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No. 06-11612

IN THE

Supreme Court of the United States

HOMERO GONZALEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over *voir dire*?

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INTERESTS OF *AMICUS CURIAE* [1]

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) seeks to honor the extraordinary contributions of one of the great lawyers of the twentieth century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy.

CHHIRJ, through research and litigation, seeks to address various issues of disparity and racial justice. In the present case, CHHIRJ explains why jury selection under the supervision of an Article III judge is important to ensuring a felony criminal trial that is free from racial and other invidious forms of discrimination. At a minimum, the Constitution's framework for jury selection in a felony criminal trial should not be jettisoned in the absence of the express, personal consent of the defendant on the record.

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[1] The parties have consented to the filing of the brief and their letters of consent have been filed with the Clerk of the Court. *Amicus curiae* states that no counsel for either party authored any part of this brief. No person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. JURY SELECTION IS OF PARAMOUNT IMPORTANCE IN A FELONY CRIMINAL TRIAL

A. The Jury is the Constitution's Cornerstone in Felony Criminal Cases

The right to "trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). A criminal defendant's right to a jury trial is the only guarantee included in both the body of the Constitution and the Bill of Rights. Article III, section 2 provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Likewise, the Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

These constitutional provisions codify the English and early American understanding "'[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies.'" *Duncan*, 391 U.S. at 152 (quoting Resolutions of the Stamp Act Congress (1765)). First recognized in the Magna Carta, the right to jury trial has always been a fixture in American society. *See* 3 J. Story, Commentaries on the Constitution § 1773, at 652-53 (1833) [hereinafter "Story"] (jury trial was a "fundamental right" and the Constitution would have been "justly obnoxious to the most conclusive objection, if it had not recognised, and confirmed it in the most solemn terms"); *see also* 4 W. Blackstone, Commentaries 342-44 (1769) [hereinafter "Blackstone"] (jury trial is the "grand bulwark of our liberties"); M. Hale, His-

tory and Analysis of the Common Law of England 252-64 (1713) (jury trial is "upon all Accounts . . . the best Trial in the World"). Each of the colonies with written constitutions guaranteed the right to jury trial, and the First American Congress named it one of the "most essential rights and liberties of the colonists." Resolutions of the Stamp Act Congress (1765), *reprinted in* Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 270, 270 (Richard L. Perry ed., 1959). After colonial juries refused to convict for violations of unpopular taxation and trade regulations, the Crown resorted to vice-admiralty courts and courts-martial to obtain convictions. Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 3 (1966). That denial of the right to jury trial was "one of the principal causes of the American Revolution," *id.*, and was one of the grievances listed in the Declaration of Independence. *See* The Declaration of Independence para. 15 (U.S. 1776) ("depriving us in many cases, of the benefits of Trial by Jury"). Indeed, Alexander Hamilton observed of the proponents and opponents to the proposed federal constitution that, "if they agree in nothing else, [they] concur at least in the value they set upon the trial by jury." The Federalist No. 83, at 426 (M. Beloff ed., 1987).

The constitutional right to a criminal jury is an express reservation of power to control the judiciary. "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). By ensuring that convictions be based on the judgment of the people, the jury right plays the critical role of preventing government abuse through

criminal prosecution. *See, e.g.*, *Thompson v. Utah*, 170 U.S. 343, 350 (1898); 3 Story § 1773, at 652-53.

This Court has confirmed the importance of the right to a jury in criminal cases on numerous occasions. In the nineteenth-century case *Thompson v. Utah*, 170 U.S. at 349-50, the Court praised the right to jury trial as "one of the principal excellencies of our constitution," and in *Duncan v. Louisiana*, 391 U.S. at 149, the Court found the right to be among those basic rights "fundamental to the American scheme of justice" that are incorporated into the Due Process Clause of the Fourteenth Amendment. More recently, in the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has condemned no less than five times legislative efforts to reduce the role of the jury, reaffirming that the right to a jury trial is a "constitutional protection[] of surpassing importance." *Apprendi*, 530 U.S. at 476; *Ring v. Arizona*, 536 U.S. 584, 599 (2002), *Blakely*, 542 U.S. at 305-06; *United States v. Booker*, 543 U.S. 220, 238-39 (2005); *Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007).

B. The Jury Trial Right Depends on Careful Judicial Oversight of Jury Selection

The Sixth Amendment guarantees criminal defendants the right to a trial by an "impartial jury," U.S. Const. amend. VI, and "part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire*." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) ("*Voir dire* plays a critical function in assuring the

criminal defendant that his Sixth Amendment right to an impartial jury will be honored."). *Voir dire* is necessary "to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Morgan*, 504 U.S. at 730. Through *voir dire*, the court enforces "a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (citations omitted); *see also* Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 7 (1966) ("examination of prospective jurors on voir dire" helps "assure the selection of an unbiased jury"). *Voir dire* has been a crucial stage of the criminal trial for centuries: Blackstone himself emphasized "how scrupulously delicate and how impartially just the law of England approves itself . . . in it's caution against all partiality and biass, by . . . repelling particular jurors, if probable cause be shewn of malice or favour to either party." 3 Blackstone 365-66.

In addition to facilitating the removal of jurors for cause, *voir dire* permits a defendant to exercise the right to peremptory challenges where provided by statute, as in the federal courts. *See Rosales-Lopez*, 451 U.S. at 188. Peremptory challenges permit defendants, as well as the prosecution, to secure a fair and impartial jury. *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *see also Pointer v. United States*, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused."); 4 Blackstone 346-47.

This Court has specifically acknowledged the critical role of *voir dire* in rooting out impermissible

racial prejudice in criminal juries. As early as 1931, the Court held that the "essential demands of fairness" required a trial judge to question prospective jurors with respect to racial prejudice in a case involving an African American defendant. *Aldridge v. United States*, 283 U.S. 308, 310 (1931). The Court has often reiterated this requirement in cases potentially involving "racial issues." *Ristaino v. Ross*, 424 U.S. 589, 597 (1976); *see also Rosales-Lopez*, 451 U.S. at 189 (plurality); *Ham v. South Carolina*, 409 U.S. 524 (1973); *cf. Turner v. Murray*, 476 U.S. 28, 34 (1986).

At the same time, the Court has recognized that the jury selection process may be subject to abuse and that judicial oversight is therefore critical to ensure race-neutral jury selection. Racial discrimination is difficult to discover in the *voir dire* process, as prospective jurors are unlikely to admit to racist attitudes in open court. *The Supreme Court, 1991 Term—Leading Cases*, 106 Harv. L. Rev. 240, 246-47 (1992). Thus, this Court has explained that the determination of a prospective juror's racial prejudice "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Uttecht v. Brown*, 127 S. Ct. 2218, 2223 (2007).

The Court has similarly recognized the importance of judicial oversight in the exercise of peremptory challenges to ensure that those challenges are not misused to exclude persons from a jury on account of race or gender. In *Batson v. Kentucky*, for example, the Court held that the Equal Protection Clause forbids prosecutors from exercising peremptory challenges solely to remove potential jurors of the defendant's race. *See Batson v. Kentucky*, 476

U.S. 79, 91 (1986); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (extending *Batson* to peremptory challenges on gender grounds). This Court observed that racial discrimination in jury selection "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. Indeed, as the Court presaged in *Batson*, studies increasingly confirm that racial composition may have an effect on the jury's decision. *See* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 75-99 (1993); *see also* Theodore Eisenberg, et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277 (2001); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1557, 1559-60 (1988); *cf. Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 Geo. Wash. L. Rev. 189, 289-90 (1996) (reporting that 40 percent of surveyed African Americans indicated that they believed African Americans were discriminated against in the selection of jurors). To prevent peremptory challenges for impermissible racial reasons, the Court required prosecutors who demonstrate a pattern of striking potential jurors of a particular race to provide a race-neutral justification for those peremptory challenges. The trial judge is in the best position to evaluate the prosecutor's proffered race-neutral reason for striking a prospective juror and "to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). That assessment is also likely to "largely turn on evaluation of credibility," and thus, "[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility

lies peculiarly within a trial judge's province." *Hernandez v. New York*, 500 U.S. 352, 364-65 (1991) (plurality opinion) (internal quotation marks omitted).

II. THE CONSTITUTION VESTS OVERSIGHT OF CRIMINAL TRIALS IN ARTICLE III JUDGES BECAUSE THEIR INDEPENDENCE PROTECTS INDIVIDUAL RIGHTS

If juries were the Framers' principal guarantee of fairness in criminal trials, independent judges were a close second. To that end, Article III provides that judges "shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Art. III, § 1. Founding-era sources make clear that the judicial independence secured by life tenure and fixed compensation was seen as indispensable to protect individual liberties, particularly in cases pitting an unpopular minority against an inflamed public, and especially in criminal prosecutions.

At one time, most English judges served at the King's pleasure, and many were dismissed for political reasons (most famously Sir Edward Coke). *See* 5 W. Holdsworth, A History of English Law 350-52, 438-44 (1927 ed.). The Act of Settlement of 1701 ended that practice by requiring that "judges' commissions be made *quamdiu se bene gesserint* [during good behavior], and their salaries ascertained and established." 12 & 13 Will. 3, c. 2, § 3 (1701). Those conditions secured "independence and uprightness of

the judges," "one of the best securities of the rights and liberties of . . . subjects." 1 Blackstone 258.

The Act of Settlement did not apply to the colonies, and disputes recurred throughout the eighteenth century. *See* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. Pa. L. Rev. 1104 (1976). In the notorious 1734 criminal libel prosecution of John Peter Zenger, for example, defense counsel's very first objection was that the presiding judge served "only during Pleasure; whereas that Authority . . . ought to be granted during good Behaviour." J. Alexander, A Brief Narrative of the Case and Tryal of John Peter Zenger 6 (New York 1736). The judge retorted that, although counsel had "thought to have gained a great Deal of Applause and Popularity" by making the objection, he would "neither hear nor allow" it—and, to drive the point home, he disbarred Zenger's lawyers. *Id.* at 8. This and other episodes led to the Declaration of Independence's charge that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). The Framers responded by entrenching life tenure and fixed compensation in Article III, beyond the reach of executive or legislative manipulation.

Hamilton defended those provisions in *The Federalist*: "[A]s nothing can contribute so much to . . . firmness and independence, as permanency in office," life tenure was the "best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws." The Federalist No. 78, at 291-92 (1788). Independence was "peculiarly essential" to protect constitu-

tional rights from both executive excess and "encroachments and oppressions of the representative body." *Id.* at 291-93. Nothing but "permanent tenure of judicial offices" would adequately secure "that independent spirit in the judges, which must be essential to the faithful performance" of their duties. *Id.* at 295-96. And "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The Federalist No. 79, at 299 (1788).

Early American authors echoed those sentiments. Story saw judicial independence as crucial "to preserve the citizens against oppression and usurpation in civil and criminal prosecutions"; judges "holding their offices for the short period of two, or four, or even six years" would not be "firm enough to resist the will of those, who appoint them, and may remove them" when their term is up. 3 Story § 1608, at 472-73. Kent concurred that judges needed "confiden[ce] of the security of their stations" for "firmness" to stand against those "disposed, from the force of passion, or the temptations of interest, to make a sacrifice of constitutional rights." 1 J. Kent, Commentaries on American Law 275-76 (1826) [hereinafter "Kent"]. And Tucker, too, extolled "absolute independence of the judiciary," which "can never be perfectly attained, but by a *constitutional tenure of office*." 1 G. Tucker, Blackstone's Commentaries app. 355 (1803) [hereinafter "Tucker"].

Judicial independence was thought particularly important to protect political or other minorities. Public passions or prejudices could threaten "serious oppressions of the minor party in the community." The Federalist No. 78, at 296 (1788). It would "require an uncommon portion of fortitude in

the judges to do their duty as faithful guardians of the constitution" where "invasions of it had been instigated by the major voice of the community." *Id.* at 296-97. That fortitude "can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence." *Id.* at 298. As Story succinctly put it: "There can be no security for the minority in a free government, except through the judicial department," and "if the tenure of office of the judges is not permanent," judges would be mere "pliant tools of the leading demagogues of the day." 3 Story § 1606, at 469.

Judicial independence was important "especially in cases where a criminal prosecution may be carried on." 1 Tucker app. 355. "[I]n criminal prosecutions, the executive is in the eye of the law, always plaintiff; and where the prosecution is carried on by it's direction, the purity of the judiciary is the only security for the rights of the citizen . . . , interposing it's shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence." *Id.* at 357. Limited tenure in England had led to "dangerous influence . . . in cases where the claims or pretensions of the crown were brought to bear upon the rights of a private individual." 1 Kent 275. It had "produced the most disgraceful compliances with the wishes of the crown; and the most humiliating surrenders of the rights of the accused." 3 Story § 1602, at 465. "Subserviency to the crown was so general in state prosecutions, that it ceased almost to attract public indignation." *Id.* at 465 n.1. Once "independence of the judges [was] secured by this permanent duration of office,"

however, justice flowed on "with an uninterrupted, and pure, and unstained current." *Id.* at 466.

III. THE FEDERAL MAGISTRATES ACT SHOULD BE CONSTRUED TO REQUIRE THE EXPRESS, PERSONAL CONSENT OF THE DEFENDANT TO AVOID A GRAVE CONSTITUTIONAL QUESTION

A. Allowing Magistrates To Conduct Jury Selection in Felony Cases Presents Grave Constitutional Questions

In light of the foregoing, allowing magistrates to conduct felony *voir dire* strikes at the heart of Article III's guarantees. The practice should be permitted, if at all, only in the most carefully defined circumstances.

Magistrates lack the constitutionally required independence of Article III judges. Most obviously, while Article III judges have *permanent* tenure during good behavior, magistrates are appointed for only eight-year terms (four in the case of part-time magistrates). 28 U.S.C. § 631(e) (2000). In the Framers' view, *any* temporary appointment was inadequate to guarantee independence: "Periodical appointments, *however regulated, or by whomsoever made*, would in some way or other be fatal to [judicial] independence." The Federalist No. 78, at 298 (1788) (emphasis added). Limited tenure poses the inevitable risk that future employment prospects will dull zealous protection of unpopular defendants or vindication of unpopular rights. *See* 3 Story

§ 1608, at 472-73. That is no less true today than it was at the framing.

Magistrates fall short of the necessary independence in other respects as well. Although the Federal Magistrates Act limits grounds for removal, 28 U.S.C. § 631(i) (2000), and purports to prohibit salary reductions, 28 U.S.C. § 634(b) (2000), both provisions are merely statutory and may be altered by Congress at any time. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1039 (7th Cir. 1984); *see also id.* at 1053 (Posner, J., dissenting) ("Congress can reduce [magistrates'] salaries, or abolish their offices (selectively if it wishes) . . . ."). Because Article III's life-tenure and compensation provisions were designed in part to check *legislative* encroachment, *see* The Federalist No. 78, at 291 (1788); 3 Story §§ 1606-07, at 469-71, mere statutory protections are necessarily ineffective substitutes.

Magistrates, moreover, are "beholden to judges as well as to Congress." *Geras*, 742 F.2d at 1053 (Posner, J., dissenting). They cannot be reappointed unless a judge determines that they are "competent to perform the duties of the office." 28 U.S.C. § 631(b)(2) (2000). Judges have broad discretion over which cases to refer. 28 U.S.C. § 636(b) (2000). And references may be vacated in certain cases "for good cause shown." 28 U.S.C. § 636(c)(4) (2000). That extensive control similarly threatens magistrates' independence. *See Geras*, 742 F.2d at 1053 (Posner, J., dissenting).

Those controls are singularly problematic in felony jury selection. As already noted, the Framers thought judicial independence crucial in criminal cases, which pitted the power of government against

the liberties of citizens. Any conduct of criminal trials by officers appointed for a temporary term of years (and who may be removed or impoverished at the whim of Congress in the meantime) imperils the values animating Article III.

Voir dire, in particular, uniquely implicates those concerns. Jury selection has always been crucial to ensuring fairness in the common-law criminal trial. As explained above, the careful process of "repelling particular jurors, if probable cause be shewn of malice or favour to either party," was a defining feature of the common law's "scrupulously delicate" and "impartially just" trial procedure. 3 Blackstone 365-66. Delegating that function to officers who lack constitutionally required independence removes a core component of the common-law trial from direct judicial supervision.

A magistrate who believed jury selection must be done expeditiously—because he is in a district with a large backlog of cases or because that is what the appointing judge expects—might not take as much time to question each juror's impartiality, or might be less willing to entertain challenges for cause. A magistrate presiding over a politically or racially charged trial might think twice about ejecting prominent members of the community from the venire for bias, when his future employment prospects depend on congressional forbearance and a superior's assessment of his "competen[ce]." 28 U.S.C. § 631(b)(2) (2000). *See Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.,* 725 F.2d 537, 552 (9th Cir. 1984) (Schroeder, J., dissenting) (observing that district court control "create[s] a severe conflict of interest for the magistrate who is compelled to choose between what the magistrate concludes is

right and the result the magistrate thinks will please the district court").

Those are precisely the sorts of concerns that motivated Article III. The Framers secured judicial independence to protect citizens' constitutional rights. *See, e.g.*, The Federalist No. 78, at 292-93 (1788). Jury selection is fraught with decisions affecting those rights—the Sixth Amendment itself grants the right to an "*impartial* jury," which can only be meaningfully enforced by judicious oversight of *voir dire*. The Framers further thought judicial independence necessary to protect minorities from popular passions or prejudices. *See, e.g.*, *id.* at 296; 3 Story § 1606, at 469. There are few stages in the common-law criminal trial where a judge's careful oversight can better protect a criminal defendant from the prejudices of an inflamed public, or where the failure to discharge those duties conscientiously could lead to more "serious oppressions of the minor party in the community." The Federalist No. 78, at 296 (1788).

Having a magistrate rather than a judge select the jury in a felony criminal trial is utterly foreign to common-law procedure—no less than forgoing the jury entirely and trying a case to the bench. While the law may allow a defendant to consent to these nontraditional methods of determining guilt, *see Peretz v. United States*, 501 U.S. 923 (1991), the grave constitutional questions they present require scrupulous care and, at a minimum, the express, personal consent of the defendant.

B. This Court's Precedents Mandate Reading the Federal Magistrates Act To Require Express, Personal Consent of the Defendant, On the Record

This Court has already addressed the constitutional dangers posed by a sweeping reading of the Federal Magistrates Act, 28 U.S.C. § 631 *et seq*. (2000). In *Gomez v. United States*, 490 U.S. 858 (1989), this Court rejected the Government's claim that a magistrate could conduct *voir dire* in the absence of a defendant's consent. *Gomez* noted this Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues," and found that a reasonable interpretation of the Federal Magistrates Act that avoided the constitutional issues raised by the Government's interpretation could "be deduced from the context of the overall statutory scheme." *Id.* at 864. The Court noted that Congress, in passing the Federal Magistrates Act, had intended that district courts retain "the greatest possible scrutiny and control of a magistrate's trial jurisdiction," H.R. Rep. No. 1629, at 21 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4264. The Court explained that jury selection cannot be fully reviewed by examining a transcript or reexamining jurors, so jury selection by magistrates was not consistent with the high level of oversight Congress intended district judges to have over magistrates. In light of this concern, *Gomez* emphasized that it was critical that defendants consent to this scheme. *Gomez*, 490 U.S. at 870 ("A critical limitation on [the expanded jurisdiction of the Federal Magistrates Act] is consent.").

Two years later, in *Peretz v. United States*, 501 U.S. 923 (1991), the Court allowed a magistrate judge to conduct *voir dire*, but once again emphasized the vital importance of consent. *See id.* at 932 (noting that "the defendant's consent significantly changes the constitutional analysis"). While *Peretz* confirmed that a magistrate may conduct *voir dire*, it did not overrule the Court's holding in *Gomez*. *Peretz* reaffirmed the concerns this Court articulated in *Gomez* about the district court's limited ability to review *voir dire* conducted by a magistrate, noting that in many cases *de novo* review by the district court would provide an inadequate substitute for the Article III judge's actual supervision of *voir dire*. *Peretz*, 501 U.S. at 936 n.12 ("We do not qualify the portion of our opinion in *Gomez* that explained why jury selection is an important function, the performance of which may be difficult for a judge to review with infallible accuracy."). Explaining that the defendant's consent significantly changes the constitutional analysis, this Court held in *Peretz* that a magistrate judge can conduct *voir dire* if the defendant affirmatively consents to the magistrate and waives his right to an Article III judge.

This reading of *Gomez* and *Peretz* is further supported by the Court's decision in *CFTC v. Schor*, 478 U.S. 833 (1986). Although the Court in *Schor* permitted a non-Article III tribunal to adjudicate a state law claim, it did so only after concluding that the litigants "had the option" to proceed in an Article III court but "with full knowledge . . . chose to avail" themselves of the non-Article III forum. *Id.* at 850. *Schor* also emphasized that the constitutionality of a given delegation of judicial power to a non-Article III actor depends on "the origins and importance of the right to be adjudicated." *Id.* at 851. The right of a

defendant to an impartial jury is one of the cornerstones of the constitutional framework. At a minimum, then, a defendant must have "full knowledge" of his "option" to have an Article III judge preside over jury selection and his consent to forego that option must be stated on the record before dispensing with this key constitutional protection.

C. Express, Personal Consent of the Defendant, On the Record, Is Required in Contexts Involving Waivers of Similarly Important Constitutional Rights

The issue of what kind of consent is required before a constitutional right can be waived is not new. As the Court of Appeals acknowledged in the decision under review:

> What suffices for waiver depends on the nature of the right at issue. Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

United States v. Gonzalez, 483 F.3d 390, 394 (5th Cir. 2007). The express, personal consent of the defendant on the record is universally recognized as the constitutional minimum in contexts involving waivers of constitutional rights that are on par with the right to an Article III judge conducting *voir dire*.

Congress confronted this issue when it approved the use of magistrates in other contexts. Before a magistrate judge may try a minor offense—a misdemeanor punishable by no more than one year imprisonment or a fine of not more than $1,000, or both—the magistrate must carefully explain to the defendant what is at stake and must obtain an explicit waiver of the defendant's right to proceed before an Article III judge. Specifically:

> The magistrate judge shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a district judge and that he may have a right to trial by jury before a district judge or magistrate judge. The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record.

18 U.S.C. § 3401(b) (2000).

Similar protection is provided civil litigants pursuant to 28 U.S.C. § 636(c). As the Eighth Circuit has observed, "section 636(c) requires a clear and unambiguous statement in the record of the affected parties' consent to the magistrate judge's jurisdiction." *J.C. Henry v. Tri-Services, Inc.*, 33 F.3d 931, 933 (8th Cir. 1994). "Without clear and unambiguous consent, litigants cannot be deemed to have forfeited their right to proceed in front of an Article

III judge." *Harris v. Folk Constr. Co.*, 138 F.3d 365, 369 (8th Cir. 1998). The consent requirement is, in the words of the Seventh Circuit, "the linchpin of the constitutionality of 28 U.S.C. § 636(c)." *Adams v. Heckler*, 794 F.2d 303, 307 (7th Cir. 1986); *see also United States v. Gomez-Lepe*, 207 F.3d 623, 631 (9th Cir. 2000) (concluding that "explicit, clear and unambiguous consent" is necessary to the constitutionality of § 636(c)). A critical part of a felony trial—jury selection—requires at least as much. *See Peretz*, 501 U.S. at 929 n.6 (Marshall, J., dissenting) (noting that "the standard governing a party's consent to delegation of a portion of a felony trial under the additional duties clause should be at least as strict as that governing delegation of a misdemeanor trial to a magistrate").

The Court of Appeals reached the opposite conclusion because it erroneously concluded "that the defendant does not, by waiving his right to have an Article III judge conduct *voir dire*, waive his right to judicial review of those proceedings." *Gonzalez*, 483 F.3d at 394. But, as this Court explained in *Gomez* and reaffirmed in *Peretz*, a defendant does, in fact, waive his right to meaningful review by an Article III judge because of the nature of jury selection. *Gomez*, 490 U.S. at 874-75; *Peretz*, 501 U.S. at 936 n.12. "To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives." *Gomez*, 490 U.S. at 874-75. In addition, the officer conducting *voir dire* "must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." *Id.* at 875. As a result, "no transcript can recapture the atmosphere of the *voir dire*, which

may persist throughout the trial." *Id.* Judge Posner has made a similar point:

> The tone in which the trial judge addresses the jurors, . . . the manner in which he reads or paraphrases the instructions to the jury . . . these discretionary aspects of the trial judge's responsibility are largely beyond the power of an appellate court to correct, yet they can influence a jury's verdict.

Geras, 742 F.2d at 1049 (Posner, J., dissenting). Added to these impediments to review is the fact that district judges lack incentives to reexamine jurors because "the time consumed by such review would negate time initially saved by the delegation [to the magistrate]." *Gomez*, 490 U.S. at 876.

The Court of Appeals ignored these concerns in deciding that a defendant gives up only a "limited" right when he allows a magistrate to conduct *voir dire*. It is precisely because the defendant is waiving effective oversight of *voir dire* by an Article III judge that his or her express, personal consent is so important.

In *New York v. Hill*, 528 U.S. 110 (2000), the Court recognized a dividing line between "certain fundamental rights" that a defendant must waive personally and other trial rights that are waivable by a defendant's attorney as part of the attorney's "'authority to manage the conduct of the trial.'" *Id.* at 114-15 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). An attorney cannot validly waive "basic rights" without the "fully informed and publicly acknowledged consent of the client." *Taylor*,

484 U.S. at 417-18. *Taylor* listed among the rights requiring a defendant's explicit, personal waiver the right to plead not guilty and to confront and cross-examine witnesses (citing *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966)), the right to counsel (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)), the right to a jury trial (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)), and the right to be present at trial (citing *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963)). Similarly, courts have required knowing waiver of a defendant's right to appeal. *See, e.g.*, *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992).

The Court in *Taylor* contrasted "fundamental" rights such as the above with other prerogatives routinely exercised by counsel in order to "manage the conduct of the trial." 484 U.S. at 417-18. The Court explained that "the adversary process could not function effectively if every tactical decision required client approval." *Id.* A criminal defendant's right to have an Article III judge preside over *voir dire* is not a "tactical decision" of the sort routinely exercised by attorneys without the defendant's express assent. It is an important structural protection on the level of other rights that require a knowing waiver.

The Federal Rules of Criminal Procedure provide additional support, as they likewise require a defendant's explicit, personal waiver of certain rights that are comparable in importance to the right to have an Article III judge conduct *voir dire*. These include the right to prosecution by indictment, Fed. R. Crim. P. 7(b), the right to a jury trial, Fed. R. Crim. P. 23(a), the right to arraignment before a district judge, Fed. R. Crim. P. 58(b)(3), the right to venue, Fed. R. Crim. P. 23(a) and 58(c)(2), and the

right to appear at arraignment, Fed. R. Crim. P. 10(b). In all of these instances, the Federal Rules demand waiver by the defendant either in writing or on the record.

Moreover, courts have found similar rights involving the jury to require express waiver, even when the Federal Rules were silent as to the procedure for waiver. Both *United States v. Olano*, 934 F.2d 1425, 1437 (9th Cir. 1991) (*Olano I*), *reversed on other grounds by United States v. Olano*, 507 U.S. 725 (1993) (*Olano II*), and *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870 (4th Cir. 1964), required express, personal waiver for deviations from Rule 23(b), regarding the number of jurors, and Rule 24(c), regarding alternate jurors.[2] As the court in *Olano I* explained, requiring express personal waiver not only serves to "provid[e] reliable evidence that the defendant has in fact consented," but also "alerts the defendant to the fact that a waiver of Rule 24(c)'s protections may affect the outcome of the case." *Olano I*, 934 F.2d at 1437.

A requirement of express waiver in these instances serves to alert the defendant as the stakeholder to the significance, as well as the very existence, of an important trial decision. Given its importance, the oversight of jury selection by an Article III judge certainly stands alongside the other rights that require express, personal waiver.

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[2] While this Court in *Olano II* overruled the application of the plain error standard in the *Olano I*/*Virginia Erection* line of cases, it did not rule on the waivability of the rights at issue or on the proper procedure for waiver. *See Olano II*, 507 U.S. 725.

D. Other Actors in the Criminal Justice System Will Not Adequately Protect a Defendant's Right to an Article III Forum

The defendant's personal consent is critical because no other actor in the system—not the magistrate, the judge, nor the defense lawyer—will weigh judicial independence against efficiency the same way the defendant will.

Magistrates will obviously discount the need for an independent Article III judge because to do otherwise would undercut the magistrates' own legitimacy.

Although one might think that Article III judges would zealously guard their own constitutional authority, countervailing incentives might push them to accept an incursion on judicial independence. Specifically, because of crushing caseloads, judges might be all too willing to delegate some of their tasks to magistrates, even if it compromises the independence of the judicial function. *See Geras*, 742 F.2d at 1050 (Posner, J., dissenting) (noting that, "since 1960, the caseload of the district courts has tripled and that of the courts of appeals has octupled, and there has not been a corresponding increase in the number of judges" and that "[t]he crisis has caused federal judges to delegate more and more of their work to judicial adjuncts"). Indeed, the demands placed on Article III judges might explain why "the Court has been the least protective of the separation of powers" in cases involving the delegation of judicial power to other actors. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 1036-37 (2006) (noting "the

Court's receptivity to claims that a proposed change in government will yield efficiency gains for the judiciary"); *see also* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 515 (1987) (observing that "the Court seems much more clearly committed to functionalism in examining its own place in the constitutional scheme than in dealing with issues concerning the other two heads of government" and that one possible explanation "may reflect self-interested relief at being freed of the need to decide matters of routine in litigation-rich times"). This potential conflict explains why "the Constitution guarantees not merely that no Branch will be forced by one of the *other* branches to let someone else exercise its assigned powers—but that none of the branches will *itself* alienate its assigned powers." *Peretz*, 501 U.S. at 956 (Scalia, J., dissenting).

Defense lawyers are also an imperfect surrogate for the defendant because their interests may diverge from their clients'. Unlike the defendant, the defense lawyer is typically a repeat player in the system and may be reluctant to say no to magistrate oversight of *voir dire* to avoid upsetting district judges who want to streamline their dockets. Moreover, the defense lawyer might share the desire for a speedier resolution because of financial and caseload pressures of his or her own. Even when a defendant can afford to retain counsel, in most cases the lawyer is paid a flat fee in advance. Steven Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1988 (1992). These lawyers therefore have an incentive to resolve the case as quickly as possible to maximize the financial return on their time. The vast majority of criminal cases, moreover, involve indigent defen-

dants with appointed counsel. In most of these cases, appointed defense lawyers are paid either "a flat fee per case, or a low hourly rate coupled with a ceiling on total compensation payable." *Id.* The faster the case proceeds, the better off these lawyers are. Even when an indigent defendant is represented by a public defender, the defense lawyer will have an incentive to move the case along quickly because these offices are woefully underfunded and understaffed. ABA Standing Comm. on Legal Aid and Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice 7-10 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport. pdf; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 687-88 (2007) (noting that public defenders in some jurisdictions are responsible for well over one thousand cases per year). The danger that lawyers will agree to magistrate judges simply to save time, regardless of the client's wishes, is therefore particularly great in cases where the defense lawyer is court-appointed and earning a below-market fee. *See* H.R. Rep. No. 287, 96th Cong., 1st Sess. 11 (1979) (reporting that Congress did not intend magistrate judges to become a de facto "poor people's court").

If consent is allowed to trump the important structural values of Article III, at the very least, that consent must come from the only actor who is affected by the real costs of relinquishing the right to have a life-tenured judge conduct *voir dire*. The defendant must personally and expressly decide whether to give up this right.

CONCLUSION

For the aforementioned reasons, *amicus* Charles Hamilton Houston Institute for Race and Justice urges the Court to reverse.

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