No. 19-1447

In the Supreme Court of the United States

Yehudi Manzano,

Petitioner,

v.

United States of America,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF THE CATO INSTITUTE, FAMM FOUNDATION, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

FAMM is a nonpartisan, national advocacy organization promoting fair and effective criminal justice reforms. Founded in 1991 as Families Against Mandatory Minimums, FAMM raises the voices of individuals directly affected by counterproductive sentencing and prison policies. By mobilizing prisoners and their families adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings in important cases.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association founded in 1958 that, together with its affiliates, has more than 40,000 members. It works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF THE ARGUMENT

Throughout the entire Anglo-American legal tradition, the independence of citizen jurors has been understood to be an indispensable structural check on executive and legislative power. This independence has traditionally implied that jurors would both understand the consequences of a conviction and possess the power of conscientious acquittal, or "jury nullification"—that is, the inherent prerogative to decline to convict a defendant, even if factual guilt is shown beyond a reasonable doubt, when convicting would work a manifest injustice.[2]

Notwithstanding the storied history of jury independence, there is tension in modern case law on the subject. Courts have generally held that defendants do not have a *right* to argue directly for conscientious acquittal, nor to insist that juries be made aware of potential sentences in all cases, yet courts continue to protect the power of juries to acquit "in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

Most critically, this Court has never held that it is inherently improper for a judge to *permit* the introduction of evidence as to the consequences of a conviction or that a judge *must* prohibit any argument touching on the potential for nullification. The Second Circuit's decision below is not only inconsistent with its own indication in *United States v. Polouizzi*, 564 F.3d 142,

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[2] *Amici* suggest that "jury nullification" is a misleading term, as the phrase seems to beg the question as to whether such acquittals are *lawful* exercises of the jury's discretion. "Conscientious acquittal" would be a more apt description, and *amici* will use that phrase interchangeably in this brief.

161–63 (2d Cir. 2009), that such matters are within the district court's discretion, but the resolution of this question on a writ of mandamus created multiple circuit splits on the proper use of that extraordinary instrument. *See* Pet. at 1–2, 11–13, 16–20..

In this case, the District Court's openness to permitting evidence as to a 15-year mandatory minimum and its tentative willingness to permit argument concerning nullification did not warrant the extraordinary remedy of a writ of mandamus. The judge's comments at the pre-trial conference reflect only his initial judgment that, in light of the extreme and unusual nature of this particular case (in which the government has charged a grossly disproportionate 15-year mandatory minimum), it may be appropriate for the jury to hear evidence and argument as to the consequences of a conviction.

No binding authority holds that this approach, which is still contingent on how the trial itself develops, exceeds a district court's discretion. Accordingly, the Second Circuit's issuance of the writ falls far short of the standard set by this Court in *Cheney*, which directs courts to issue writs of mandamus only to prevent a "usurpation of power" or "clear abuse of discretion." *Cheney v. United States Dist. Court*, 542 U.S. 367, 372 (2004).

Moreover, it is especially important to protect the court's discretion in this regard, in light of the near-disappearance of the criminal jury trial. Today, jury trials have been all but replaced by plea bargaining as the baseline for criminal adjudication, and severe mandatory minimums, like the one at issue here, are a major driver of this trend. Preserving the possibility that juries may, in appropriate cases, be informed

about the consequences of conviction is a small but vital safeguard against the wholesale erosion of the jury trial itself.

ARGUMENT

I. THE INDEPENDENCE OF CITIZEN JURIES IS A WELL-ESTABLISHED AND CRUCIAL FEATURE OF OUR LEGAL AND CONSTITUTIONAL HISTORY.

The right to a jury trial developed as a "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968) (trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties").

Scholars have long debated the origin of so-called "jury nullification," but something resembling our notion of an independent jury refusing to enforce unjust laws pre-dates the signing of Magna Carta. *See* CLAY CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 13 (2d ed. 2014); *see also* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 51–85 (1852) (discussing the practice both before and after Magna Carta). In other words, jury independence is as ancient and storied as the Anglo-Saxon legal tradition itself.

A significant pre-colonial influence on the Framers was *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). Bushell was a member of an English jury that refused to convict William Penn for violating the Conventicle Act, which prohibited religious assemblies of more

than five people outside the auspices of the Church of England. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 236–49 (1985). Due to Penn's factual guilt, the trial judge essentially ordered the jury to return a guilty verdict, and imprisoned the jurors for contempt when they refused. However, the Court of Common Pleas granted a writ of habeas corpus, cementing the authority of a jury to acquit against the wishes of the Crown. *Id.*

This understanding of the jury trial was likewise firmly established in the American colonies. In the years preceding the American Revolution, "[e]arly American jurors had frequently refused to enforce the acts of Parliament in order to protect the autonomy of the colonies." CONRAD, *supra*, at 4. One notable case involved John Peter Zenger, who was charged with seditious libel for printing newspapers critical of the royal governor of New York. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–72 (1994). The jury refused to convict notwithstanding Zenger's factual culpability, thus establishing an early landmark for freedom of the press and jury independence. *Id.* at 873–74. Indeed, "Zenger's trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies." *Id.* America's Founders thus "inherited a well-evolved view of the role of the jury, and both adopted it and adapted it for use in the new Nation." CONRAD, *supra*, at 4.

A necessary corollary of Colonial juries' authority to issue conscientious acquittals was their awareness of the consequences of a conviction. In an era with a far simpler criminal code, detailed instructions from

the judge were often unnecessary to ensure that the jury was properly informed. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 22–29, 32, 34–35 (1994) ("[J]urors did not even need to rely on a judge's instructions to know the common law of the land . . . ."). Juries were thus able to tailor their verdicts to prevent excessive punishment. *See, e.g.*, 4 WILLIAM M. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *342–44 (1769) (juries often found value of stolen goods to be less than twelvepence in order to avoid mandatory death penalty for theft of more valuable goods).

The community's central role in the administration of criminal justice has therefore been evident since our country's founding. "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson v. Utah*, 170 U.S. 343, 349–350 (1898) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779). Alexander Hamilton observed that "friends and adversaries of the plan of the [constitutional] convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in this: the former regard[ed] it as a valuable safeguard to liberty; the latter represent[ed] it as the very palladium of free government." THE FEDERALIST NO. 83. This "insistence upon community participation in the determination of guilt or innocence" directly addressed the Founders' "[f]ear of unchecked power." *Duncan*, 391 U.S. at 156.

Ultimately, the jury is expected to act as the conscience of the community. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991), and "places the real direction of society in the hands of the governed," AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 88 (1998) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed. 1945)).

II. THE DISTRICT COURT'S OPENNESS TO PERMITTING EVIDENCE AND ARGUMENT AS TO THE CONSEQUENCES OF A CONVICTION WAS A REASONABLE EXERCISE OF THE COURT'S DISCRETION, NOT SUBJECT TO CONTROL BY MANDAMUS.

A writ of mandamus "'is a drastic and extraordinary remedy reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 372. A writ will only issue if a district court has "usurped its power or clearly abused its discretion." *Id.* (citing cases). Judge Underhill's limited and preliminary rulings fall well short of that extraordinarily high standard.

A. The District Court's provisional decisions thoughtfully harmonize different threads of modern case law, respecting the jury's traditional authority to issue conscientious acquittals while still operating within the strictures of precedent.

Notwithstanding the storied history of jury independence in the Anglo-American legal tradition, courts today do not protect a defendant's Sixth Amendment right to a jury trial in the same manner and to the same degree as in the Founding Era. Relying on *Sparf v. United States*, 156 U.S. 51 (1895), courts have generally held that defendants do not have a constitutional right to argue or obtain an instruction on nullification. *See, e.g.*, *United States v. Thomas*, 116 F.3d 606, 615–16 (2d Cir. 1997).

Nevertheless, the jury's prerogative to issue conscientious acquittals still receives meaningful protection, and the power of courts to discourage nullification remains bounded by the Sixth Amendment. As recently as 1976, this Court clarified that any system in which the "the discretionary act of jury nullification would not be permitted . . . would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976). More specifically, while courts may discourage nullification, they must not give *coercive* anti-nullification instructions that "state or imply that (1) jurors could be punished for jury nullification, or that (2) an acquittal resulting from jury nullification is invalid." *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2018); *see also United States v. Simpson*, 460 F.2d 515, 520 (9th Cir. 1972) ("American judges have generally avoided such interference as would divest juries of their power to acquit an accused, even

though the evidence of his guilt may be clear.") (citing cases).

Crucially, however, whereas courts have held that a defendant has no *right* to introduce evidence or make argument promoting conscientious acquittal, no binding authority precludes a district court from exercising its discretion to *permit* such arguments in appropriate circumstances. Although the government's argument relied heavily on *Polouizzi*, that decision explained that "in some, albeit limited, circumstances it may be appropriate to instruct the jury regarding [the] consequences [of conviction]," 564 F.3d at 161, and it refrained from outright curtailing "the district court's discretion to inform the jury of the applicable mandatory minimum sentence," *id.* at 162.

The District Court's proposed course of action here is more limited even than the scenario left undecided in *Polouizzi*. Judge Underhill's amicus brief below explicitly stated that he is *not* planning to issue an instruction as to the sentence, nor is he otherwise planning to encourage nullification in any way. App. 144–45. Rather, the judge has explained only that he is open to permitting the possible introduction of evidence disclosing the mandatory minimum, assuming that defense counsel is able to lay a foundation for such evidence. App. 135–36.

The government conceded below that the Second Circuit had "not expressly held that a defendant may not argue for nullification," but nevertheless argues that "other courts across the country" have held as such. However, all but one of those cases involved the rejection of the argument that a defendant has a *right* to argue nullification (or have the jury instructed on it). *See United States v. González-Pérez*, 778 F.3d 3,

18–19 (1st Cir. 2015) (upholding district court's decision not to present nullification issue to jury); *United States v. Muse*, 83 F.3d 672, 677 (4th Cir. 1996) (same); *United States v. Trujillo*, 714 F.2d 102, 105–06 (11th Cir. 1983) (same); *United States v. Moylan*, 417 F.2d 1002, 1005–07 (4th Cir. 1969) (same).[3] This is an entirely different issue than whether a decision to *permit* such a defense amounts to the "judicial usurpation of power" or "clear abuse of discretion" that is necessary to justify a writ of mandamus. *Cheney*, 542 U.S. at 380.

There is reason to doubt, in light of the clear history of jury independence discussed in Part I, whether modern case law adequately protects a defendant's right to a jury trial. *See, e.g.*, *United States v. Lynch*, 903 F.3d 1061, 1088 (9th Cir. 2018) (Watford, J., dissenting) ("I have my doubts about whether we were right to endorse [an anti-nullification] instruction, for it affirmatively misstates the power that jurors possess."); *United States v. Polizzi*, 549 F. Supp. 2d 308, 424 (E.D.N.Y. 2008), *rev'd sub nom. United States v. Polouizzi,* 564 F.3d 142 (2d Cir. 2009) ("Consistent modern judicial attempts to water down the Sixth Amendment . . . have not escaped notice by academics and other scholars whose commentary has been generally critical of limitations on Sixth Amendment jury power to dispense mercy.") (citing sources).

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[3] *United States v. Alston*, 112 F.3d 32 (1st Cir. 1994)—the one other case cited by the government for this point—is not a nullification case at all; rather, the First Circuit simply upheld a decision to permit introduction of evidence over a Rule 403 objection. The court said in passing that the defendant "cannot ask the jury to nullify the law," *id.* at 36, but only as a response to an argument that the evidence was too prejudicial.

But this doubt, and the tensions present in modern case law, need not be resolved by this Court. The District Court's limited and preliminary ruling, while recognizing the acknowledged and protected power of jurors to consider the consequences of a conviction, did not exceed its discretion under existing case law. At the very least, the government's right to relief is not "clear and indisputable," *Cheney*, 542 U.S. at 381, and thus does not warrant the extraordinary remedy of mandamus.

Moreover, as the Petition explains in detail, the Second Circuit's decision to grant a writ of mandamus was not only mistaken, but created circuit splits on the questions of whether the United States can seek a writ of mandamus in criminal cases not authorized by 18 U.S.C. § 3731, Pet. at 6–13, and on the standards for what constitutes a "clear and indisputable" right to relief, Pet. at 16–20.

B. Permitting a jury to hear evidence about the consequences of conviction is especially reasonable in a case with a severe and surprising mandatory minimum.

Judge Underhill's openness to permitting an argument on the consequences of conviction is especially appropriate in a case like Manzano's, where the defendant faces the risk of an extreme and disproportionate mandatory minimum sentence. As noted by the dissent below, prosecutors provided no substantial explanation to either the trial court or the appellate court for their decision to press such inordinate charges: "It is highly unlikely—indeed inconceivable—that what Manzano did was what Congress had in mind when it provided for fifteen-year mandatory sentences . . . Judge Underhill was confronted with a

charging decision by the prosecutors that prima facie indicated serious overreach and foreshadowed a miscarriage of justice." *United States v. Manzano (In re United States)*, 945 F.3d 616 at 636, 641 (2d Cir. 2019) (Parker, J., dissenting). This is precisely the sort of "overzealous prosecution" this Court has stated that nullification exists to ward against. *Duncan* 391 U.S. at 156.

To support its position that this evidence may not be permitted, the government relies on *United States v. Shannon*, 512 U.S. 573 (1994), which held that, as a *general* matter, defendants do not have a *right* to introduce such evidence. *Shannon* relied in large part on the idea of a "basic division of labor in our legal system between judge and jury," namely that "[t]he jury's function is to find the facts," and that "[t]he judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict." *Id.* at 579.

But *Shannon* also recognized the discretion of the court to instruct the jury on sentencing consequences to correct the jury's misunderstanding based on a party's misstatement. *See id.* at 587. And critically, the *Shannon* "division of labor" is illusory where severe mandatory minimums dictate the sentence, thus removing the judge's discretion and potentially misleading a jury to the defendant's detriment. A jury told, in essence, that sentencing is the sole province of the judge will likely infer, erroneously, that the judge possesses actual sentencing discretion to fit the punishment to the offense. A jury that believes it is considering the equivalent of statutory rape (which in many jurisdictions is a strict liability offense punished as a misdemeanor) might well apply the reasonable-doubt standard more laxly than in a more severe case,

even though the definition in each instance is the same.

Here, the jury would be more likely to convict if it believes Mr. Manzano would receive a sentence tailored to his actual conduct than if it understood that, under the law, the offense will be treated for sentencing purposes like murder or forcible rape. Avoiding the sort of mistake or confusion that arises when jurors wrongly believe a judge has sentencing discretion is a reasonable basis for permitting evidence about a severe mandatory minimum in an unusual case like this.

Moreover, this case also presents the risk that an uninformed jury will return a "compromise" verdict on a mistaken assumption about which of the two counts is more serious. Mr. Manzano was charged with a violation of both 18 U.S.C. § 2251(a) (production of child pornography), which carries a 15-year minimum, and 18 U.S.C. § 2252A(a)(1) (transporting or distributing child pornography), which carries a five-year minimum. It would hardly be obvious to a typical juror which is the more serious offense. Under the circumstances of this case, "production" could easily be understood as less serious, as it occurred in the context of a non-coerced relationship, while the transportation/distribution charge might be understood to entail further harm through dissemination to third parties (even though, in this case, no one except for government investigators ever saw the recording).

Although juries are discouraged from rendering compromise verdicts, the possibility of such outcomes are a well-accepted reality of criminal litigation. *See, e.g.*, *Dunn v. United States*, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary"). Judges

and juries alike may "search for a middle ground between the absolutes of conviction and acquittal . . . for those occasional hard cases in which 'law and justice do not coincide.'" Alexander L. Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 651 (1950).

For example, one party or the other will often seek, or oppose, a lesser-included offense instruction out of fear, or welcoming of, a compromise verdict. Without evidence explicating the sentencing consequences for each charge, the jury might well convict Mr. Manzano only of production, on the mistaken belief that this charge carried a lesser sentence. Warding off the risk of such error, especially when the judge himself is deprived of the power to set an appropriate sentence, is yet another reason why the District Court's openness to permitting evidence of the mandatory minimum is not only within its discretion but eminently reasonable.

III. PROTECTING JURY INDEPENDENCE IS ALL THE MORE IMPORTANT GIVEN THE VANISHINGLY SMALL ROLE THAT JURY TRIALS PLAY IN OUR CRIMINAL JUSTICE SYSTEM.

Despite their intended centrality as the bedrock of our criminal justice system, jury trials are being pushed to the brink of extinction. Letting defendants inform the jury of the consequences of conviction and urge conscientious acquittal, in appropriate cases, would be a small but significant step toward rehabilitating the jury trial.

The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of

pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions").

Most troubling, there is ample reason to believe that many criminal defendants—regardless of factual guilt—are effectively *coerced* into taking pleas, simply because the risk of going to trial is too great. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014. In a recent report, the NACDL has extensively documented this "trial penalty"—that is, the "discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial." NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018).

Although the trial penalty has many complex causes, one of the biggest factors is the unbridled discretion of prosecutors to charge defendants in excess of what their alleged crimes actually warrant—especially when mandatory minimums remove the judge's sentencing discretion entirely, as in the present case. *See id.* at 7, 24–38. Given the pressure that prosecutors can bring to bear through charging decisions alone, many defendants decide to waive their right to a jury trial, no matter the merits of their case.

In short, we have traded the transparency, accountability, and legitimacy that arise from public jury trials for the efficiency of a plea-driven process that would have been unrecognizable and profoundly objectionable to the Founders. There is no panacea for this problem, but the least we can do to avoid further discouraging defendants from exercising their Sixth Amendment rights is to preserve the discretion of judges, in appropriate cases, to let the defense inform the jury of the consequences of a conviction and urge conscientious acquittal—especially when a case is so obviously overcharged, and severe mandatory minimums are at play.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant certiorari.

Respectfully submitted,

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