence that Mr. Rhines was sentenced to die in part because of his sexual orientation.

This is untenable and unconstitutional. LDF urges the Court to grant certiorari.

ARGUMENT

I. CLAIMS THAT ANTI-GAY BIAS AFFECTED A JURY VERDICT SHOULD BE EXCEPTED FROM THE NO-IMPEACHMENT RULE.

In *Peña-Rodriguez*, this Court held that the "no-impeachment rule" must give way "when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." 137 S. Ct. at 861. The evidence the *Peña-Rodriguez* Court found compelling was affidavits by jurors asserting that during deliberations, another juror said, "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.* at 862. That juror also said that "in his experience, 'nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.'" *Id.* The juror said he believed Mr. Peña-Rodriguez "did it because he's Mexican and Mexican men take whatever they want." *Id.* And the juror told the rest of the jury that he did not find Mr. Peña-Rodriguez's alibi witness credible because he was "'an illegal.'" *Id.*

This Court called the juror's statements "egregious and unmistakable in their reliance on racial bias." *Id.* at 870. The Court found the statements particularly troubling because they showed the juror "deploy[ed] a

dangerous racial stereotype to conclude [Mr. Peña-Rodriguez] was guilty" and then "encouraged other jurors to join him in convicting on that basis." *Id.*

The problem the *Peña-Rodriguez* Court faced was that Colorado, like every state, had a rule "generally prohibit[ing] a juror from testifying as to any statement made during deliberations . . . ." *Id.* at 862. The Court thus had to "decide whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt." *Id.* at 867.

The Court started its analysis by reiterating that the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *Id.* (quotation marks omitted). And by the time of the Fourteenth Amendment's ratification, it was "clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial." *Id.* Thus, "[t]ime and again," the Court "has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Id.*

Peña-Rodriguez stood "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." *Id.* at 868. In finding that a claim of racial bias trumps the no-impeachment rule, the Court noted that a racial bias claim "differs in critical

ways" from the cases where the Court had upheld the no-impeachment rule: *McDonald v. Pless*, 238 U.S. 264 (1915), where it was alleged the jury reached an improper compromise verdict; and *Tanner v. United States*, 483 U.S. (1987), where it was alleged some jurors were under the influence during trial. The Court explained that while the jurors' behavior in *McDonald* and *Tanner* was "troubling and unacceptable," they involved "anomalous behavior from a single jury—or juror—gone off course." *Id.* at 868. "The same cannot be said about racial bias," which "implicates unique historical, constitutional, and institutional concerns," which "if left unaddressed, would risk systemic injury to the administration of justice." *Id.* A racial bias exception to the no-impeachment rule is therefore "necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 869.

A racial bias claim is also "distinct in a pragmatic sense," the Court continued, because while there are "safeguards" to protect against most types of juror misbehavior, "[t]he stigma that attends racial basis may make it difficult to report inappropriate statements during the course of juror deliberations." *Id.* A juror may be hesitant to reveal that a fellow juror is a "bigot." *Id.*

The question for this Court here is whether there should be an anti-gay bias exception to the no-impeachment rule for capital cases. In arguing there should not be one, South Dakota focuses on *Peña-*

Rodriguez's recognition that racial discrimination in the jury system "implicate[s] unique historical, constitutional, and institutional concerns." Opp'n at 26. The State argues anti-gay discrimination does not implicate the same concerns. *See id.* at 27-29.

There is no disputing that racial discrimination in the jury occupies a unique constitutional, historical, and institutional space in our country. But a closer look at the reasons *Peña-Rodriguez* gave for crafting a racial bias exception to the no-impeachment rule shows that overt anti-gay bias claims should be excepted from the no-impeachment rule too—especially when, as here, the case involves a sentence of death.

Constitutional Concerns. It is true, as *Peña-Rodriguez* said, that the Fourteenth Amendment was designed "to eliminate racial discrimination emanating from official sources in the States." 137 S. Ct. at 867. Even so, this Court has made clear that the Fourteenth Amendment also protects against sexual orientation discrimination. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The Court recently declared that the Fourteenth Amendment's "principles of liberty and equality" both "define and protect the rights of gays and lesbians." *Obergefell*, 135 S. Ct. at 2604. Given that the Fourteenth Amendment protects against anti-gay discrimination, there are constitutional concerns when overt anti-gay bias infects jury deliberations.

Further, because this is a capital case, the Eighth Amendment demands a "heightened need for reliability in the determination that death is the appropriate punishment." *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quotation marks omitted). "Because sentences of death are qualitatively different," the Eighth Amendment requires that courts ensure "that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (quotation marks omitted). Here, there is evidence that the jury sentenced Mr. Rhines to die due to anti-gay bias. This is the exact type of arbitrariness the Eighth Amendment forbids.

Historical Concerns. It is also true, as *Peña-Rodriguez* noted, that the country's history of racial discrimination is "unique." 137 S. Ct. at 868. Even so, gay people have also faced a long history of discrimination, which until recently, was sanctioned by every branch of Government. For example, "[i]n 1953, President Eisenhower issued an executive order banning the employment" of gay people, which also required private contractors to "search out" and "terminate" gay employees. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 427 (M.D. Pa. 2014). Gay people have been banned from military service on the theory that they were "unfit for service because they had a 'personality disorder' or a 'mental illness'" *Able v. United States*, 968 F. Supp. 850, 855 (E.D.N.Y. 1997)

(citations omitted).[2] Up until 1990, federal law prohibited gay noncitizens from entering the country because "the Immigration and Nationality Act of 1952 labeled gay and lesbian people as mentally ill." *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014). And "[p]erhaps the most telling proof of animus and discrimination against [gay people] is that, for many years and in many states, homosexual conduct was criminal." *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012). This Court condoned the criminalization of gay intimacy just 33 years ago. *See Bowers v. Hardwick*, 478 U.S. 186 (1986). And the consequences for violating these laws were barbarous: "It was common for state laws to call for sterilization or castration . . . for homosexual behavior." *Campaign for S. Equality v. Bryant*, 64 F. Supp. 3d 906, 930 (S.D. Miss. 2014) (quotation marks omitted). Thus, while different from its history of racial discrimination, America has a long and horrible history of anti-gay discrimination, steeped in fear, odious stereotypes and inhumane treatment.

Institutional Concerns. And while it is true that, as *Peña-Rodriguez* reminded, the Court has "time and again" had to enforce the constitutional guarantee against racial discrimination in the jury system, it is important to recall one of the principal reasons why this Court has been quick to act: the right to an impartial jury is a cornerstone of our democracy.

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[2] It was not until 2010 that gay people were allowed to serve openly in the military. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111–322, 124 Stat. 3516 (Dec. 22, 2010).

"Just as suffrage ensures the people's ultimate control in the legislative and executive branches, [the] jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). Indeed, "with the exception of voting, for most citizens, the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). The impartial jury is a critical bulwark "against the arbitrary exercise of power," *Batson v. Kentucky*, U.S. 79, 86 (1986), that "guards the rights of the parties" and "ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407. Simply, the right to an impartial jury is "justly dear to the American people"; this Court must therefore guard "every encroachment upon it . . . with great jealousy." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.). If the right to an impartial jury is a cornerstone of democracy, that impartiality should extend to a defendant's sexual orientation.

It is only recently that "[o]ur society has come to the recognition that gay persons . . . cannot be treated as social outcasts as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). The idea that the "Constitution, can, and in some instances must, protect [gay people] in the exercise of their civil rights" is new to this Court's jurisprudence. *Id.* Thus, the fact that the Court does not have a long history of combating anti-gay discrimination in the jury system

should not dissuade the Court from starting that fight in this case.

In this context, the similarities between anti-gay bias claims and racial bias claims are far more important than their differences. Both claims "differ[] in critical ways" from the cases in which this Court has upheld the no-impeachment rule. A claim that a juror's anti-gay bias influenced his verdict is not an example of a juror going "off course" like *McDonald*—where the jury improperly reached a compromise verdict, or *Tanner*—where jurors were drunk and high. *See Peña-Rodriguez*, 137 S. Ct. at 868-69. Instead, it is a prejudice that undermines the effort "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.* at 868.

From a "pragmatic sense," as the *Peña-Rodriguez* Court reasoned for racial bias claims, it is important to except claims of anti-gay bias from the no-impeachment rule given the "stigma" that attends anti-gay bias, which "may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Id.* at 869. A juror may not feel comfortable reporting that a fellow juror was influenced by her anti-gay bias until after the fact, because as *Peña-Rodriguez* recognized, it is one thing for a juror to report another juror behaving badly; "[i]t is quite another to call her a bigot." *Id.*

At bottom, verdicts infected by anti-gay bias, like verdicts infected by racial bias, "cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* This is especially true in capital cases. So just as the no-impeachment rule must give way when there is evidence tending "to show that racial animus was a significant motivating factor in the juror's vote to convict," *id.* the no-impeachment rule should give way in the face of evidence tending to show that anti-gay bias was the reason why a juror voted for death. A contrary holding would severely undermine "the law as an institution," the "community at large," and "the democratic ideal reflected in the processes of our courts." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). There is a "sound basis" to treat anti-gay bias "with added precaution." *Peña-Rodriguez*, 137 S. Ct. at 869.

The notion that, for capital cases, there should be an exception to the no-impeachment rule when a petitioner presents a credible claim that his death sentence was infected by anti-gay bias should be uncontroversial. This Court has recognized that the "*basic premise* of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are." *Buck*, 137 S. Ct. at 778 (emphasis added). As *Buck* explained: "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.* Even though *Buck* declared this in the context of a claim that the petitioner's race may have influenced his death sentence, it applies to a claim centering on a

petitioner's sexual orientation given the Court's recognition that sexual orientation is immutable. *See Obergefell*, 135 S. Ct. at 2594.

Turning to the facts here, a refusal to hear the merits of Mr. Rhines' anti-gay bias claim would run a similar risk of injustice that prompted the Court to act in *Buck* and *Peña-Rodriguez*. In both cases, this Court was concerned with the fact that a jury may have handed down a death sentence based on "powerful" and "dangerous" racial stereotypes. *Buck*, 137 S. Ct. at 776 (the "powerful racial stereotype—that of black men as violence prone" (quotation marks omitted)); *Peña-Rodriguez*, 137 S. Ct. at 862, 870 (the "dangerous racial stereotype[s]" that "Mexican men" are "aggressive" and "physically controlling of women" and "illegal[s]" are not credible witnesses). The concern of pernicious racial stereotypes influencing the verdicts prompted the Court to recognize that procedural and evidentiary obstacles must yield so the lower courts could rule on the merits of the claims.

The Court should recognize that the no-impeachment rule must yield here, too, given that there is a real risk that at least one juror voted for Mr. Rhines' death in part because he is gay, relying on powerful and dangerous anti-gay stereotypes. One juror declared that the jury knew Mr. Rhines "was a homosexual and thought that he shouldn't be able to spend his life with men in prison." Pet. at 3. A declaration from another juror recalled one juror commenting "that if [Mr. Rhines] is gay, we'd be

sending him where he wants to go if we voted for [life imprisonment]." *Id.* Yet another juror said there was "lots of discussion of homosexuality" and there "was a lot of disgust." *Id.*

The statements are "egregious and unmistakable in their reliance on [anti-gay] bias." *Peña-Rodriguez*, 137 S. Ct. at 870. The comments play on the prevalent misconception that gay men enjoy prison because it is an all-male environment where they can get "sexual attention from men." Terry A. Kupers, *Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA Women's L.J. 107, 123 (2010). Indeed, this stereotype was once so widely believed that official jail guidelines called for the "[c]omplete isolation and at least segregation [of gay men] from other prisoners" as that was "the only method by which [gay men] may be rendered harmless within the jail." Joan W. Howarth, *The Rights of Gay Prisoners: A Challenge to Protective Custody*, 53 S. Cal. Rev. 1225, 1232 (1979-80) (quoting The American Correctional Association's Manual of Correctional Standards for Jails).

The fact that Mr. Rhines' jury may have relied on these explicit and egregious anti-gay stereotypes when deciding whether he should be sentenced to die "poisons public confidence in the judicial process." *Buck*, 137 S. Ct. at 766. Allowing Mr. Rhines' death sentence to stand would be especially harmful considering he received the "ultimate punishment of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Given the stakes, the constitutional promise

of impartiality is paramount. Here, the anti-gay statements reflect a "disturbing departure" from the basic principle that undergirds our justice system—people are punished for what they do and not who they are. *See Buck*, 137 S. Ct. at 766.

The Court should adopt a "constitutional rule" for capital cases that anti-gay "bias in the justice system must be addressed—including, in some instances, after the verdict has been entered." *Peña-Rodriguez*, 137 S. Ct. at 869. This rule "is necessary to prevent a systemic loss in confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.*

CONCLUSION

For these reasons, the Court should grant Mr. Rhines' petition for certiorari.

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