No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court for the State of Illinois

REPLY BRIEF OF THE PETITIONER

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Petitioner was found guilty by a jury that included an unlawful adjudicator. It is difficult to conceive of anything more structural than the legal authority of the body charged with determining factual guilt or innocence. The legitimacy of the adjudication of guilt cannot be separated from the lawful authority of the adjudicator—if the adjudicator was unlawful, then the judgment is void and requires automatic reversal. Pet. Br. 11-20.

Respondent does not deny that this Court has, without exception, automatically reversed every judgment issued by a tribunal with an unlawful adjudicator. Respondent even concedes that, as a matter of federal law, a court with an unlawful adjudicator is no court at all. Resp. Br. 30. Respondent nonetheless shoves this principle aside by arguing that (1) only a rule of constitutional dimension can apply to this case arising out of state court and (2) the error here does not violate the federal Constitution. Both efforts to evade this Court's consistent and fundamental rule of law fail.

The first assertion rests on a false premise that pervades respondent's brief: that the Illinois Supreme Court applied Illinois state harmless-error law. Resp. Br. 9, 15, 18, 20-21, 25. The Illinois Supreme Court applied what it believed was *this* Court's harmless-error law, relying on its understanding of *this* Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999). JA 164-72. Indeed, respondent asserts that the Illinois Supreme Court "followed *Neder*[] … to the letter." Resp. Br. 50. This Court has the authority to correct the Illinois Supreme Court's erroneous understanding of federal harmless-error law. *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983).

The second assertion ignores the narrow scope of petitioner's claim. Petitioner asserts that trial before an unlawful adjudicator violates due process. Respondent counters primarily with this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988). Resp. Br. 13-14, 17, 29. But *Ross* did not consider the question here, much less reject it, because that case did not involve a trial before an unlawful adjudicator. The objectionable potential juror in *Ross* was excluded from the jury. See also *United States* v. *Martinez-Salazar*, 528 U.S. 304, 317-18 (2000) (Souter, J., concurring). Respondent also observes that this Court has never held that constitutional principles of due process compel automatically reversing decisions involving an unlawful adjudicator. Resp. Br. 29-30. But respondent does not and cannot say that this Court has ever held that trial before an unlawful adjudicator is consistent with due process. And respondent offers no reason why this Court should so hold. Put simply, trial before a tribunal that, due to the unlawfulness of the adjudicator, was effectively no court at all, denied petitioner the process he was due under the 14th Amendment.

The error here also makes harmless-error analysis impossible. Pet. Br. 20-26. Respondent rejects this independent basis for reversal by arguing that harmless-error analysis can apply even when it is impossible to conduct. Resp. Br. 46. There is no support for that self-contradictory assertion. Respondent further asserts that harmless-error analysis can be applied by asking whether any juror who adjudicated petitioner's guilt was actually biased. *Id.* at 47-48. But that "would not be sensitive to the fundamental nature of the error committed." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S.

787, 812 (1987) (plurality). The juror here was not lawfully permitted to sit because petitioner struck her peremptorily. She was thus an invalid juror for reasons that do not require proof of actual bias. Respondent also denies that harmless-error analysis here would require the reviewing court to undertake independent evaluation of the record as a whole in contravention of the rule against directed verdicts of guilt in criminal cases. Resp. Br. 49-53. The Illinois Supreme Court's analysis speaks for itself: it believed it was permitted to review the entire record to determine whether any rational jury could reasonably have acquitted. JA 164-72. Respondent never explains how that process differs from a trial court directing a verdict of guilt. Even this Court's decision in *Neder* disclaims the suggestion that it was authorizing a reviewing court to consider the strength of the entire record. 527 U.S. at 11, 16.

Finally, respondent urges this Court to reject petitioner's claim that the risk of bias inherent in the erroneous rejection of a defendant's peremptory challenge violates due process and warrants automatic reversal. Once again, respondent mischaracterizes petitioner's argument, repeatedly suggesting that a ruling in petitioner's favor necessarily entails constitutionalizing the right to peremptory challenges. Resp. Br. 28, 30, 31, 35-36. That is not so. Just as this Court's decision requiring effective assistance of counsel on appeal, *Evitts* v. *Lucey*, 469 U.S. 387 (1985), did not constitutionalize the right to a direct criminal appeal, a ruling in petitioner's favor here would not constitutionalize the right to peremptory challenges. But if the state chooses to provide peremptory challenges, it is empowering the defendant to participate in the process of ensuring a fair trial before an impartial jury. Having made that

choice, thus aligning itself with an unbroken (but not constitutionally compelled) tradition in American law, the state introduces a constitutionally unacceptable risk of bias when it wrongfully rejects a defendant's challenge to a particular juror. This Court's decisions requiring automatic reversal in the face of a risk of bias thus support automatic reversal here.

I. FEDERAL LAW DETERMINES WHETHER THE ERROR IN THIS CASE IS SUBJECT TO HARMLESS-ERROR ANALYSIS OR AUTOMATIC REVERSAL, WITHOUT REGARD TO ANY FEDERAL CONSTITUTIONAL VIOLATION.

Respondent contends that this Court may not reject the ruling of the Illinois Supreme Court without deciding whether the failure to honor petitioner's lawful peremptory challenge of Ms. Gomez violated any federal constitutional right. Respondent's position depends upon a demonstrably false proposition: that the Illinois Supreme Court applied Illinois' own harmless-error law.

Respondent asserts that the Illinois Supreme Court must have applied its own harmless-error law because it "conclud[ed] that it need not decide whether there was constitutional error at all to resolve the appeal." Resp. Br. 9; see also U.S. Br. 13-14. Respondent has it backwards. The fact that the Illinois Supreme Court did not decide whether there was any constitutional error conclusively proves that it applied what it thought was *federal* harmless-error/automatic-reversal principles.

Federal law determines whether an error in violation of the federal constitution is structural or subject to harmless-error analysis. *Chapman* v.

California, 386 U.S. 18, 20-21 (1967). Thus, the Illinois Supreme Court could apply its own law for determining whether an error requires automatic reversal only if it had held that there was no violation of the federal constitution. But it concluded that it did not need to reach the question whether a federal constitutional right had been violated because, in its (erroneous) view, *federal* law for determining whether an error is structural permitted it to review the record for prejudice. In short, the Illinois Supreme Court's ruling has postured this case so that it squarely presents the harmless-error/automatic-reversal question as a matter of *federal* law.

The Illinois Supreme Court's decision to apply federal law is also apparent from its reliance on this Court's decision in *Neder*. JA 164-72. Indeed, respondent asserts (wrongly) that the Illinois Supreme Court "followed *Neder*[] … to the letter." Resp. Br. 50. Nothing in the Illinois Supreme Court's decision indicates that it was applying state law rules for determining whether an error is subject to harmless-error review or automatic reversal. Even the cited Illinois state court decisions purported to apply *Neder*. JA 164-65, 171-72.

The Illinois Supreme Court's decision contrasts in this regard with that of the Michigan Supreme Court in *People* v. *Bell*, 702 N.W.2d 128 (Mich. 2005). In *dicta*, the *Bell* court indicated that it would apply its own harmless-error principles to determine that reverse-*Batson* errors are subject to harmless-error review.[1] The Illinois Supreme Court did not indicate that it was applying its own harmless-error

[1] The harmless-error discussion in *Bell* was *dicta* because the court held that no error had occurred. 702 N.W.2d at 137-38, 141.

principles. As a result, this Court may review the Illinois Supreme Court's misapplication of *federal* harmless-error/automatic-reversal principles in this case.

Ultimately, respondent concedes that the Illinois Supreme Court never *explicitly* stated that it was relying on its own law for determining whether to apply harmless-error analysis or automatic reversal. The most respondent (and the United States) can say is that the state law ground was "implicit[]." Resp. Br. 9; U.S. Br. 13-14. But even if that were true (and for the reasons discussed above, it is not), that would amount to an admission that no state-law basis was clearly stated. Under *Michigan* v. *Long*, 463 U.S. at 1040-41, the absence of a clearly stated adequate and independent state ground for the ruling authorizes this Court to consider the question as a matter of federal law.

As a result, respondent's assertion that a ruling in petitioner's favor by this Court would "'federalize' and require automatic reversal for any misapplication of countless state procedural rules," Resp. Br. 25, is wrong. Likewise, respondent wrongly asserts that, because petitioner's right to strike Ms. Gomez peremptorily is based in state, not federal law, there is no basis in federal law to reverse the Illinois Supreme Court's ruling that the error may be reviewed for harmlessness. *Id.* at 9. The Illinois Supreme Court, not petitioner, "federalized" this case by basing its decision on an erroneous understanding of federal law.

For the same reason, respondent is wrong to assert that "[n]one of [this Court's] decisions [automatically reversing judgments in which unlawful adjudicators participated] has any bearing here." *Id.* at 20. Those decisions are as appropriate for this Court's

consideration here as is *Neder*, which respondent frequently invokes. The full body of this Court's decisions considering whether to apply harmless-error analysis or automatic reversal can be considered, without having first to determine that any of petitioner's constitutional rights have been violated. Because the Illinois Supreme Court hinged its ruling on its misunderstanding of federal law, this Court can and should correct that misunderstanding. Put simply, this Court should consider whether *federal* law requires automatic reversal here.[2]

None of this is to say that the error here did not violate the federal Constitution. And as discussed in each of the succeeding sections, each of the independent bases for concluding that automatic reversal

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[2] Respondent in passing asserts that petitioner has waived his argument that federal rules for determining whether harmless-error analysis or automatic reversal apply, independent of any constitutional violation. Resp. Br. 16. There has been no waiver. Respondent does not deny that petitioner has consistently argued that he was entitled to a new trial because Ms. Gomez was wrongly seated over his lawful peremptory challenge. Petitioner is entitled in this Court to present any argument in support of the claim he has properly preserved. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). That is especially true here, where resolving this case on petitioner's non-constitutional ground would reflect this Court's preference to avoid reaching constitutional issues when it is unnecessary to do so. *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). This Court has considered non-constitutional grounds of decision even when the question presented was phrased exclusively in constitutional terms. *E.g., Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960); *Neese* v. *S. Ry.*, 350 U.S. 77, 78 (1955) (per curiam).

applies can be grounded in a related violation of a federal constitutional right. However, for the reasons stated above, this Court need not find such a violation to reverse the Illinois Supreme Court.

II. PETITIONER WAS TRIED BEFORE AN UNLAWFUL ADJUDICATOR, WHICH IS STRUCTURAL ERROR.

A. Under Federal Law, A Judgment From Proceedings Involving An Unlawful Adjudicator Is Reversed Automatically.

This Court's unbroken line of decisions automatically reversing proceedings involving an unlawful adjudicator warrants ordering automatic reversal here. Pet. Br. 13-19 (citing and discussing cases). Indeed, respondent concedes that it is "[t]rue enough[] as a matter of federal law" that a court with an unlawful adjudicator is "'virtually no court at all'" and its judgment is void. Resp. Br. 30 (quoting *William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645, 652 (1913)).

Respondent and the United States both urge this Court to ignore its consistent reversal of trials involving unlawful adjudicators because, they say, this Court's cases are confined to circumstances in which the adjudicator acted without lawful statutory authority. Resp. Br. 18; U.S. Br. 28. As they see it, petitioner's trial did not involve an unlawful adjudicator at all. Respondent points to the Illinois statute that describes the "legal qualifications" that jurors "must have" in Illinois, 705 ILCS 305/2, and asserts that Ms. Gomez possessed certain of those requirements, including residency, age, English literacy, and U.S. citizenship. Resp. Br. 20. Respondent ignores the jury qualification that is directly

relevant: that jurors be "[f]ree from all legal exception." 705 ILCS 305/2(3). The Illinois Supreme Court has long held that "legal exception" includes all exceptions at common law still in force in 1874. *Kerwin* v. *People*, 96 Ill. 206 (1880). One of the common law exceptions to jury service that has always been recognized is the peremptory challenge. See William Blackstone, 3 *Commentaries* *364-65 (using "exception" and "challenge" interchangeably in jury selection context). The Illinois Supreme Court thus determined that Ms. Gomez was subject to a lawful exception when it ruled that petitioner had lawfully exercised his right to excuse her peremptorily.[3] JA 157-58. She was not a lawful adjudicator of petitioner's guilt.

As a result, the tribunal that declared petitioner guilty was without statutory authority to render judgment. That is why cases such as *Gomez* v. *United States*, 490 U.S. 858, 876 (1989), *Wingo* v. *Wedding*, 418 U.S. 461, 466-67, 473-74 (1974), *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 135

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[3] Respondent, in a footnote, attempts to bolster its claim that Ms. Gomez was a lawful juror by asserting that the Illinois Supreme Court wrongly ruled that petitioner lawfully struck Ms. Gomez from the jury. Resp. Br. 43 & n.3. Respondent takes the view that an erroneous finding of prima facie discrimination (as here) is mooted by a subsequent ruling that the strike was discriminatory. But respondent did not file a conditional cross-petition asking this Court to review the Illinois Supreme Court's application of the reverse-*Batson* rule here. So the parties have not briefed the issue, and *Hernandez* v. *New York*, 500 U.S. 352 (1991) (plurality), does not resolve it. Further, the Illinois Supreme Court held both that there was no prima facie case of discrimination *and* that the articulated grounds for the challenge were sufficiently neutral to preclude an inference of discrimination, JA 157. As a result, the scope of *Hernandez* is not even implicated here.

(1947), and *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960), so strongly support automatic reversal here. Jurors are the central decisionmakers in a criminal trial. They possess the unreviewable authority to declare a defendant not guilty. *United States* v. *Powell*, 469 U.S. 57, 65 (1984). And their determination of guilt is, as a factual matter, reviewable only under the demanding sufficiency-of-the-evidence standard. *Jackson* v. *Virginia*, 443 U.S. 307, 318-19 (1979). The extraordinary authority of the jury is far more consequential than the magistrate who unlawfully presided over jury selection alone in *Gomez*. The judgments of jurors are far more insulated from effective review than those of the magistrate who unlawfully presided over the habeas corpus proceeding in *Wingo* (whose rulings were subject to *de novo* review, 418 U.S. at 473-74), or the unlawfully constituted appellate panels that presided in *Ayrshire Collieries* and *American-Foreign Steamship Corp*. Yet in each of those cases this Court determined that the bare presence of an unlawful adjudicator, without even a claim of potential bias, much less a showing of actual bias, required automatic reversal. This Court automatically reversed in each case because the errors went to the core of legitimacy of the judgments of those tribunals. The error here strikes at the core of a criminal judgment's legitimacy even more directly.[4]

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[4] *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), relied upon by the United States but not respondent, does not suggest that the error of trying a case before an unlawful adjudicator may be reviewed for harmlessness rather than automatically reversed. In *Liljeberg*, the Court held that a judge is disqualified under 28 U.S.C. § 455(a) when a reasonable person would question his impartiality, even when the judge is not aware of facts leading to his disqualification. *Id.* at 860-61.

This Court's consistency in automatically reversing judgments of courts involving judges or judicial panels without lawful authority is matched by its consistency with regard to juries that are unlawfully composed. Pet. Br. 13, 16-17. It is true, as respondent argues, that cases such as *Peters* v. *Kiff*, 407 U.S. 493 (1972) (plurality), and *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), involved discrimination in the selection of the jury. Resp. Br. 24-25. But these decisions are important here because they highlight the centrality of the jury in the criminal process, and underscore that when the "composition of the trier of fact itself is called into question," *Powers* v. *Ohio*, 499 U.S. 400, 412-13 (1991), then so too is the "'integrity of the judicial process,'" *id.* at 411. Automatic reversal is appropriate under these circumstances.

Applying the automatic reversal rule for judgments from proceedings with unlawful adjudicators in this case would not contravene this Court's decision in *Ross*, 487 U.S. 81. Respondent's reliance on *Ross* misunderstands both petitioner's narrow argument, and *Ross*'s holding.

Contrary to respondent's suggestion, Resp. Br. 16, petitioner is not arguing that any error that arises during the course of composing the tribunal would require automatic reversal as a matter of federal law. Petitioner's claim is rooted in the fact that under Illinois law, petitioner lawfully voided Ms. Gomez as

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The issue did not arise during the trial itself, or even on review of the judgment. The issue arose *after* the litigation was "closed" and was brought forward through the procedural mechanism of Fed. R. Civ. P. 60(b). *Id.* at 858, 862 n.9. The need to determine whether justice required vacatur of the judgment and remand for new trial drew directly from the standards applicable to motions under Rule 60(b)(6) for reopening judgments that have been closed. *Id.* at 863-65.

a juror. As a result, when she was seated, his jury included an individual without lawful authority to adjudicate his guilt. By contrast, none of the jurors who adjudicated Ross's guilt lacked lawful authority to do so. It is true that an error occurred during jury selection in both cases. But the errors are critically different: in Ross's case, the error did not produce an unlawful adjudicator while here it did. Respondent goes to extraordinary lengths to scrub this crucial distinction from this case, including rewriting the question presented so that the critical fact—that the lawfully challenged juror was seated—is deleted. Compare Pet. Br. i, with Resp. Br. i.

Respondent states that this Court in *Ross* expressly rejected the argument "'that any error which affects the composition of the jury must result in reversal,'" Resp. Br. 17 (quoting *Ross*, 487 U.S. at 87 n.2), as if the Court thereby held that an error like that here can be reviewed for harmlessness. That is a mischaracterization of the discussion in *Ross*. As the opinion makes clear, the Court was considering Ross's broad argument that any error raising even the mere possibility that the composition of the jury was affected requires automatic reversal. 487 U.S. at 87. The footnote itself endeavors to explain how the composition of the jury might be completely altered by an error (if, for example, the judge dismisses the entire venire in light of the error and restarts jury selection) without requiring reversal of a conviction. *Id.* at 87 n.2. Petitioner agrees: if the entire venire is changed and only lawful adjudicators of guilt are seated, then the rule petitioner proposes would not apply. The critical question is whether any unlawful adjudicator was seated. The answer here is yes; in both *Ross* and *Martinez-Salazar*, 528 U.S. 304, the

answer was no.[5] Requiring automatic reversal here is in no way inconsistent with this Court's decisions affirming the convictions in those cases.

B. Trial Before An Unlawful Adjudicator Violates Due Process.

As discussed above and in petitioner's brief, this Court can reverse the Illinois Supreme Court's ruling and apply its rule requiring automatic reversal of judgments from proceedings with unlawful adjudicators without first determining that the error violated the Due Process Clause. Nonetheless, if this Court considers the issue, it should conclude that trial before a jury that includes an individual without lawful authority to sit violates due process.

Both respondent and the United States urge this Court to hold that trial before an unlawful adjudicator does not violate due process primarily because this Court has never said that it violates due process. Resp. Br. 29-30; U.S. Br. 14-15. But that falls far short of explaining how trial before an unlawful adjudicator could be considered consistent with due process. Given this Court's consistent rationale for automatically rejecting proceedings involving unlawful adjudicators—because they cast grave doubt on

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[5] *Ross* provides another way to get to the same distinction. As this Court observed, in *Ross* the petitioner was not denied anything to which state law entitled him. Ross used his peremptory challenge just as state law anticipated he would: to correct a trial judge's erroneous failure to remove a juror who should have been excused for cause. 487 U.S. at 89. Thus the error caused Ross to use a peremptory challenge he should not have had to use, but did not cause the seating of an unlawful juror. Here, by contrast, petitioner was wrongly denied his lawful right to preclude Ms. Gomez from sitting. Thus, the petitioner's, but not Ross's, lost peremptory challenge resulted in an unlawful juror.

the legitimacy of the proceedings—it would be highly incongruous to conclude that such a proceeding is nonetheless consistent with due process.

As this Court has repeatedly recognized, the lawfulness of the adjudicator is critical to the authority of the judgment itself. A court without lawful authority to judge is "virtually no court at all." *William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtis Marine Turbine Co.*, 228 U.S. 645, 652 (1913). This Court treats judgments from adjudicators without lawful authority as "perhaps absolutely void." *Am. Constr. Co.* v. *Jacksonville Tampa & Key W. Ry.*, 148 U.S. 372, 387 (1893). It is hard to imagine what else might be "due" a criminal defendant than that his judgment of conviction be rendered by a body lawfully authorized to deprive him of his liberty.

Indeed, this Court has found a violation of due process on less. In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), Oklahoma's habitual offender statute mandated a 40-year sentence for Hicks's conviction, and the state trial judge instructed the jury to sentence Hicks to 40 years if it convicted. *Id.* at 344-45. Subsequently, the Oklahoma Court of Criminal Appeals ruled in a different case that the statute requiring Hicks to be sentenced to 40 years violated the Oklahoma constitution. *Id.* at 345. Hicks was entitled under state law to have the jury consider whether to sentence him to a number of years not less than 10. *Id.* at 346. This Court determined that it was a violation of due process for the Oklahoma state courts to reject Hicks's request to be resentenced by a jury acting with the degree of discretion they lawfully possessed.

In effect, *Hicks* involved an unlawful sentencer under state law: the court erroneously seized the

power to sentence from the jury. This Court held that when the state judge violated state (not federal) law by ordering a particular sentence he had no lawful authority to order, Hicks's due process rights were violated. If it violates the 14th Amendment's Due Process Clause for the adjudicator of a criminal defendant's *sentence* to be without lawful authority as a matter of state law, then *a fortiori* it violates the Due Process Clause for a criminal defendant's *adjudication of guilt* to be determined by an adjudicator without lawful authority.

In *Gomez*, this Court considered a proceeding in which the unlawful adjudicator played even less of a role than in this case or *Hicks*. The magistrate who was without authority presided over jury selection only. 490 U.S. at 860-61. Yet this Court not only ordered reversal without inquiring into prejudice (though that is significant), but it also equated the violation of "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," with the "basic fair trial right[]" to an impartial adjudicator. *Id.* at 876.

In short, it makes little sense for this Court to confine to its supervisory power over federal courts the rationale of its decisions requiring automatic reversal for proceedings involving an unlawful adjudicator. That rationale fits comfortably with the basic protections of the Due Process Clause.

Respondent and the United States suggest that acknowledging that state criminal proceedings involving unlawful adjudicators violate the Due Process Clause would have dire and expansive consequences. None of the concerns they express warrants rejecting petitioner's Due Process Clause argument.

This Court, of course, need not today decide whether due process is violated and automatic reversal is required when individuals are seated who fail to meet other state law criteria for jury service (whether as a matter of age or residency or felony status or capacity to understand English). Resp. Br. 26-27; see U.S. Br. 16-18. And it is pure conjecture, and fairly far-flung conjecture at that, that such errors will occur with any frequency, if at all. What is clear, however, is that there would be nothing odd about such a ruling. Such state laws reflect each state's judgment about who is sufficiently mature to adjudicate the guilt of another (age), or how to define the relevant community that will pass judgment on the defendant (residency), or whether those who have violated the law are fit to sit in judgment of others who stand accused of doing so (felon status), or even whether one could adequately understand the proceedings and deliberations such that the judgment is arrived at rationally (capacity to speak English). That states may differ on each criterion does not make them any less meaningful a restriction on who is and is not a lawful adjudicator. And the fact that states will vary on these criteria does not mean that the meaning of the Due Process Clause varies, as both respondent and the United States suggest. Resp. Br. 26; U.S. Br. 17. It would remain constant: a defendant has a federal constitutional right to adjudication before a tribunal that includes only those with lawful authority to judge.

Respondent and the United States also suggest that a rule of automatic reversal will dissuade prosecutors and judges from vigorously defending the rights that *Batson* and its progeny exist to protect. Resp. Br. 50; U.S. Br. 25-26. This speculation is groundless. Until this Court's 2000 decision in *Martinez-Salazar*, this

Court's statement in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), requiring automatic reversal whenever a defendant was wrongfully denied a peremptory challenge, was unquestioned. Thus, automatic reversal was the rule when the Court first applied *Batson*'s restrictions to defense counsel's exercise of peremptory challenges in *Georgia* v. *McCullom*, 505 U.S. 42 (1992). Respondent does not suggest that the specter of automatic reversal has chilled enforcement of the rule of nondiscrimination in jury selection from its inception, and there is no reason to believe that has been or would be true.

Respondent ventures into the absurd when it predicts that if this Court holds that the error here requires automatic reversal, counsel for defendants will exercise their peremptory challenges "strategically on jurors (like Gomez) who may trigger *Batson* rulings that can later be used to force an automatic reversal." Resp. Br. 11-12. Respondent apparently believes that defense counsel will use peremptory challenges to strike potential jurors they believe to be "clearly neutral or defense friendly," *Id.* at 50, in a way that appears to the trial judge to be discriminatory, but really is not, in an effort to bait the trial judge into an erroneous reverse-*Batson* ruling, in the hopes that counsel will be able to persuade an appellate court of that error, all so the defendant can be retried. Such irrational and unseemly speculation should not occupy this Court.

There is thus no reason to shy away from acknowledging what common sense suggests: trial before an unlawful adjudicator is not consistent with basic fairness and violates due process. Thus if this Court determines that the federal rule requiring automatic reversal of judgments from proceedings involving unlawful adjudicators can be applied only if

such proceedings violate the federal Constitution, it should so hold.

III. THE WRONGFUL SEATING OF A JUROR IS STRUCTURAL ERROR BECAUSE HARMLESS-ERROR REVIEW IS IMPOSSIBLE TO CONDUCT.

Federal law provides an independent reason to apply automatic reversal here: harmless-error analysis is impossible to conduct. A reviewing court cannot conduct harmless-error analysis without improperly substituting its own judgment regarding guilt or innocence for the constitutionally protected right of a determination by a lawful jury.[6]

This Court has clearly stated that "the difficulty of assessing the effect of the error" can, standing alone, provide the basis for requiring automatic reversal. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (citing *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984)). Respondent inexplicably denies this proposition of law, citing the same footnote from *Gonzalez-Lopez* in which this Court stated it. Resp.

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[6] This federal-law basis for requiring automatic reversal can be applied to reverse the Illinois Supreme Court's ruling even if this Court determines the Illinois court applied *state* law in determining that harmless-error analysis applied (contrary to the argument in Section I above) and even if this Court determines that the error here did not violate the Due Process Clause. (Of course, acceptance of either of those arguments would fully support applying the federal rule of automatic reversal for errors that render harmless-error analysis impossible.) As discussed below, and in petitioner's brief, Pet. Br. 25-26, the way the Illinois Supreme Court conducted harmless-error review violated petitioner's right to a jury trial under the Sixth Amendment. This Court has the authority to order automatic reversal of the Illinois Supreme Court's violation of petitioner's Sixth Amendment right.

Br. 46. It is true that there is no "single, inflexible criterion" for determining when automatic reversal is required. 548 U.S. at 149 n.4. But that means that difficulty of conducting harmless-error analysis is not the *sole* basis for automatic reversal. It most certainly does not stand for the illogical proposition that harmless-error analysis can apply when it can't be applied.

Respondent does not deny that this Court, in *Vasquez*, 474 U.S. 254, and *Peters*, 407 U.S. 493, ruled that convictions stemming from proceedings in which a jury panel was unlawfully constituted require automatic reversal. Respondent does not deny that both of those decisions explained their reasoning not *only* in terms of the need to eradicate racial discrimination from the justice system, but *also* because a court could not assess the effect of the error. *Vasquez*, 474 U.S. at 264; *Peters*, 407 U.S. at 504. Instead, respondent cavalierly deems that express rationale "secondary." Resp. Br. 55. This Court should reject respondent's self-serving hierarchical categorization of this Court's rationales.

In any event, respondent wrongly asserts that a reviewing court can determine the effect of an unlawful juror on the trial's outcome. Respondent offers two ways to conduct harmless-error analysis here, one of which simply ignores the nature of the error, the other of which improperly replaces petitioner's right to a jury determination with the appellate court equivalent of a directed verdict. Neither is a permissible method of harmless-review.

Respondent first argues that harmless-error analysis "in cases of purported jury prejudice" simply involves inquiring into whether any juror was biased and thus excusable for cause. *Id.* at 47-48. But this approach ignores the requirement that harmless-

error analysis "be sensitive to the fundamental nature of the error committed." *Young*, 481 U.S. at 812 (plurality). The error here—the wrongful seating of a juror over a lawful peremptory challenge—presupposes that the challenged juror was not actually biased in any provable way. So review for actual bias in these circumstances would by definition *preclude* a finding of harm. Respondent is proposing a rule of automatic affirmance.

There is no authority for so completely sweeping under the rug the fact that petitioner's criminal trial was adjudicated by a juror who should have been excused by the court but was not. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548 (1984), does not stand for such a surprising result. It merely holds that "[t]o invalidate the result of a three-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* at 555. To order a retrial in that *civil* case would impose a substantial burden on the court in the absence of any "error" by the trial judge. In this case, by contrast, a *criminal* trial was adjudicated by a juror who should not have been present because of the trial court's legal error. Respondent's reliance on *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam), is equally unavailing. There was no suggestion that the improper *ex parte* contact between the judge and a juror in that case should have led to the juror's removal from the case at all.

Respondent's second proposed method of harmless-error review tracks that employed by the Illinois Supreme Court below. Resp. Br. 50. Harmless-error review here, respondent states, "merely" involves "determin[ing] whether the evidence set forth in the trial record is such that no rational jury would have

acquitted." *Id.* at 53. But as petitioner argued in its brief, Pet. Br. 25-26, such review amounts to a directed verdict of guilt, in violation of the Sixth Amendment, by an appellate court.

Respondent denies that there is any impropriety in imagining what a hypothetical "rational" juror would have done in Ms. Gomez's place. It asserts that this Court has authorized such an approach in the past. Resp. Br. 53. But neither *United States* v. *Hasting*, 461 U.S. 499 (1983), nor *Schneble* v. *Florida*, 405 U.S. 427 (1972), involved a reviewing court substituting a hypothetical juror for a real juror. In both cases, the Court was considering whether the jury that actually sat and actually heard all of the evidence and rendered a verdict of guilt would have reached a different conclusion had the error (improper prosecutorial comments in *Hasting*, and violation of the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968) in *Schneble*) not been committed. That is, in each case the Court could start from the proposition that *this* lawfully composed jury had adjudicated the defendant guilty, and the only question was whether there was any basis to conclude that the particular jury that had reached such a conclusion might have reasonably changed its mind had the error not been committed. Here, by contrast, the reviewing court would not be trying to determine whether the particular jury that adjudicated petitioner guilty would reasonably have changed its mind if the error had not occurred. The reviewing court is hypothesizing what a *different* jury could reasonably have done.

That distinction is why *Sullivan* v. *Louisana*, 508 U.S. 275 (1993), controls. Contrary to respondent's argument, Resp. Br. 52, the error here does "vitiate *all* the jury's findings," 508 U.S. at 281, because the

findings of *this* jury are not being reviewed. The harmless-error analysis advocated by the State and undertaken by the Illinois Supreme Court does not "'*preserve* a jury's findings, but it [impermissibly] *supplement[s]* those findings.'" *Neder*, 527 U.S. at 27 (Stevens, J., concurring). Indeed, it replaces them in full. This is not the harmless-error analysis envisioned by *Chapman*, which requires determining whether the error "contribute[d] to the *verdict obtained*." 386 U.S. at 24 (emphasis added). This is determining whether a verdict of "not guilty" could have been obtained. Even under the rubric of an "objective" standard like a "reasonable juror," appellate evaluation of the entire record to determine whether acquittal would have been appropriate is unprecedented. And it is indistinguishable from what a trial court unlawfully directing a verdict of guilt at the close of the evidence would do.[7] The United States asserts that the error was harmless because any "juror serving in Gomez's stead would have been *required* to find [petitioner] guilty." U.S. Br. 26 (emphasis added). A clearer statement of a directed verdict of guilt would be hard to find.

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[7] Respondent asserts that petitioner has not "challenge[d] the determination that no rational jury would have acquitted ... because the trial evidence allows no other result." Resp. Br. 50. This is nonsense. Petitioner did not challenge the Illinois Supreme Court's application of harmless-error analysis to the facts of this case because he has asked this Court to apply a rule of automatic reversal that, by definition, is indifferent to the strength, or lack thereof, of the evidence supporting a guilty verdict. In fact, a reasonable jury readily could have acquitted petitioner. There was no physical evidence placing petitioner at the scene, respondent's principal witnesses were allegedly former gang members who had a motive to testify falsely against the petitioner, and whose credibility a reasonable jury could have rejected. JA 166-71.

The impropriety of substituting appellate consideration of the record for the right to have a lawful factfinder render a valid judgment is underscored by this Court's decision in *Wingo*, 418 U.S. 461. While *Wingo* involved an unlawful judicial officer (a magistrate instead of an Article III judge), it acknowledges that cases often turn on how the particular "factfinder appraises the facts," and thus ordered the judgment reversed automatically, even though appellate review of the judge's factual findings would have been *de novo*, and would have included not just a transcript of the proceedings but a recording of them as well. *Id.* at 466, 474. Respondent's (and the United States') argument, Resp. Br. 53; U.S. Br. 24, that the jury is not a critical part of the structure of a criminal trial because it does not create the trial record or exercise judgment over the evidence admitted, rings hollow. The essentially unreviewable role of *evaluating* the evidence is no less a critical component of the structure of a criminal trial than the role of creating that evidence. The kind of harmless-error analysis applied by the Illinois Supreme Court—one which affirms on the basis of "its view of what a reasonable jury would have done," *Sullivan*, 508 U.S. at 281—improperly substitutes judicial evaluation for the findings of a lawful jury to which petitioner is entitled as a matter of both state law and the Sixth Amendment.

IV. THE SEATING OF A JUROR WHOM THE DEFENDANT HAS LAWFULLY STRUCK IS STRUCTURAL ERROR BECAUSE IT CREATES AN UNACCEPTABLE RISK OF BIAS.

The final, independent reason automatic reversal is warranted here is that (1) this Court's decisions

require automatic reversal when the error involves an unacceptable risk of bias in the jury, and (2) the error here, denying petitioner his lawfully exercised peremptory challenge, carries a constitutionally unacceptable risk of bias. Pet. Br. 26-39. Respondent responds largely with a non-sequitur: that this Court has consistently refused to recognize any constitutional right to peremptory challenges. But, contrary to respondent's repeated suggestion, Resp. Br. 28, 30, 31, 35-36, petitioner's argument does not depend on this Court recognizing any such constitutional right, as his brief made clear. Pet. Br. 38.

Petitioner has argued that peremptory challenges have consistently throughout our history played an important part in preserving the undoubted constitutional right to an impartial jury, even without themselves being a constitutional right. That is precisely what this Court has said on numerous occasions. *Id.* at 30 (citing cases). By choosing to provide peremptory challenges, a state involves the defendant in the process of ensuring a fair trial before an impartial jury. Having made that choice, the state cannot arbitrarily override the defendant's participation in that process without introducing an unacceptable risk of bias.

Respondent asserts that the "likelihood or appearance of bias" in a jury violates neither due process nor warrants automatic reversal. Resp. Br. 32. But this Court was clear in *Peters*: such a "likelihood" could violate the Due Process Clause "even if there is no showing of actual bias in the tribunal." 407 U.S. at 502. The defendant's interest in the impartiality of the adjudicator is sufficiently strong that it requires protection not only against its proven violation, but also against circumstances in which the violation can reasonably be asserted, even

if not proven. That is why in *Turner* v. *Louisiana*, 379 U.S. 466, 473-74 (1965), this Court automatically reversed a conviction issued by a jury that had been sequestered with two deputies who were key prosecution witnesses. It was not important to establish that the witnesses had discussed the case with the jurors; the reasonable possibility that they had was sufficient to violate due process and require a new trial.

The denial of petitioner's right to strike Ms. Gomez raises a sufficient concern about the partiality of petitioner's jury to warrant automatic reversal. Respondent disparages the traditional, well-recognized use of peremptory challenges to root out juror bias that the necessarily imperfect system of for-cause challenges will not catch. Resp. Br. 34-35; see Pet. Br. 29-34. That the right to strike a juror peremptorily might be employed for less noble reasons does not change its frequent and proper use. More importantly, if Illinois or any other state believes that peremptory challenges do not helpfully advance the cause of administering a fair and impartial criminal jury system, one would expect to see them abolished. But no state has done so.

Ultimately, this case involves the deprivation of a state-law right that has an unbroken tradition of acceptance in Illinois and the nation, and that this Court has repeatedly recognized plays an important role in ensuring the right to a fair and impartial jury. The unique status of this state-law right and its role in preserving a federal constitutional right mean that its arbitrary deprivation violates the Due Process Clause. In *Evitts*, this Court recognized that there is no constitutional right to a direct criminal appeal. "Nonetheless, if a State has created appellate courts ... the procedures used in deciding appeals

must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." 469 U.S. at 393 (citations omitted). Likewise, when a state grants the defendant the power to participate in the selection of those who adjudicate guilt, the arbitrary denial of that power offends due process. See *id.* at 400-01 ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of … the Due Process Clause."). Just as this Court's ruling in *Evitts* did not create a constitutional right to a criminal appeal, or lead to the "federalization" of countless state rules of criminal procedure, so too a ruling here that the wrongful denial of petitioner's peremptory strike violates due process will not create a constitutional right to peremptory challenges or lead to the "federalization" of other state procedural rules.

Finally, respondent is wrong to assert that petitioner's due process rights were satisfied by *erroneous* appellate review of his claim. Resp. Br. 41-42. In *Hicks*, the petitioner had the opportunity to present his claim to the Oklahoma appellate courts, but they provided no relief. 447 U.S. at 345 & n.2. Likewise, here petitioner has consistently insisted on his state law rights, and has been consistently denied them. Just as *Hicks* was denied due process, so was petitioner.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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