No. 25-6544

# In the Supreme Court of the United States

LOUIS OLIVARRIA,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT

## BRIEF OF RESPONDENT


ROB BONTA
*Attorney General of California*
SAMUEL T. HARBOURT
*Solicitor General*
HELEN H. HONG
*Principal Deputy Solicitor General*
KIMBERLEY DONOHUE
*Senior Assistant Attorney General*
CARA M. NEWLON*
AARON D. PENNEKAMP
*Deputy Solicitors General*
NICOLE WELINDT
JOHN R. MERRITT
WILLIAM MOINE
*Deputy Attorneys General*

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
(213) 269-6524
Cara.Newlon@doj.ca.gov
**Counsel of Record*


May 6, 2026

## QUESTION PRESENTED

The record in this case shows that 11 jurors believed that the defendant was guilty, but the 12th juror had concluded otherwise. When deliberations broke down and the jury could not reach a verdict, the trial court interviewed several members of the jury, including the holdout, and concluded that she had failed to meaningfully participate in deliberations. On that basis, the court dismissed the juror and replaced her with an alternate. The reconstituted jury then voted unanimously to convict.

The question presented is what legal standard should be applied to determine whether a dismissal in these circumstances violates the Sixth Amendment right to a unanimous jury verdict.

## DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

*People v. Olivarria*, No. S292392 (review denied October 1, 2025)

California Court of Appeal:

*People v. Olivarria*, No. C098553 (judgment affirmed on direct appeal on June 30, 2025)

Sacramento County Superior Court:

*People v. Olivarria*, No. 21FE016166 (judgment entered May 12, 2023)

## TABLE OF CONTENTS

Page

Statement .......... 1

A. Legal framework .......... 1

B. Procedural background .......... 5

Argument .......... 11

Conclusion .......... 25

## TABLE OF AUTHORITIES

**Page**

**CASES**

*Abbell v. United States*
537 U.S. 813 (2002) .... 15

*Apodaca v. Oregon*
406 U.S. 404 (1972) .... 1

*Cheadle v. United States*
577 U.S. 985 (2015) .... 15, 19

*Christensen v. United States*
580 U.S. 1049 (2017) .... 15

*Commonwealth v. Williams*
486 Mass. 646 (2021) .... 16

*Escobar v. Texas*
143 S. Ct. 557 (2023) .... 22

*Fattah v. United States*
586 U.S. 1223 (2019) .... 15

*Garcia v. People*
997 P.2d 1 (Colo. 2000) .... 16

*Johnson v. Williams*
568 U.S. 289 (2013) .... 5, 17

*Montague v. United States*
144 S. Ct. 2654 (2024) .... 22

*Myers v. United States*
587 U.S. 981 (2019) .... 22

*People v. Armstrong*
1 Cal.5th 432 (2016) .... 3, 4, 18, 19, 21

*People v. Caddell*
332 Mich. App. 27 (2020) .... 16

*People v. Cleveland*
25 Cal.4th 466 (2001) .... 3, 4, 10, 16, 17, 18, 20, 21, 22, 24

**TABLE OF AUTHORITIES**
**(continued)**


**Page**

*People v. Engelman*
28 Cal.4th 436 (2002) ........ 18

*People v. Gallano*
354 Ill. App. 3d 941 (2004) ........ 16

*People v. Lomax*
49 Cal.4th 530 (2010) ........ 17

*People v. McGhee*
17 Cal.5th 612 (2025) ........ 3, 4, 5, 17, 18

*People v. Olivarria*
No. S292392 (2025) ........ 11

*People v. Thompson*
49 Cal.4th 79 (2010) ........ 11, 17

*Ramos v. Louisiana*
590 U.S. 83 (2020) ........ 1, 23

*Riggs v. State*
809 N.E.2d 322 (Ind. 2004) ........ 16

*Rojas v. United States*
142 S. Ct. 421 (2021) ........ 22

*Shotikare v. United States*
779 A.2d 335 (D.C. 2001) ........ 16

*Spruill v. United States*
580 U.S. 963 (2016) ........ 15

*State v. Elmore*
155 Wash.2d 758 (2006) ........ 15, 19

*State v. Fitzpatrick*
574 P.3d 374 (Idaho Ct. App. 2025) ........ 16

*State v. Robb*
88 Ohio St.3d 59 (2000) ........ 16

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*United States v. Abbell*
271 F.3d 1286 (11th Cir. 2001) .......... 13, 14

*United States v. Barone*
114 F.3d 1284 (1st Cir. 1997) .......... 15

*United States v. Brown*
823 F.2d 591 (D.C. Cir. 1987) .......... 1, 2, 12, 13, 14, 18

*United States v. Edwards*
303 F.3d 606 (5th Cir. 2002) .......... 14

*United States v. Kemp*
500 F.3d 257 (3d Cir. 2007) .......... 12, 13, 14, 23

*United States v. Laffitte*
121 F.4th 472 (4th Cir. 2024) .......... 2, 3, 14, 20, 23

*United States v. Litwin*
972 F.3d 1155 (9th Cir. 2020) .......... 18

*United States v. McIntosh*
380 F.3d 548 (1st Cir. 2004) .......... 14

*United States v. Ozomaro*
44 F.4th 538 (6th Cir. 2022) .......... 13

*United States v. Spruill*
808 F.3d 585 (2d Cir. 2015) .......... 14

*United States v. Symington*
195 F.3d 1080 (9th Cir. 1999) .......... 13, 14, 22, 23

*United States v. Thomas*
116 F.3d 606 (2d Cir. 1997) .......... 2, 13

*United States v. Wilkerson*
966 F.3d 828 (D.C. Cir. 2020) .......... 13, 14

*Williams v. Johnson*
720 F.3d 1212 (9th Cir. 2013) .......... 5

## TABLE OF AUTHORITIES (continued)

Page

*Zielinski v. United States*
__ S. Ct. __ (2026) ........ 22

STATUTES

Cal. Penal Code
§ 288(a) ........ 5
§ 1089 ........ 1, 2

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI ........ 1

COURT RULES

Cal. Rules of Court, rule 8.552 ........ 24

Fed. R. Crim. P.
23(b)(3) ........ 2
24(c)(3) ........ 2

OTHER AUTHORITIES

Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of the Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 Fordham L. Rev. 861 (1987) ........ 2

Markovitz, Note, *Jury Secrecy During Deliberations*, 110 Yale L. J. 1493 (2001) ........ 1

Webster, Note, *Preserving Fundamental Rights in the Realm of Mid-deliberation Juror Removal*, 52 U. of Memphis L. Rev. 1069 (2022) ........ 1

## STATEMENT

### A. Legal Framework

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. This Court has "repeatedly . . . recognized that the Sixth Amendment requires unanimity" among jurors in order to obtain a valid conviction. *Ramos v. Louisiana*, 590 U.S. 83, 92 (2020). Although the "badly fractured set of opinions" (*id.* at 93) in *Apodaca v. Oregon*, 406 U.S. 404 (1972), created confusion about whether the unanimity right applied to the States under the Fourteenth Amendment, this Court recently clarified that the States must guarantee unanimous jury verdicts. *See Ramos*, 590 U.S. at 105-111.

As a number of state and federal courts have recognized, *see, e.g.*, *United States v. Brown*, 823 F.2d 591, 595-596 (D.C. Cir. 1987), the Sixth Amendment unanimity right can be implicated when a trial court considers the dismissal of a juror after deliberations have begun. Many States and the federal system have adopted rules allowing mid-deliberation dismissal "[i]f at any time . . . a juror dies or becomes ill, or upon other good cause shown . . . [is] unable to perform his or her duty." *E.g.*, Cal. Penal Code § 1089.[1] Some jurisdictions,

---

[1] *See also* Markovitz, Note, *Jury Secrecy During Deliberations*, 110 Yale L. J. 1493, 1518-1521 (2001) (collecting examples of "cause" to dismiss a juror); Webster, Note, *Preserving Fundamental Rights in the Realm of Mid-deliberation Juror Removal*, 52 U. of Memphis L. Rev. 1069, 1071 n.5 (2022) (comparing state and federal "good cause" requirements for removing jurors).

including California, authorize replacement of the dismissed juror with an alternate. *See, e.g.*, *id.* Others authorize either replacement with an alternate or a verdict rendered by the remaining jurors. *See, e.g.*, Fed. R. Crim. P. 23(b)(3), 24(c)(3).[2]

Sometimes, the basis for a mid-deliberation dismissal is relatively straightforward—for example, where a juror becomes completely incapacitated due to illness. *See United States v. Thomas*, 116 F.3d 606, 613 (2d Cir. 1997). In other circumstances, however, courts must evaluate whether there is "'just cause' to dismiss [a] juror[] who, although available and physically capable of serving," may "nonetheless . . . be unable to perform [his] duties properly." *Id.* In those circumstances, there can be a danger that the dismissal "stems from doubts the juror harbors about the sufficiency of the government's evidence." *Brown*, 823 F.2d at 596. "A discharge of this kind would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case." *Id.*

One recent case from the Fourth Circuit is illustrative. In *United States v. Laffitte*, 121 F.4th 472, 490 (4th Cir. 2024), the federal government argued that mid-deliberation dismissal was proper because the challenged juror was "'emotionally very fragile'" and unable to meaningfully participate in

---

[2] At common law, there was an absolute bar on mid-deliberation dismissal. *See, e.g.*, Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of the Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 Fordham L. Rev. 861, 861 (1987).

deliberations. But as the court of appeals explained, "the cause of [the juror's] emotional state" was that "her views of the case" created tension with the other jurors. *Id.* For that reason, the court held that the dismissal effectively deprived the defendant of his Sixth Amendment right to a unanimous verdict. *See id.* at 489 ("the district court had a variety of choices to adequately protect" the defendant's Sixth Amendment right: "send the juror back to deliberations with instructions . . . [to] continue to attempt to reach agreement, recess for the evening, or declare a mistrial"); *id.* ("[t]he district court did none of them").

2. In the California system, a juror may be dismissed midway through deliberations if "it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." *People v. Cleveland*, 25 Cal.4th 466, 484 (2001). "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." *Id.* at 485. "Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury." *Id.*

As the California Supreme Court has repeatedly cautioned, the mid-deliberation dismissal of a juror is a "delicate matter." *Cleveland*, 25 Cal.4th at 484; *see People v. McGhee*, 17 Cal.5th 612, 629 (2025); *People v. Armstrong*, 1 Cal.5th 432, 454 (2016). "The circumstance that a juror does not deliberate

well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge." *Cleveland*, 25 Cal.4th at 485. "Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge." *Id.* "A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." *Id.* So long as a juror "listen[s] to other jurors"—even "'halfheartedly'"—and "attempt[s] to explain his views" to the other jurors, the juror sufficiently "engage[s] in the deliberative process." *Id.* at 486; *see id.* at 485 (defining "deliberations" as "listening to [others'] views and . . . expressing his or her own views").

"Because the discharge of a deliberating juror implicates a defendant's jury trial and due process rights under the federal and state Constitutions," *McGhee*, 17 Cal.5th at 628, the California Supreme Court has instructed intermediate appellate courts "to apply a heightened standard of review" when addressing challenges to mid-deliberation dismissals, *Armstrong*, 1 Cal.5th at 453. "To uphold the discharge of a juror, . . . a reviewing court 'must be *confident* that the trial court's conclusion is manifestly supported by evidence on which the court actually relied,' considering that evidence and the court's

reasons for discharging the juror in light of the entire record." *McGhee*, 17 Cal.5th at 628 (emphasis added).[3]

### B. Procedural Background

1. On April 6, 2023, the Sacramento County District Attorney's Office charged petitioner with one count of committing a lewd and lascivious act on a child under 14 years of age. CT 120-121.[4] That offense requires proving that the defendant "willfully touched any part of a child's body either on the bare skin or through the clothing . . . with the intent of" sexual arousal or gratification. CT 146 (jury instructions); *see* Cal. Pen. Code § 288(a). The charges arose from allegations that petitioner—an adult—attacked a 10-year-old child during a party "attended by dozens of people, including children." Pet. App. A-2. The alleged incident took place in an upstairs bathroom while the other adults were downstairs. *Id.* at A-2-3.

At trial, petitioner took the stand and testified that the incident never took place. Pet. App. A-3. The victim testified, by contrast, that petitioner cornered her in the upstairs bathroom, while her friend managed to escape and

---

[3] Although many state and federal appellate courts have addressed Sixth Amendment challenges to mid-deliberation juror dismissals, *see, e.g.*, *infra* pp. 12-19, this Court has not previously done so. The Court's decision in *Johnson v. Williams*, 568 U.S. 289, 293 (2013), arose from a challenge in California state court to a mid-deliberation dismissal, but the Court limited its ruling to a threshold question under the Antiterrorism and Effective Death Penalty Act. *See also Williams v. Johnson*, 720 F.3d 1212, 1214 (9th Cir. 2013) (Kozinski, C.J., concurring), *judgment vacated*, 573 U.S. 773 (2014).

[4] CT and RT refer to the trial court's Clerk's Transcript and Reporter's Transcript prepared for the court of appeal.

run for help. *Id.* She stated that petitioner pushed her into the bathtub, causing her to hit her head. *Id.* According to the victim's testimony, petitioner "grabbed his hands on the sides of [her] hips" and "tried to forcefully pull" down her pants and underwear. 4 RT 171. She also testified that petitioner reached for her thigh. 4 RT 180-183. Her initial testimony was that his hand did not touch her leg because she smacked it away, 4 RT 182, but she later testified that she did not remember if his hand had touched her leg, 4 RT 184. Ultimately, her testimony was that petitioner had "grazed" her leg as he reached toward her private parts. 4 RT 247-249. The victim escaped when petitioner's wife called for him from downstairs. Pet. App. A-3.

2. The jury began deliberating at 9 a.m. on a Friday. CT 130. That afternoon, the jury requested readback of the victim's testimony about "the touching of her leg, and the hands on her pants." *Id.* The jury later requested readback of additional testimony by the victim "relative to touching," CT 131, and was unable to reach a verdict on the first day of deliberations. The jury "went home Friday afternoon at 4:30 and came back [on Monday] morning and began deliberating again." 7 RT 591-592.

At 10:15 a.m. that morning, the jury foreperson sent a note to the court stating that "one juror has dissented and has stated nothing will change her mind." CT 134. The court then called all members of the jury into the courtroom and in their presence asked the foreperson if the juror in question was "refusing to deliberate" or "after deliberating, the juror feels convinced

that nothing will change her mind?" 7 RT 598. The foreperson responded that "[a]fter deliberating, that juror is convinced that nothing will change her mind." *Id.* After conferring with counsel, the court informed the jury that it could request legal argument from the attorneys for both sides. 7 RT 598-599. The court then sent the jury back to the deliberation room so that it could discuss what issues, if any, it would like to hear the attorneys discuss. 7 RT 599-600. About one hour later, the jury sent a note asking the court if the victim's testimony was that the petitioner "touched her?" CT 135. The court responded that this was a factual question that it could not answer because the question was solely committed to the jury. *Id.* The jury foreperson responded with a note stating that "[t]he jury continues to be at impasse" and that "[o]ne juror has indicated that she is not open to additional input or accept[ing] the parts of the testimony that do not agree with her conclusion." *Id.*

At the prosecution's request, the judge then called the jurors into the courtroom and directed counsel to deliver a short argument on "the law on the touching." 7 RT 604, 610-612. The prosecutor explained that petitioner had twice touched the victim inappropriately: first, when he attempted to pull down the victim's pants, and second, when he grazed her thigh. 7 RT 613. The prosecutor also emphasized that the jury could find the defendant guilty so long as it concluded that at least one of those two touchings occurred. *See* 7 RT 614 ("even if you don't agree that it was a touching to the leg, she was unequivocal about the touching to her pants as he was pulling her pants down").

In response, petitioner's counsel pointed to the part of the victim's testimony where she denied that petitioner had touched her thigh. 7 RT 615. In defense counsel's view, the victim's testimony was not sufficiently clear to convict. 7 RT 615-616.

Later that day, the foreperson sent back another note, stating that "one juror . . . does not engage in meaningful or impartial deliberations" and that "[t]he jury cannot reach consensus." 7 RT 619. The court then summoned the individual jurors for questioning. Starting with the foreperson, the court asked whether the juror in question—referred to in this brief as the "holdout juror"—was "at one point, deliberating, and then . . . stopped at some point?" 7 RT 621. The foreperson responded that "[s]he was forthcoming with her opinion, but . . . when other jurors would ask her for clarification or for additional information or a reasoning behind her position, she was not forthcoming with anything, other than that's her position." *Id.* The foreperson also informed the court that the holdout juror had asked to be removed from the jury. 7 RT 623.

Although other members of the jury offered similar accounts, *see, e.g.*, 7 RT 625-639, they disagreed about whether there had been a noticeable shift in the holdout juror's approach throughout the deliberations. Some suggested that she had not meaningfully participated in deliberations from the very beginning. *See, e.g.*, 7 RT 637-638. Others told the court that she had participated for "[p]art of the day on Friday," 7 RT 633, before "shut[ting] off," 7 RT 634. The trial court, however, did not clearly define the terms "deliberate"

or "participate" when asking the jurors whether the holdout had meaningfully participated. 7 RT 620-639; *see* 7 RT 626-627 (juror noting that "I have a hard time with the definition of that" when asked by the court whether the holdout was "refusing to participate in deliberations").

The court then questioned the holdout juror. Although she "appeared confused in her answers" at times, she told the court that "she had pointed the other jurors" to her views on the evidence and "responded to questions posed to her." Pet. App. A-11. She also stated that she "believed that the testimony is true from the . . . defendant," 7 RT 645; that "there are 11 and I'm the one," 7 RT 640; that she believed the defendant was "not guilty," 7 RT 642; and that she wanted to be dismissed because "I could not convince [the other jurors] otherwise," 7 RT 641.

On Monday evening, over defense counsel's objection, 7 RT 648, the court removed the holdout juror for failure to deliberate and replaced her with an alternate. CT 37, 136. In a ruling from the bench, the court found that the holdout had "refused to deliberate meaningfully . . . from at least mid-day Friday through the end of the day." 7 RT 651. And it made a credibility determination that the holdout had "lied to the Court about her deliberations" because, in the court's view, she was not sufficiently responsive to the court's questioning. *Id.* "I don't believe her," the court explained, "when she says that she always answered the questions" from other jurors because "she couldn't even answer the Court's questions." *Id.* The new jury began deliberations the

next day and found petitioner guilty. CT 159. The trial court sentenced petitioner to eight years in prison. CT 209.

3. The court of appeal affirmed in an unpublished order. Pet. App. A-1-22. In the majority's view, the record provided sufficient support for the trial court's dismissal. The majority emphasized that the holdout juror had come "to a quick conclusion" about the evidence, *id.* at 13, and refused "to consider other viewpoints after expressing [that] fixed opinion," *id.* at 16. The majority also concluded that the holdout's failure to "coherently answer" the trial court's questions suggested that she could not "answer questions posed by other jurors or consider other points of view during deliberations." *Id.* at 15.

Justice Feinberg dissented. Pet. App. A-23-33.[5] In her view, the California Supreme Court's precedent on mid-deliberation dismissals merely requires jurors to "participate[] in deliberations for a reasonable period of time." *Id.* at 23 (quoting *Cleveland*, 25 Cal.4th at 485). It is "not uncommon, or grounds for a discharge," the dissent explained, "for a juror . . . to come to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors." *Id.* (internal quotation marks omitted). Because the record here showed that the holdout juror had deliberated "for at least some number of hours" and formed a view based on the testimony offered

[5] The dissenting opinion included in the petition appendix is separately paginated from the majority opinion. The page numbers used in this brief refer to the electronic PDF page numbers.

at trial, *id.* at 24, it was improper to dismiss her. The dissenting justice also explained that the "juror's refusal to answer yes-or-no questions [from other jurors] during deliberations" demonstrated "at most . . . a failure to deliberate *well*—not a failure to deliberate at all." *Id.* at 29. The dissent would have reversed the conviction on the ground that the juror should not have been "discharged for refusing to change her mind." *Id.* at 24; *see id.* at 33.

4. Petitioner sought review in the California Supreme Court, but the Court denied the petition. *See People v. Olivarria*, No. S292392 (review denied Oct. 1, 2025). Justices Liu and Evans would have granted review. *Id.*

## ARGUMENT

Petitioner alleges a conflict among the federal appellate courts on the standard for determining whether the dismissal of a juror during deliberations violates the Sixth Amendment. Pet. 5. But there is no genuine disagreement among those courts. And although the California Supreme Court has "expressly rejected" the standard applied by the federal appellate courts, *People v. Thompson*, 49 Cal.4th 79, 138 (2010), the standard that it has adopted is not meaningfully different in practical effect. This case would also provide a poor vehicle for exploring the extent of any conflict because the result should be the same under federal or California precedent. Although the State defended the judgment below, it has reexamined its position and now agrees with petitioner that, in the particular circumstances of this case, the trial court committed prejudicial Sixth Amendment error. In light of that confession of

error, it would be appropriate for the Court to grant, vacate, and remand for further proceedings. But plenary review is unwarranted.

1. There is no conflict among state or federal appellate courts that warrants plenary review in this Court.

a. Petitioner asks the Court to grant certiorari because the federal courts of appeals have articulated different standards for determining when a juror may properly be removed during deliberations. Pet. 5. But the standards applied in each circuit do not diverge in any meaningful way. Though federal courts have used slightly different verbal formulations, they have undertaken the same basic approach in substance. *See, e.g.*, *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007) ("[w]hile there is a slight difference in [evidentiary] standards as expressed by" the federal appellate courts, "the difference is one of clarification and not disagreement").

The first major decision in this area was the D.C. Circuit's decision in *Brown*, 823 F.2d at 596, which recognized that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." "If a court could discharge a juror on the basis of such a request," the court explained, "then the right to a unanimous verdict would be illusory." *Id.* "[T]he problem" in giving effect to that principle is that "the reasons underlying a request for a dismissal will often be unclear." *Id.* Juror deliberations take place in secret and courts are forbidden from "delv[ing] deeply" into the nature and content of

deliberations. *Id.* Given these circumstances, the court in *Brown* "decided to 'err[] on the side of Sixth-Amendment caution.'" *United States v. Wilkerson*, 966 F.3d 828, 836 (D.C. Cir. 2020). It held that, "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Brown*, 823 F.2d at 596 (emphasis added). The court later clarified that "any possibility" means a "tangible or appreciable possibility, not merely whether there is literally any possibility." *Wilkerson*, 966 F.3d at 838 (internal quotation marks and brackets omitted).[6]

Petitioner does not identify any federal appellate court that has adopted a materially different standard. The Third, Sixth, and Ninth Circuits have held that a juror may not be dismissed if there is a "*reasonable* possibility" that the dismissal would stem from the juror's views on the merits of the case. *Kemp*, 500 F.3d at 304 (emphasis added); *see United States v. Ozomaro*, 44 F.4th 538, 545-546 (6th Cir. 2022); *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999). The Second Circuit has adopted the D.C. Circuit's "any possibility" formulation, *Thomas*, 116 F.3d at 622, and would surely agree with its commonsense clarification that "any possibility" means a "'tangible' or

---

[6] *Brown* focused on a "request" by a holdout juror to be dismissed midway through deliberations. 823 F.2d at 596. But the same standard governs when a juror does not request dismissal but a trial court nonetheless considers it—for example, when the jury reaches an impasse and the majority of the jurors allege the holdout has refused to deliberate or follow the law. *See, e.g.*, *United States v. Abbell*, 271 F.3d 1286, 1302-1304 (11th Cir. 2001).

'appreciable' possibility," *Wilkerson*, 966 F.3d at 838; *see United States v. Spruill*, 808 F.3d 585, 595 (2d Cir. 2015) (equating the Second Circuit's standard with the standard adopted by the Third and Ninth Circuits). In adopting a "substantial possibility" standard, the Eleventh Circuit has explained that "the term 'any possibility' and the term 'substantial possibility' . . . are interchangeable, both meaning a tangible possibility, not just a speculative hope." *Abbell*, 271 F.3d at 1302 n.14. Similarly, the Fourth Circuit has held that the correct standard is either a "'reasonable' or 'substantial' possibility," "assuming there is a difference between the two." *Laffitte*, 121 F.4th at 489. And although the First Circuit has not definitively embraced that standard, it has favorably cited the D.C. Circuit's decision in *Brown*, 823 F.2d at 597, recognizing that "[i]n the absence of unambiguous evidence that a juror is attempting to thwart the deliberative process, . . . the wisest course when a juror's views are known is to proceed cautiously." *United States v. McIntosh*, 380 F.3d 548, 556 (1st Cir. 2004).[7]

---

[7] In circumstances in which there is little risk that a court will dismiss a juror midway through deliberations because of that juror's views of the evidence, courts have suggested that it is unnecessary to apply the "tough legal standard" discussed above. *Kemp*, 500 F.3d at 303 (internal quotation marks omitted); *see, e.g.*, *id.* at 303 n.25; *Symington*, 195 F.3d at 1088 n.6 (discussing "questions of juror bias or competence [that] focus on 'some event, or relationship between a juror and a party, that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process'" (ellipsis omitted)); *see also United States v. Edwards*, 303 F.3d 606, 633 (5th Cir. 2002) (acknowledging the "substantial possibility" standard but

(continued…)

This Court has repeatedly denied certiorari in cases asserting a similar conflict among the federal appellate courts. For example, in *Cheadle v. United States*, the Court denied review after the federal government filed a brief in opposition explaining that "courts have used somewhat different language" but "have undertaken essentially the same analysis and applied the same core standard": "dismissal is not appropriate when there is a possibility based on the record evidence that the basis for the dismissal rests on the juror's views of the merits of the case." Br. in Opp. 19-20, *Cheadle v. United States*, No. 15-59, 2015 WL 5996411 (Oct. 14, 2015), *cert denied*, 577 U.S. 985 (2015); *see also Fattah v. United States*, 586 U.S. 1223 (2019) (No. 18-763); *Christensen v. United States*, 580 U.S. 1049 (2017) (No. 16-461); *Spruill v. United States*, 580 U.S. 963 (2016) (No. 16-401); *Abbell v. United States*, 537 U.S. 813 (2002) (No. 01-1618).

b. Nor is the State aware of any meaningful conflict among state appellate courts or between the state and federal appellate courts. Several state courts have adopted the same standard applied in the federal cases discussed above. For example, in *State v. Elmore*, 155 Wash.2d 758, 777 (2006), the Washington Supreme Court examined cases from the D.C., Ninth, and Eleventh Circuits and adopted "the 'any reasonable possibility' standard." Several other States have similarly treated the federal appellate courts'

---

deeming it inapplicable when unnecessary to "delv[e] into the reasons underlying the jurors' views of the case" (internal quotation marks omitted)); *United States v. Barone*, 114 F.3d 1284, 1309 (1st Cir. 1997) (similar).

approach as persuasive authority.[8] And other States have adopted standards that appear to operate similarly in practice. *See, e.g.*, *Commonwealth v. Williams*, 486 Mass. 646, 651 (2021) (juror may be dismissed midway through deliberations only for reasons that "having nothing whatever to do with the issues of the case"); *Riggs v. State*, 809 N.E.2d 322, 327-328 (Ind. 2004) (removal mid-deliberations only permitted for "the most extreme situations where it can be shown that the removal of the juror is necessary for the integrity of the process, does not prejudice the deliberations of the rest of the panel, and does not impair the parties right to a trial by jury"); *Garcia v. People*, 997 P.2d 1, 5-6 (Colo. 2000) (dismissal of a juror mid-deliberation creates a "presumption of prejudice" only overcome by "extraordinary precautions").

c. The California Supreme Court has taken a somewhat different approach—but any difference between its precedent and that of the federal appellate courts lacks sufficient practical importance to warrant plenary review. In a 2001 decision called *People v. Cleveland*, 25 Cal.4th at 480-484, the California Supreme Court carefully reviewed—and declined to adopt—the standard applied in several of the federal appellate decisions discussed above. As this Court explained when reviewing *Cleveland* in the context of a federal habeas case, *supra* p. 5 n.3, the California Supreme Court "found much to

---

[8] *See State v. Robb*, 88 Ohio St.3d 59, 80 (2000); *State v. Fitzpatrick*, 574 P.3d 374, 382-383 (Idaho Ct. App. 2025); *People v. Gallano*, 354 Ill. App. 3d 941, 953 (2004); *People v. Caddell*, 332 Mich. App. 27, 52 (2020); *see also Shotikare v. United States*, 779 A.2d 335, 345 (D.C. 2001).

praise in [the federal appellate] decisions" but ultimately "declined to follow" them. *Johnson*, 568 U.S. at 304. The standard adopted in *Cleveland* instead asks whether it "appears as a 'demonstrable reality' that [the relevant] juror is unable or unwilling to deliberate." 25 Cal.4th at 484; *see supra* pp. 3-5.[9] In two decisions following *Cleveland*, the Court reiterated its rejection of the federal courts' approach. *See Thompson*, 49 Cal.4th at 138; *People v. Lomax*, 49 Cal.4th 530, 590 n.17 (2010).

In legal and practical effect, however, the differences between the standards are limited. Consistent with the federal cases discussed above, *supra* pp. 12-15, the California Supreme Court has made clear that the mid-deliberation dismissal of a juror is a "delicate matter," *Cleveland*, 25 Cal.4th at 484; that a juror's failure to "deliberate well . . . is not a ground for discharge," *id.* at 485; and that a juror's disagreement "with the majority of the jury as to what the evidence shows . . . does not constitute a refusal to deliberate," *id.* The California Supreme Court has also invoked federal appellate precedent in support of the principle that dismissal is inappropriate if other jurors can "describe to the court the views of the challenged juror," which demonstrates

[9] "*Cleveland* did not expressly purport to decide a federal constitutional question, but its discussion of [the federal decisions] shows that the California Supreme Court understood itself to be deciding a question with federal constitutional dimensions." *Johnson*, 568 U.S. at 305. And the California Supreme Court has subsequently made clear that "the discharge of a deliberating juror implicates a defendant's jury trial and due process rights under the federal and state Constitutions." *McGhee*, 17 Cal.5th at 628.

that the challenged juror "must have been engaging in the deliberative process." *McGhee*, 17 Cal.5th at 634 (citing *United States v. Litwin*, 972 F.3d 1155, 1176 (9th Cir. 2020)). And the California Supreme Court has repeatedly reversed lower courts based on improper juror dismissals midway through deliberations. *See Cleveland*, 25 Cal.4th at 486; *McGhee*, 17 Cal.5th at 636; *Armstrong*, 1 Cal.5th at 453-454; *see also People v. Engelman*, 28 Cal.4th 436, 446 (2002) ("[A] court may not discharge a juror for failing to agree with the majority of other jurors or for persisting in expressing doubts about the sufficiency of the evidence.")

To be sure, the focus of the California and federal appellate inquiries is somewhat different. The California Supreme Court's "demonstrable reality" standard requires trial courts to focus on whether a juror has engaged in misconduct—specifically, by refusing "to engage in the deliberative process." *Cleveland*, 25 Cal.4th at 485. The federal courts' standard, by contrast, focuses on the risk that dismissal could stem from "doubts the juror harbors about the sufficiency of the government's evidence." *E.g.*, *Brown*, 823 F.2d at 596. And although the California Supreme Court has recognized that it is improper to dismiss a juror based upon such doubts, *see, e.g.*, *McGhee*, 17 Cal.5th at 635, the Court has not provided clear guidance for trial courts in cases where there is conflicting record evidence about the basis for a breakdown in jury deliberations. Where *some* evidence suggests that an impasse arose because a juror has doubts about the prosecution's case—but other evidence suggests a

different, legitimate need for dismissal, such as juror misconduct—the federal appellate standard would generally bar dismissal because there would be at least a "reasonable or substantial possibility" that dismissal would stem from the challenged juror's views of the evidence. The California Supreme Court's "demonstrable reality" standard appears to provide trial courts with some measure of additional flexibility to dismiss jurors in those circumstances.

Even in such cases, however, the discretion entrusted to California courts is not unlimited. For example, in *Armstrong*, 1 Cal.5th at 452, some evidence suggested that deliberations broke down because of a juror's misconduct: reading a book and using a cellphone, rather than engaging in deliberations. But other evidence suggested that the jury reached an impasse because of differing "view[s] of the prosecution's evidence." *Id.* at 453. Because the evidence of inappropriate cellphone usage and reading was relatively thin, the California Supreme Court held that the record did not show to a "demonstrable reality" that the juror had engaged in misconduct supporting dismissal. *Id.* at 452-454. In practical application, then, the California Supreme Court's "demonstrable reality" standard does not appear to "produce[] different results as compared to the evidentiary standard used by other courts." Br. in Opp. 21, *Cheadle v. United States*, No. 15-59, 2015 WL 5996411 (Oct. 14, 2015) (internal quotation marks omitted), *cert denied*, 577 U.S. 985 (2015); *see Elmore*, 155 Wash.2d at 776 n.8 (same).

2. This case would also provide an exceptionally poor vehicle for the Court to consider any differences between the legal standards adopted by the federal appellate courts and the California Supreme Court. Under either, Sixth Amendment error occurred here. Starting with the federal courts' approach, there was plainly a "reasonable" or "substantial" possibility that the holdout juror's dismissal stemmed from her views of the evidence. *E.g.*, *Laffitte*, 121 F.4th at 489. The juror testified that she believed petitioner's testimony rather than the victim's. *Supra* p. 9; *see, e.g.*, 7 RT 645 (stating that she "believed the testimony is true from . . . the defendant"). And the statements of the other jurors, combined with the requests for readbacks of the victim's testimony, suggest that the holdout did not find the testimony adequate to prove beyond a reasonable doubt that the petitioner had touched the victim with sexual intent. *Supra* pp. 6-10; *see, e.g.*, 7 RT 634 (explaining that the jury "had the court reporter come in a couple of times to re-read" testimony in response to the holdout juror's concerns).

Under the California Supreme Court's standard, the question is somewhat closer. But the State now agrees that the record does not show to a "demonstrable reality" that the dismissed juror failed to engage in deliberations. *Cleveland*, 25 Cal.4th at 484. Although some jurors testified that the holdout never participated in deliberations, others testified to the contrary: that she did participate for at least several hours on the first day of deliberations. Pet. App. A-26-30 (Feinberg, J., dissenting). And critically, the

trial court did not make clear what it meant when asking the jurors whether the holdout had refused to participate "in a deliberative process." *E.g.*, 7 RT 631; *see supra* p. 9. Had the trial court used the definition supplied by the California Supreme Court—"listening to [other jurors'] views and . . . expressing his or her own views," *Cleveland*, 25 Cal.4th at 485—the other jurors likely would have responded differently. Several jurors explicitly acknowledged that the holdout expressed her own views. *See* 7 RT 621-638. And a note from the foreperson "confirms that [the holdout] was stating her interpretation of evidence to her colleagues." Pet. App. A-28 (Feinberg, J., dissenting). The other jurors also emphasized that they had repeatedly explained their views to the holdout, *see, e.g.*, 7 RT 629-632, and one juror testified that the holdout was "courteous"; "[s]he wasn't rude or anything," 7 RT 634. It is well-settled under California Supreme Court precedent that a juror may not be discharged merely because she "'c[a]me to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse[d] to change . . . her mind despite the persuasive powers of the remaining jurors.'" *Armstrong*, 1 Cal.5th at 453.

The trial court also found that the holdout juror "lied about engaging in the deliberative process" when she told the court that she had answered the other jurors' questions. Pet. App. A-15; *supra* p. 9. Again, however, California Supreme Court precedent merely requires a juror to explain his or her views of the case and listen to others' views, even if only "'halfheartedly.'" *Cleveland*,

25 Cal.4th at 486. The record shows that the holdout juror did so. And although the holdout's "confusing and rambling" colloquy with the trial court might suggest that she was inarticulate when deliberating, Pet. App. A-15, that would "at most . . . demonstrate[] a failure to deliberate *well*—not a failure to deliberate at all," *id.* at A-29 (Feinberg, J., dissenting). Accordingly, the State now agrees that "the record fails to support as a demonstrable reality that [the challenged juror] refused to deliberate." *Id.* at A-33.[10]

In light of the State's confession of error, the appropriate disposition would be an order granting, vacating, and remanding for further proceedings. Although several members of this Court have criticized the Court's practice of issuing "GVR" orders in response to confessions of error in certain circumstances, *see, e.g.*, *Myers v. United States*, 587 U.S. 981, 982 (2019) (Roberts, C.J., dissenting), the Court has continued to GVR where the government's confession supports reversal of the underlying judgment, *see, e.g.*, *Escobar v. Texas*, 143 S. Ct. 557 (2023); *Rojas v. United States*, 142 S. Ct. 421 (2021).[11] Here, the State's confession implicates the judgment: the Sixth

---

[10] To be sure, the Sixth Amendment does not bar dismissal of a juror who refuses to engage in any way with other jurors. That constitutes misconduct and justifies dismissal. *See, e.g.*, *Cleveland*, 25 Cal.4th at 485. In practice, however, it can sometimes be difficult to distinguish between misconduct of that nature and disagreements between a holdout and other jurors about the prosecution's case. *See, e.g.*, *Symington*, 195 F.3d 1088 nn.7-8.

[11] *See also Zielinski v. United States*, __ S. Ct. __ (2026) (No. 25-5067) (GVR'ing in light of confession even though the Solicitor General argued that the confession did not implicate the judgment); *Montague v. United States*, 144 S. Ct. 2654 (2024) (No. 23-959) (same).

Amendment error that occurred in this case was not harmless. *See, e.g.*, *Symington*, 195 F.3d at 1088 (deeming juror dismissal error in similar circumstances and reversing); *Laffitte*, 121 F.4th at 491 (similar).

3. If the Court nonetheless grants plenary review, the position of the State would be that the Court should adopt the "reasonable or substantial possibility" standard applied by the federal appellate courts. *Supra* pp. 13-14. Although the difference between that approach and the California Supreme Court's standard appears to be quite narrow in practice, *supra* pp. 16-18, the federal courts' approach offers greater clarity and predictability for courts and litigants. The federal courts' standard also appropriately balances respect for the Sixth Amendment's right to unanimity, *see Ramos*, 590 U.S. at 92, with the need to allow dismissal of jurors for good cause midway through deliberations in extraordinary circumstances. *See, e.g.*, *Kemp*, 500 F.3d at 304 (observing that the standard is "by no means lax" but provides "district courts with some leeway in handling difficult juror issues").

If the Court does not grant plenary review, the State will ask the California Supreme Court to alter its precedent and adopt the federal courts' approach. In the event that the Court issues a GVR order, for example, the State will immediately move to transfer the case to the California Supreme Court so that the State can ask it to adopt the "reasonable or substantial possibility" standard—or at least make clear that the "demonstrable reality" standard does not meaningfully differ from the federal courts' approach. *See*

*generally* Cal. Rules of Court, rule 8.552. In the event that the Court denies certiorari, the State will seek California Supreme Court review for that purpose in another appropriate case. Until that time, lower courts across the State will continue to be bound by the California Supreme Court's rejection of the federal courts' standard. *See, e.g.*, *Cleveland*, 25 Cal.4th at 484. The California Department of Justice will also communicate its position on the applicable legal standard to district attorneys across the State, who handle the vast majority of prosecutions in state trial courts.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted,

ROB BONTA
*Attorney General of California*
SAMUEL T. HARBOURT
*Solicitor General*
HELEN H. HONG
*Principal Deputy Solicitor General*
KIMBERLEY DONOHUE
*Senior Assistant Attorney General*
Cara M. Newlon/AC
CARA M. NEWLON
AARON D. PENNEKAMP
*Deputy Solicitors General*
NICOLE WELINDT
JOHN R. MERRITT
WILLIAM MOINE
*Deputy Attorneys General*

May 6, 2026