

No. 08-1402

IN THE
Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

v.

DIAPOLIS SMITH,

Respondent.

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

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, THE AMERICAN
CIVIL LIBERTIES UNION AND THE NATIONAL
JURY PROJECT AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENT DIAPOLIS SMITH**

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John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 *Creighton L. Rev.* 1137 (1978)22, 25, 31

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Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 *Chi.-Kent L. Rev.* 1033 (2003)29, 31

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The National Association of Criminal Defense Criminal Lawyers ("NACDL"), the American Civil Liberties Union ("ACLU"), and the National Jury Project ("NJP") respectfully submit this brief as *amici curiae* in support of respondent Diapolis Smith.¹

STATEMENTS OF INTEREST

The NACDL, founded in 1958, is a non-profit corporation with more than 12,000 direct members nationwide and in 28 countries, and more than 40,000 affiliate members in 90 state, provincial and local affiliate organizations. NACDL members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving jury composition and ensuring that juries are comprised of a fair cross-section of the community. In furtherance of its objectives, the NACDL files approximately fifty *amicus curiae* briefs each year,

¹ Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed with the Clerk, *amici curiae* have permission of all parties to file.

in this Court and others, addressing a wide variety of criminal justice issues.

The ACLU is a non-profit, nonpartisan national organization. The ACLU is dedicated to preserving the principles of liberty and equality embodied in the Constitution and the civil rights laws of this country.

The NJP is a non-profit corporation established in 1975 for the purpose of studying all aspects of the American jury system and maintaining and strengthening that system. The NJP has offices in Philadelphia, Pennsylvania, Minneapolis, Minnesota, and Oakland, California, providing consultative and educational services to attorneys and social science professionals in criminal and civil litigation in federal and state courts throughout the United States.

INTRODUCTION AND SUMMARY

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed" U.S. Const. amend. VI. This requirement of "an impartial jury" is a core American constitutional value. As this Court explained more than three decades ago, "an impartial jury" requires that the jury be representative of the community—that it "must be drawn from a fair cross-section of the community" *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). This recognition implements the Sixth Amendment's

impartial jury guarantee; it furthers paramount constitutional protections; it promotes accurate, unbiased, and reliable adjudications that instill confidence in our criminal justice system; it has deep historic roots; and it has worked well as a sound rule in the administration of criminal justice.

In support of Petitioner, *amicus* Criminal Justice Legal Foundation now asks this Court to jettison settled precedent and eviscerate the Sixth Amendment's "impartial jury" guarantee by overruling *Taylor* and *Duren*. Such a radical and abrupt departure is neither necessary nor appropriate. It would fly in the face of the Sixth Amendment's fundamental protection, it would injure important constitutional values, and it would harm the administration of criminal justice by undermining both the jury's legitimacy and the corresponding legitimacy of its verdicts. *Taylor* and *Duren* are sound and important precedents; they are essential to the Sixth Amendment, and should not be rejected or abandoned by this Court.

For the reasons stated by Respondent, the Sixth Circuit's decision should be affirmed. *Amici* submit this brief to emphasize that *Taylor* and *Duren*, and the fair cross-section requirement they explicate, are indispensable in implementing the fundamental constitutional guarantee of "an impartial jury."

ARGUMENT

I. The Requirement of A Representative Jury Is a Fundamental Constitutional Value.

From the nation's earliest days, Americans have believed the right to a representative jury to be of the highest importance.

Even before achieving independence, Americans emphasized this principle. Various forms of the right to a trial by one's peers were included in foundational documents for the colonies.² The Declaration of Independence, moreover, lists the denial of trial by jury as one of the abuses compelling separation from England. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 875 (1994).

The First Continental Congress, in turn, stressed the importance of the jury by declaring that "the respective colonies are entitled to . . . the great and

² The right to a jury trial was guaranteed by King James I's Instructions for the Government of the Colony of Virginia drafted in 1606; the Massachusetts Body of Liberties adopted in 1641; the Concessions and Agreements of West New Jersey of 1677; the Frame of Government of Pennsylvania of 1682; the Declaration of Rights of the First Continental Congress of 1774; the Constitution of Virginia of 1776; the Declaration of Independence, and the first constitutions of most states. Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501, 507-08 (1986).

inestimable privilege of being tried by their peers of vicinage, according to the court of [common] law." Jon Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 6 (1977) (quoting Declaration of Rights of the Continental Congress (1774), Article 5 (reprinted in Charles C. Tansill, ed., House Document No. 398, 69th Congress, 1st Session (Washington: Government Printing Office, 1927), p. 3)).

The Constitution's ratification debates reflect the vital necessity of ensuring that juries be representative of the community. In the run-up to the pivotal Virginia ratification debate, Richard Lee emphasized the role of the jury as a democratic institution:

It is essential in every free country that *common people* should have a part and share of influence, in the judicial as well as in the legislative department. . . . The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion and influence, and the wisest and most fit means of protecting themselves in the community. Their situation as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society, and to come forward, in turn, as the centinels and guardians of each other.

Van Dyke, *supra*, at 46-47 (quoting Richard Henry Lee, "Letters of a Federal Farmer", Letter IV, Oct. 12, 1787, in *Pamphlets on the Constitution of the United States* 316 (Paul Leicester Ford ed., 1968)).

The explicit inclusion of the right to "an impartial jury" as a core guarantee in the Bill of Rights vividly demonstrates the importance of this principle. The "impartial jury" right is included in the same Amendment that provides such fundamental protections as "a speedy and public trial," the right to counsel, and the right to confront one's accusers; like those protections, it reflects a quintessential American value. Along with those other Sixth Amendment rights, an impartial jury enhances the accuracy and reliability of verdicts, as well as the public's confidence in the fairness of proceedings.

Indeed, the role of juries was deemed so essential to our system of government that guarantees of various aspects of trial by jury were referenced in three separate amendments in the Bill of Rights. *See* U.S. Const. amends. V (right to be indicted by a grand jury in felony cases), VI (right to an impartial jury in criminal cases) and VII (right to a jury in civil matters).

Soon after ratification of the Bill of Rights, the paramount role of impartial juries in the American system of justice and democracy continued to be emphasized. Thomas Jefferson, for example, raised the topic in his first inaugural address. Jefferson stressed that "trials by juries *impartially selected*" represent one of the cornerstones of our system. Van Dyke, *supra*, at 46-47 (quoting *Messages and Papers*

of the Presidents 323-24 (James D. Richardson, ed. 1876)) (emphasis added).

Long before *Taylor* and *Duren*, this Court emphasized the importance of representative juries as an essential element of the Sixth Amendment's impartial jury guarantee. In *Strauder v. West Virginia*, 100 U.S. 303 (1879), for example, the Court defined the criminal jury as a body "composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id.* at 308.

This Court has consistently explained that an impartial jury is, of necessity, a broadly representative one. In *Smith v. Texas*, 311 U.S. 128 (1940)—a case decided 35 years before *Taylor*—this Court addressed a claim that African Americans had intentionally been excluded from grand juries. In upholding the challenge, the Court emphasized the historical basis for the requirement that a jury be representative of the community: "It is part of the established tradition in the use of juries . . . that the jury be a body truly representative of the community." *Id.* at 130.

The Court explained that it is only when juries represent the entire community that they can function as true "instruments of public justice." *Id.* Stressing the crucial role that representative juries play in our society, the Court added that "the exclusion from jury service of otherwise qualified groups not only violates our Constitution . . . but is at war with our basic concepts of a democratic

society and a representative government." *Id.* This analysis of grand juries, of course, applies to trial juries with at least equal force.

The Court renewed and expanded its commitment to representative juries only two years later. In *Glasser v. United States*, 315 U.S. 60 (1942), the Court confronted a claim by a defendant that he had been denied his Sixth Amendment right to an impartial jury. The defendant claimed that the only women on the venire were members of the League of Women Voters who had attended "jury classes whose lecturers presented the views of the prosecution." *Id.* at 83-84. The Court condemned "the deliberate selection of jurors from the membership of particular private organizations" because it rendered the jury "the organ of a special class," and "openly partisan." *Id.* at 86. Significantly, the Court also expressly recognized that drawing potential jurors from "*a cross-section of the community*" is the only sure method of guaranteeing the right to an impartial jury. *Id.* (emphasis added). The Court proceeded to note that "a 'body truly representative of the community'" is vital to the proper functioning of the jury system, and it characterized "trial by a representative group" as an "essential right." *Id.*

Four years later, the Court again affirmed its belief that only juries drawn from a cross-section of the community pass constitutional muster. In *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), the Court addressed a civil litigant's challenge to the jury selection procedures in federal court. *Id.* at 219. Speaking in terms equally applicable to criminal juries, the Court explained that "[t]he American tradition of trial by jury, considered in connection

with either criminal or civil proceedings, necessarily contemplates *an impartial jury drawn from a cross-section of the community.*" *Id.* at 220 (emphasis added).

The Court recognized that individual juries cannot be expected to include representatives of every group in a community, but emphasized that "those eligible for jury service are to be found in every stratum of society," and that to disregard this imperative would "open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Id.*

In subsequent opinions, the Court continued to validate the cross-section requirement as an essential element of an impartial jury. In *Brown v. Allen*, 344 U.S. 443 (1953), for example, the Court considered a challenge to a state-court criminal conviction on equal protection and due process grounds. *Id.* at 465. The defendant argued that the state's practice of developing jury lists solely from tax records constituted discrimination because it led to the under-representation of African Americans. *Id.* at 467-68.

In rejecting the claim, the Court explicitly recognized that state-devised lists for jury service must "reasonably reflect[] a cross-section of the population suitable in character and intelligence for [jury] duty." *Id.* at 474. Like other decisions of this Court, *Brown* thus makes clear that the cross-section requirement is integral to ensuring a fair trial.

After it found the Sixth Amendment applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court continued to emphasize the

importance of the cross-section requirement. For example, in *Williams v. Florida*, 399 U.S. 78 (1970), the Court rejected a challenge to Florida's practice of empanelling criminal juries of only six members. In doing so, however, the Court once again stressed that petit juries must "provide a fair possibility for obtaining a representative cross-section of the community." *Id.* at 100.

Against this background, the Court in 1975 confronted a constitutional challenge based on a system that had the effect of excluding most women from jury eligibility. *Taylor*, 419 U.S. at 524. Justice White's opinion for the Court explained that, under this Court's existing precedents, "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial," *id.* at 528, and thus the exclusion was unconstitutional.

The Court further explained that the fair cross-section requirement is "fundamental" and has "a solid foundation," and added that the Sixth Amendment guarantee is not protected "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Id.* at 530. The Court was not breaking new ground; rather, it was enforcing the central Sixth Amendment guarantee of "an impartial jury," which ensures that the jury is representative of the community.

Similarly, in *Duren v. Missouri*, 439 U.S. 357 (1979), the Court again reaffirmed the importance of a jury drawn from a fair cross-section of the community in order to implement the Sixth

Amendment's guarantee of an "impartial jury." The Court explained that, to demonstrate a Sixth Amendment violation, a defendant must establish a prima facie case by showing that a distinctive group was under-represented in the venire because it was systematically excluded from the jury-selection process, and that the state is unable to justify that exclusion with a significant state interest. *Id.* at 364. The Court again emphasized the settled right of "a criminal defendant . . . to a petit jury selected from a fair cross section of the community" as an essential element of the "Sixth and Fourteenth Amendments." *Id.* at 359.

Most recently, in *Holland v. Illinois*, 493 U.S. 474 (1990), the Court again stressed the importance of the fair cross-section requirement, while recognizing that this requirement "obviously is not explicit in [the] text [of the Sixth Amendment]" *Id.* at 480. In *Holland*, the Court determined that the petitioner, a Caucasian, had standing to raise a Sixth Amendment challenge because African Americans were excluded from his jury. *Id.* at 476.

Speaking for the Court, Justice Scalia explained that the cross-section requirement "is derived from the traditional understanding of how an 'impartial jury' is assembled. That traditional understanding includes a representative venire, so that the jury will be . . . 'drawn *from* a fair cross section of the community.'" *Id.* at 480 (quoting *Taylor*, 419 U.S. at 527) (emphasis in original).

The foregoing makes clear that, from the earliest days of this nation, an impartial jury, representative of the community or one's peers, has been viewed as

essential to American liberty and democracy. This Court has consistently recognized and protected this bedrock principle. The requirement of a representative jury has long been honored as an indispensable means of ensuring that the jury reflects the full variety of attitudes and human experience that comprise the larger community—an critical element of fairness in the criminal justice system, and of democratic participation in the judicial process.

II. The Importance of a Representative Jury Has Deep Historic Roots.

The overarching importance of ensuring that criminal juries reflect the views of the larger community was recognized well before the concept of representativeness assumed its central role in the American experience. From its earliest origins, the jury has been understood as a representative body that brings the community's sense of justice to bear on criminal matters. This view is a necessary consequence of the fundamental purpose served by a criminal jury—to deliver a verdict that will be accepted as just and impartial both by the parties and the community at large. *See generally Powers v. Ohio*, 499 U.S. 400, 413 (1991) ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.").

The concept of representativeness has always been essential in the character of the criminal jury. Even jury systems in ancient times reflected a belief

that representativeness is essential if the jury's verdict is to be accepted by the community as impartial and fair. In ancient Egypt, for example, a jury that tried minor charges against workmen was required to be comprised of equal numbers of individuals from both sides of the Nile. See Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* 4 (1973). Criminal juries in ancient Athens were even more democratic—all citizens at least 30 years of age were eligible to serve, provided they were not indebted to the state. *Id.* at 2. Similarly, in Scandinavian and Teutonic judicial proceedings, such as the Norse *Thing* and the German *Mallum*, all citizens were initially entitled to participate. See William Forsyth, *History of Trial by Jury* 4, 7 (1852). These assemblies were eventually limited to "representatives of the community," presumably when growing populations made the process too cumbersome. *Id.* at 7.

It was no different in the Anglo-Saxon tradition. In their earliest form, English juries functioned like modern grand juries, deciding only whether the accused should stand trial.³ See Charles L. Wells, *The Origin of the Petty Jury*, 27 L. Q. Rev. 347 (1911). These grand juries were comprised of twelve higher-ranking men selected from the hundred, or district, in which the offense had been committed, "and represented the voice of the hundred in making the

³ The test of the accused's guilt or innocence was by some other means, such as trial by ordeal. Wells, *supra*, at 347.

accusation."⁴ Wells, *supra*, at 357; *see also* Moore, *supra*, at 38-39 (1951). These juries were supplemented with representatives from the "vills," or townships, immediately adjacent to where of offense had occurred. Wells, *supra*, at 354. The representatives of these neighboring townships were commoners, and their involvement in the process reflected a clear understanding of the significance of ensuring that juries represent of all segments of the community.⁵ As one commentator described the early English jury system:

[T]he essential feature of the whole [jury] system, then as now, is that it is as a representative body that the jury is called upon for a verdict. It represents, that is, the common voice, or the common sense of the community, and that is why having a jury was called 'putting oneself on the country'.

⁴ In fact, the grand jury's precursor was well established in England before this time. But the importance of representativeness was evident even then, as grand jurors were comprised of individuals who represented the community's stake in the matter, and who provided a decidedly local assessment of the charges. William Stubbs, *The Constitutional History of England 175* (1979).

⁵ As one commentator notes, the involvement of these commoners would become important when juries were later called upon to decide actual guilt or innocence: "Representatives of the vill came to play a crucial role: their assent was typically required for a conviction." *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, 362-63 (J.S. Cockburn and T.A. Green eds., 1988).

Wells, *supra*, at 354.

These early juries were self-informing, meaning that they either had direct knowledge of the allegations or investigated the allegations themselves. Moore, *supra*, at 39. Juries thus were initially delegates of their communities, called upon to investigate and resolve disputes among their own. Wells, *supra*, at 355 ("[Jurors'] essential character . . . was that of representatives . . . and it is in this effort to get the representative voice of the community that we find the key to the real origin of the [petit] jury.").

As one historian has explained, the legitimacy of early juries derived principally from their representative nature:

[T]he jury was a body of neighbors called in . . . to decide disputed questions of fact. They were in a sense witnesses. But they were more than witnesses. They were a method of proof that the parties were obliged or had agreed to accept. It was easier so to regard them, because *they represented the sense of the community . . . from which they were drawn . . .*

1 Sir William Holdsworth, *A History of English Law* 317 (7th ed. 1956) (emphasis added). This view of the jury was by no means anomalous. As another historian remarked: "[i]n its origin the jury is of a representative character; *the basis of its composition in the early days . . . was clearly the intention to make it representative of the community.*" Theodore F.T. Plucknett, *A Concise History of the Common Law*, (Book 1) 127 (5th ed. 1956) (emphasis added).

Trial by jury emerged as a mature institution in England in the thirteenth century, when more traditional forms of trial became untenable.⁶ See Van Dyke, *supra*, at 3-4. When trial by ordeal was officially prohibited in England, juries were called upon to decide the guilt or innocence of the accused. Wells, *supra*, at 349; Moore, *supra*, at 52. Significantly, the English system's commitment to impartiality and representativeness grew even stronger at this point. See Wells, *supra*, at 354. It was recognized that, for a verdict of actual guilt to be accepted by the parties and the community, the jury would have to be expanded to include more than individuals from the adjacent townships and the surrounding district. *Id.* ("while the [grand] jury was sufficiently representative to present an indictment, it might not be representative enough to give fairly and adequately the voice of the country in regard to the real guilt or innocence of the accused"). Therefore, to enhance their

⁶ Criminal jury trials existed before this time, but were rare because the parties had to agree to a jury trial, and to bear the associated costs. See Moore, *supra*, at 41. Both trial by compurgation (in which the accused was required to assemble a group of persons to swear that his version of events was trustworthy) and trial by ordeal (in which the accused underwent some form of physical torment in the belief that God would intervene to protect the innocent) had fallen into disuse by this time. Compurgation was found to be susceptible to abuse and venality, while trial by ordeal became invalid when Pope Innocent III forbade the clergy from administering the oaths on which the trials depended. 1 Plucknett, *supra*, at 115-16.

impartiality, juries were expanded to include individuals from the entire county.⁷ *Id.* at 356.

Eventually, jurors came to be drawn from "all [geographic] parts of the County, with several members being selected from each hundred [neighborhood]." *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* 122 (J.S. Cockburn and T.A. Green eds., 1988)(discussing grand juries); *see also* Wells, *supra*, at 357 (noting the same practice was utilized for petit juries). The jury included equal numbers of men from different neighborhoods, with each group providing its own version of events. Van Dyke, *supra*, at 12; Wells, *supra*, at 357. This early example of the cross-section approach to juror selection rests on an implicit understanding that those living in different areas could decide things differently, and that fairness and impartiality can best be assured by collecting and balancing this range of perspectives. Wells, *supra*, at 358 ("By [selecting petit jurors from each neighborhood], a larger representation of the whole county could be secured, and thus a fairer estimate placed upon the merits of the case, and a truer verdict given . . .").

The English legal system's early commitment to a truly representative jury found its fullest expression

⁷ Initially, this goal was achieved simply by adding additional members to the jury. These "combination juries" numbered from twenty-four to eighty-four individuals, and the number eventually became unwieldy. This approach was initially used only in special cases, but the practice became more widespread. *See* Wells, *supra*, at 356.

in the Magna Carta, which, as this Court has noted, "declared that no freeman should be deprived of life, etc., but by the judgment of his peers" *Thompson v. Utah*, 170 U.S. 343, 349 (1898). The phrase "judgment of his peers . . ." refers to a "trial by twelve jurors," *id.*, composed of individuals from the same class, legal status, or caste as the accused. See W.S. McKechnie, *Magna Carta: A Commentary* 378 (2d ed. 1914) (the "peers of a Crown tenant were his fellow Crown tenants"); 4 William Blackstone, *Commentaries* 344 (1769).⁸ This provision ensured that "every Englishman" would be entitled to serve as jurors, and that the community from which jurors could be selected would not be limited to those beholden to the King. Blackstone, *supra*, at 344; *Twelve Good Men and True*, *supra*, at 35.⁹

⁸ Although there is some scholarly debate as to which article of the Magna Carta conferred the right to a criminal jury trial, it seems clear that the Magna Carta established this right. See Moore, *supra*, at 50-51.

⁹ That eligibility for jury service in England was historically contingent upon the ownership of land does not undermine the view that English law has always been committed to ensuring impartiality through representative juries. As one commentator noted, the property requirement was viewed as "the necessary prerequisite of impartiality and independence," and as the "best guarantee of socially acceptable verdicts." *Twelve Good Men and True*, *supra*, at 123. The property requirement, then, was little different from the juror qualifications of today, which merely ensure that jurors are adult citizens capable of understanding the evidence and law. Indeed, the property requirement may be likened to the modern practice of excusing jurors whose limited financial means make jury service unduly burdensome. Moreover, in practice, medieval juries in
(*cont'd*)

Thus, the view that a jury can be impartial only if it is representative of the entire community—a key element of the Sixth Amendment, implemented by the fair cross-section requirement of *Taylor* and *Duren*—has been central to the understanding of the role and value of juries for many centuries.

III. The Sixth Amendment's Fair Cross-Section Requirement Protects Crucial Societal and Governmental Interests.

As this Court has consistently recognized, the fair cross-section requirement supports the impartiality, democratic character, and legitimacy of the criminal justice system.

A. The Fair Cross-Section Requirement Supports the Impartiality of the Criminal Justice System.

The fair cross-section requirement buttresses the impartiality of our criminal justice system. This interest undergirds the constitutional right of the accused to a trial by jury. *See* U.S. Const. amend. VI.

(cont'd from previous page)

England were regularly comprised of those who failed to meet the property requirement — such as "day laborers, poor husbandmen and small craftsmen" — owing to the failure of many qualified landowners to appear for service. *Id.* at 125. English juries were therefore comprised of a broader cross-section of society than is sometimes presumed.

Securing impartiality presents challenges. For example, Justice Thomas has noted the persistent difficulty of reaching fair verdicts when defendants encounter racially homogeneous juries that do not fully reflect the community's demographics:

[T]he racial composition of a jury may affect the outcome of a criminal case. We explained [in *Strauder*]: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." . . . [S]ecuring representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.

I do not think that this basic premise of *Strauder* has become obsolete.

Georgia v. McCollum, 505 U.S. 42, 60-61 (1992) (Thomas, J., concurring in judgment) (*quoting Strauder*, 100 U.S. at 309).¹⁰

Research confirms that the potential partiality of homogeneous juries has direct and measurable effects on verdicts. *See, e.g.*, Douglas L. Colbert,

¹⁰ In *McCollum*, the Court invalidated a criminal defendant's discriminatory peremptory strikes under the Equal Protection Clause. 505 U.S. at 59.

Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 110-115 (1991) ("[A]ll-white mock juries consistently returned more guilty verdicts against black defendants than they did when white defendants were charged with identical crimes"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611 (1985) (discussing original findings that all-white juries are biased against racial minorities); cf. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 608 (2006) ("[H]omogeneous groups spent less time on their decisions, made more errors, and considered fewer perspectives.").

Moreover, "a substantial body of empirical evidence has developed which shows that all-white juries are not impartial when deciding cases involving interracial crimes." Colbert, *supra*, at 110; see also *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1559 (1988).

Conversely, studies have demonstrated that racially-heterogeneous juries tend to render verdicts influenced less by racial bias. See Colbert, *supra*, at 112 (citing J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 Law & Psychol. Rev. 103 (1979); Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 Hispanic J. Behav. Sci. 275 (1983)).

The fair cross-section requirement supports the critical governmental interest in impartial jury verdicts by counteracting these potential biases. With regard to cross-sectional jury venires, the Court has declared, "The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality" *Taylor*, 419 U.S. at 530. "In particular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case." *Ballew v. Georgia*, 435 U.S. 223, 234 (1978).

Supporting this objective, one commentator emphasized, "[G]iven differences in group behavior, a cross section will help cancel group biases." John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 Creighton L. Rev. 1137, 1138 (1978). As a result, "[the jury] as a whole . . . will be impartial, even though no juror is." Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 101 (1994) (citing *People v. Wheeler*, 583 P.2d 748, 755 (Cal. 1978) (discussing "overall impartiality"); *Commonwealth v. Soares*, 387 N.E.2d 499, 512, *cert. denied*, 444 U.S. 881 (Mass. 1979) (discussing "diffuse impartiality")).

Although it is doubtful that the long-held biases each juror brings to deliberations will merely evaporate upon entering the jury room with members of different groups, "the presence of persons from groups that are the object of prejudice [tends to] inhibit[] the expression of prejudice by other jurors." Ashby, *supra*, at 1139.

As one commentator suggests,

The noble purpose of [a representative] jury [is] to silence expressions of group prejudice and to ratchet up the deliberations to a higher level of generality. Jurors wishing to be persuasive . . . now have to abandon arguments that depend[] on the particular prejudices or perspectives of their own kind. Their arguments . . . have to resonate across group lines.

Abramson, *supra*, at 101.

Impartiality, as required by the Sixth Amendment in criminal juries, requires tools that reduce the potential taint of group biases. In light of the tendency of representative juries to overcome bias, Justice Marshall's admonition regarding the importance of heterogeneous juries remains persuasive:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. . . . [I]ts exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503-504 (1972) (plurality opinion) (Marshall, J., joined by Douglas and Stewart, JJ.).¹¹

The fair cross-section requirement does not exist merely as an end in itself, but rather as a means to foster more robust deliberation that minimizes jurors' reliance on preconceived notions. Thus, to the extent the fair cross-section requirement helps increase the potential for heterogeneity in the jury, it helps minimize expressions of bias that might lead members of the jury to rely impermissibly on prejudice rather than the evidence to reach a verdict. The requirement thereby fortifies societal and governmental interests in the constitutional principle of impartiality.

***B. The Fair Cross-Section
Requirement Reinforces Crucial
Democratic Goals.***

The fair cross-section requirement also significantly furthers the participatory aims of representative democracy. In *Taylor*, the Court described "community participation in the administration of the criminal law" as "consistent

¹¹ In *Peters*, the Court invalidated the indictment and conviction of a Caucasian defendant because African Americans had been excluded from the grand jury. 407 U.S. 493. Three justices found that this systematic exclusion violated the Constitution. *Id.* at 504-05 (Marshall, Douglas, and Stewart, JJ.). Three others found this systematic exclusion violated federal statutory law. *Id.* at 506-07 (White, Brennan, and Powell, JJ., concurring in judgment).

with our democratic heritage." 419 U.S. at 530. This democratic participation is both a goal and a result of representative jury pools.

Notably, the Court has likened jury service to the fundamental right to vote: "[W]ith 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*, 499 U.S. at 407. Similarly, the Court recently highlighted the important democratic function of juries: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

This view is long-standing. Thomas Jefferson described trial by jury "as the only anchor yet imagined by man by which government can be held to the principles of its constitution." Robert C. Walters, et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 322 (2005). Tocqueville wrote that the American jury as an institution "always preserves its republican character" and that it appears to be "as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power." Alexis de Tocqueville, *Democracy in America*, 282-83 (Knopf 1951).

Modern scholars also recognize this aspect of jury service: "[J]ury service is the most direct contact that a citizen has with his government and, next to voting, about the only chance he has to participate in it as a basic decision-maker." Ashby, *supra*, at 1140

(citing Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 63 (1967)). Another scholar suggests, "[T]he link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure, spanning three centuries and eight amendments: the Fifth, Sixth, Seventh, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth." Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 206 (1994).

Discrete groups in our society often have been excluded from jury pools. *See, e.g., Taylor*, 419 U.S. 522 (1975) (women); *Thiel*, 328 U.S. at 219 (daily wage earners); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican Americans); *Smith*, 311 U.S. 128 (African Americans); *Norris v. Alabama*, 294 U.S. 587 (1935) (same).¹² In response, the Court has emphasized that the fair cross-section requirement protects the ability of citizens to participate in this vital, long-standing expression of democracy: "[T]he broad representative character of the jury should be maintained . . . because sharing in the administration of justice is a phase of civic responsibility." *Taylor*, 419 U.S. at 530-31.

Earlier, the Court similarly explained, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. . . .

¹² Moreover, various commentators have discussed this persistent problem. *See infra* Part III.D, pp. 32-34.

[E]xclusion from jury service of otherwise qualified groups . . . is at war with our basic concepts of a democratic society and a representative government." *Smith*, 311 U.S. at 130.

Representative venires promote democratic principles by ensuring broad participation in the civic responsibility of administering public justice. Moreover, protecting the inclusion of identifiable groups in the jury venire—and thus potentially in the petit jury—helps ensure that verdicts reflect the values of the community. *See, e.g., Massaro, supra*, at 546-47 ("This community concern is satisfied by a jury that includes *several* different community groups and that is selected through a procedure that over time is likely to include every group.") (emphasis in original); *cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) ("Trial by a jury . . . was important to the founders because juries . . . keep the administration of law in accord with the wishes and feelings of the community.") (citing Oliver W. Holmes, *Collected Legal Papers* 237 (1920)).

The Sixth Amendment's democratic mandate that the "impartial jury" be drawn from "the State and district where in the crime shall have been committed" likewise indicates that the jury should represent the views of the community overall. *See Taylor*, 419 U.S. at 525, 530-31; Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 *Geo. L.J.* 945, 958-59 (1998). The fair cross-section requirement helps to ensure that jury verdicts reflect the totality of these views by ensuring the opportunity for broad community participation.

The fair cross-section requirement also reinforces another democratic value: protection against the arbitrary exercise of governmental power. The Court has long recognized the role of the jury in furthering this societal interest: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . [It is] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 155-156; see also *Ex parte Milligan*, 71 U.S. 2, 126 (1866) ("[T]he lessons of history informed [the Founders] that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong.").

As the Court explained in *Taylor*, the fair cross-section requirement is essential to the jury's role in discharging this democratic function:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

419 U.S. at 530.

The fair cross-section requirement thus plays a critical role in protecting and enforcing the central democratic values that underlie the jury's role in the American system.

C. *The Fair Cross-Section Requirement Bolsters Public Confidence in the Jury System.*

The fair cross-section requirement also powerfully supports the perceived legitimacy of juries. As the Court has explained, "The purpose of the jury system is to impress upon the criminal defendant *and the community as a whole* that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413 (emphasis added).

Public confidence in the jury system depends not only upon broad democratic participation in or the actual impartiality of the system, but also the public's perception that jury verdicts are fair. *See, e.g., Leslie Ellis & Shari Seidman Diamond, Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1038 (2003) ("Regardless of any direct effects on verdict, unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes."). In this regard, the public must view criminal verdicts as legitimate to prevent diminished trust in the system as a whole and maintain social order. *See id.* at 1039.

Inclusive venires (*i.e.*, those that represent all groups of the community) serve this interest. Both this Court and scholars have recognized the

relationship between inclusive juries, the perception of fairness, and public confidence in criminal justice. For example, Justice Thomas has explained:

The public, in general, continues to believe that the makeup of juries can matter in certain instances. . . . Major newspapers regularly note the number of whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

McCullum, 505 U.S. at 60-61 (Thomas, J., concurring in judgment).

Studies confirm that groups under-represented on juries distrust the verdicts rendered by homogeneous juries. For example, researchers report:

[T]he relationship between the verdict and the racial composition of the jury suggests that when the process is inclusionary (*i.e.*, the jury is racially heterogeneous), the outcome does not influence the perceived fairness of the trial. However, when the process fails to produce a heterogeneous jury (*i.e.*, the all-White jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair.

Ellis & Diamond, *supra*, at 1049. *See also* Ashby, *supra*, at 1139 ("When large classes of people are denied a role in the legal process, even if that denial is wholly unintentional or inadvertent, there is bound to be a sense of alienation from the social order."); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 Va. J. Soc. Pol'y & L. 646, 663-64 (1997).

The fair cross-section requirement helps to remedy this problem and buttresses public confidence in jury verdicts and the criminal justice system more broadly. *See Taylor*, 419 U.S. at 530 ("Community participation in the administration of the criminal law . . . is . . . critical to public confidence in the fairness of the criminal justice system."); *see also Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986); *Holland*, 493 U.S. at 489 (Kennedy, J., concurring).

The fair cross-section requirement also increases the chance that the petit jury will reflect the demographics of the community. This is an important component of perceived fairness "[b]ecause the jury's fairness is determined not only by its verdict but also by its visual appearance." Massaro, *supra*, at 517. Research shows that the public generally believes the verdicts of diverse juries are fairer. *See* Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 Am. Crim. L. Rev. 1177, 1182 (1994) ("[I]ncreasing the racial and ethnic diversity of juries

can make particular jury decisions seem fairer to litigants and observers, which in turn can bolster support for the jury as an institution."); Fukurai & Davies, *supra*, at 663-64.

Thus, the fair cross-section requirement not only furthers impartiality and democratic values, but it also contributes substantially to the public's faith that the jury system is legitimate, and its verdicts worthy of confidence and respect.

D. *The Fair Cross-Section Requirement Remains Necessary.*

Meritorious challenges under the Sixth Amendment's cross-section requirement continue to be an important mechanism for ensuring the fairness and reliability of juries. *See, e.g., United States v. Jackman*, 46 F.3d 1240, 1244 (2d Cir. 1995) (violation established where venire was selected from a list that under-represented minorities because it inadvertently omitted two cities with the highest minority population); *United States v. Osorio*, 801 F. Supp. 966, 975 (D. Conn. 1992) (prima facie cross-section violation found where jury lists inadvertently excluded all residents of New Britain and Hartford); *People v. Hubbard*, 552 N.W.2d 493, 504 (Mich. Ct. App. 1996); *In Re Rhymes*, 170 Cal. App. 3d 1100 (1985).

Research confirms that under-representation of distinctive groups in the community remains a significant problem in many jurisdictions. For example, in 2007, Citizen Action of New York tallied the race status of over 14,000 Manhattan residents reporting for jury duty at jury assembly rooms for

civil and criminal cases in the Supreme Court, New York County (Manhattan) for a 12-week period from November 2006 to February 2007. See Bob Cohen & Janet Rosales, *Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform* (June 2007).

This study concluded that Hispanics were under-represented by 77% and African Americans were under-represented by 42%, while Caucasians were over-represented by 43%, as measured by their proportionate share of Manhattan's population. *Id.* at i.

Similarly, a jury assessment report for the Third Judicial Circuit Court of Wayne County, Michigan, found that in 2004 through 2005, African-Americans comprised only 25.7% of the jury pool, compared to 39.6% of the Wayne County adult population, creating an average disparity of 13.9%. Paula L. Hannaford-Agor & G. Thomas Munsterman, *Third Judicial Circuit of Michigan Jury System Assessment, Final Report*, i (National Center for State Courts, Aug. 2, 2006).

Another study concluded that ethnic minorities are under-represented in jury pools in Dallas and Harris Counties, Texas. Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venues*, 43 *Judges J.* 17, 17 (2004). The study found that "[d]espite the fact that Hispanics comprise about one-third of Dallas County's adult population, less than 10 percent of those who show up for duty are Latino. . . . [and] [w]hile more than 30 percent of Harris County is Latino, less than 13 percent of those who

participated in the jury system are Latino." *Id.* at 19.

Studies show that under-representation of certain groups in the jury-selection process remains a problem in various other states, as well. *See, e.g.*, Nebraska Minority Justice Committee, *Representative Juries: Examining the Initial and Eligible Pool of Jurors* 26 (Dec. 2008) ("data indicate that there are significant racial disparities in the initial and eligible pool of jurors."); South Dakota Equal Justice Commission, *Final Report and Recommendations* 8 (2006) (South Dakota juries "rarely represent the racial composition of a community."); *Report of the Alaska Supreme Court Advisory Committee on Fairness and Access* 83 (Oct. 31, 1997) (Native Alaskans under-represented in Kodiak and Nome, African-Americans under-represented in Anchorage and Fairbanks, and Asian-Americans under-represented in Anchorage).

Accordingly, any attempt to characterize *Taylor*, or the fair cross-section requirement, as a relic that has outlived its usefulness is belied by the facts. In reality, *Taylor*, with its explication of the core Sixth Amendment right to "an impartial jury," remains vital precedent that is necessary to safeguard a constitutional right that fosters the public's confidence and participation in government.

IV. Principles of *Stare Decisis* Strongly Support The Fair Cross-Section Requirement.

In *Taylor*, this Court articulated a clear principle of constitutional law that enforces a longstanding, fundamental right. See Part I, *supra*. The rule is eminently sound in principle and, with the benefit of *Duren's* additional guidance, has proven entirely workable in practice.

Abandoning *Taylor* would unnecessarily "cast[] aside workability and relevance and substitute[] uncertainty." *Williams*, 399 U.S. at 129 (Harlan, J., concurring in part and dissenting in part). This Court should not endorse a result that would, inevitably, make enforcement of the obligation to provide an impartial jury more cumbersome, erratic, and unpredictable. *Taylor* was correct as an initial matter; its role as settled precedent further counsels strongly against discarding it.

This Court has repeatedly held that the doctrine of *stare decisis* "is of fundamental importance to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Fidelity to precedent "ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

Stare decisis allows society "to presume that bedrock principles are founded in law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Id.* at 265-66. Even in cases involving

constitutional rights, rejection of precedent requires a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

Amicus Criminal Justice Legal Foundation makes the anomalous suggestion that the fair cross-section requirement should be abandoned because objections to the composition of the venire can be addressed through the Equal Protection Clause. See Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 25-32.

This suggestion is unpersuasive. Since the Sixth Amendment explicitly addresses the requirement of "an impartial jury," it reverses both logic and law to suggest that the Sixth Amendment should be abridged and that a claim addressing the impartiality of the jury should be considered only under the general contours of the Equal Protection Clause.

This suggestion is especially inapt because the Sixth Amendment's guarantee of an impartial jury in the Bill of Rights reflects its cardinal role in the American system. Far from being irrelevant or redundant, the Sixth Amendment's "impartial jury" requirement is central to the fair-cross-section issue; it makes little sense to contend that all such jury challenges should be raised only under the complex equal protection jurisprudence developed in vastly different contexts.

There are also critical distinctions between the Sixth Amendment's fair cross-section right and Equal Protection that weigh overwhelmingly in favor of retaining the former as the means for ensuring impartial juries. For example, while Equal

Protection forbids discrimination against identifiable groups, the Sixth Amendment's fair cross-section right directly promotes the ideal of ensuring that juries represent all distinct groups within a community, thereby more directly promoting the constitutional values at stake.

Also, the fair cross-section right directly vindicates the defendant's interest in a fair trial, binding this interest directly to the cross-sectional ideal, while Equal Protection promotes citizens' equal access to participate in the criminal justice system. The fair cross-section right also addresses those instances in which purposefully different treatment of classes is absent, but computer glitches or other systemic problems result in an unbalanced venire.

Consequently, to withdraw the right of defendants to have potential jurors selected from a fair cross-section of the community would be inconsistent with any appropriate notion of constitutional decision-making. Only if a precedent is "unsound in principle," "unworkable in practice," or has led to inconsistent, unforeseen, or anomalous results would such a radical step be warranted. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). None of these justifications is present here. To the contrary, the fair cross-section requirement recognized in *Taylor* is sound in principle and workable in practice, and has led to principled results that further the quintessential American value of "an impartial jury." As a result, it should be fortified, not discarded.

CONCLUSION

For the foregoing reasons, and for the reasons stated by the Respondent, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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