No. 09-5429

IN THE

Supreme Court of the United States

KERRY DEAN BENALLY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street, N.W.
Washington, DC 20005
(202) 466-7767

VIRGINIA A. SEITZ*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1] AND SUMMARY OF ARGUMENT

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI and its member tribes are dedicated to protecting the rights and improving the welfare of American Indians and tribes.

Petitioner Benally has demonstrated that the legal issues presented here are the subjects of clear, acknowledged conflicts among the circuit courts of appeals and federal district courts, and that the conflict must be resolved to avoid fundamental unfairness in the administration of criminal justice. NCAI files this *amicus* brief to add another substantial dimension to the importance of this case.

For historical and geographical reasons, the federal courts' interpretation and the application of the Federal Rules of Evidence and the Sixth Amendment right to an impartial jury are of particular concern to Native Americans. First, the Major Crimes Act gives federal courts jurisdiction over violent crimes involving Indian defendants that occur in Indian country. As a result, Indians are substantially over-represented among federal criminal defendants accused of violent crimes. For example, and relevant here, they constitute a remarkable 33% of federal offenders sentenced for assault.

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[1] No person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have received timely notice of the intent to file this brief and have consented to its filing, and the letters of consent have been filed with the Clerk.

Second, as set forth *infra* at 12-15, there remains substantial discrimination against Native Americans, most notably in states including Indian reservations. There is a significant latent problem with discrimination against Native Americans that is particularly acute in cases of violent crime and that comes to the surface in jury deliberations such as those in this case.

Finally, as the facts of this case reflect, the federal districts in which reservations are located are massive, and long distances often separate Indian country and the seats of federal district courts. This fact, in combination with the relative poverty of residents of Indian country, means that Indian defendants are rarely tried by juries that include their peers, their fellow residents of Indian country. Instead, the jury venires for federal district courts in Indian country states are overwhelmingly composed of state residents who are governed by a different legal regime (state criminal law) and who lack direct experience with or understanding of Indian country or that community. See generally Kevin K. Washburn, *American Indians, Crime and the Law*, 104 Mich. L. Rev. 709 (2005-2006).

The consequences that flow from the factors described above are that (i) the interpretation of Federal Rule of Evidence 606(b) is critically important to Native Americans and their communities, and (ii) discrimination and the absence of community input within jury venires for crimes involving Indian country is a real and serious problem that the decision below will exacerbate.

NCAI recognizes that this Court's principal consideration in granting certiorari is the existence of a conflict among the lower courts on an important question of federal law. But the particular impor-

tance of this conflict to Native American criminal defendants is not evident on the face of this case: By dint of history, geography and the structure of federal and state criminal jurisdiction, Native American defendants are disproportionately disadvantaged and suffer intentional discrimination in criminal cases. These circumstances have given rise to substantial Native American wariness about the federal criminal justice system. And, where, as here, a jury verdict stands after the trial court finds that jurors made statements during deliberations that directly relate to the criminal defendant's guilt or innocence and constitute intentional race discrimination, that mistrust will surely evolve into a conclusion of illegitimacy.

In sum, NCAI's substantial interest in this case arises from its long term commitment to ensuring the fair and constitutional application of federal law to Native American defendants subject to the federal criminal justice system. The rule of law announced by the court of appeals – that Federal Rule of Evidence 606(b) forbids the admission of evidence of discriminatory juror statements that directly bear on guilt for any purpose and that the Constitution does not invalidate that Rule so interpreted – undermines NCAI's goal of equal justice for Native Americans in this area.

STATEMENT OF THE CASE

Kerry Dean Benally is a member of the Ute Mountain Ute tribe who was charged with assaulting a Bureau of Indian Affairs officer with a dangerous weapon in Indian country in violation of the Major Crimes Act, 18 U.S.C. § 111(b). During voir dire in this case, jurors were asked whether they had any negative experiences with Native Americans and

whether the fact that Mr. Benally is a Native American would affect their evaluation of the case. App. 2a. All answered no. *Id.*

In the jury room, however, the foreman told the other jurors that he had lived on or near an Indian reservation and that "'[w]hen Indians get alcohol, they all get drunk,' and when they get drunk, they get violent." App. 3a (alteration in original) (quoting Juror K.C. Aff.). A second juror stated that she lived on or near a reservation and made "'clear she was agreeing with the foreman's statement about Indians.'" *Id.* (quoting Juror K.C. Aff.). Other jurors discussed the need to "'send a message back to reservation.'" *Id.* (quoting Juror K.C. Aff.). The jury convicted Mr. Benally.

Based on this evidence of racist stereotyping, the district court found that two jurors had lied on voir dire when they failed to reveal their past experiences with Native Americans and their preconception that all Native Americans get drunk and then violent. App. 28a. The court concluded that Mr. Benally was therefore entitled to a new trial. *Id.* at 20a-31a. The court of appeals reversed, holding that the Federal Rule of Evidence 606(b) prohibited the admission of the affidavit evidence, even to demonstrate that jurors lied on voir dire about a material matter and that this application of the Rule did not violate Mr. Benally's right to a fair trial by an impartial jury. *Id.* at 26a.

The court of appeals correctly noted that "[t]here is a split in the Circuits" on the question whether proof of false juror testimony about racial bias can be used to overturn a jury verdict. App. 11a. The Ninth and D.C. Circuits have held that it can. See *United States* v. *Henley*, 238 U.S. 1111, 1121 (9th Cir. 2001); *Hard* v. *Burlington N. R.R.*, 812 F.2d 482, 485-86 (9th Cir.

1987); *United States* v. *Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995). See also *Tobias* v. *Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979). The Third Circuit, however, has indicated that such testimony should not be admitted for any purpose, expressly noting that the Ninth Circuit had held otherwise. See *Williams* v. *Price*, 343 F.3d 223, 235, 236 n.5 (3d Cir. 2003) (Alito, J.). In this case, the Tenth Circuit chose to follow the Third.

In addition, the panel found that the jurors' statements did not reflect "extraneous prejudicial information" or an "outside influence" in the jury room, and thus admission under Rule 606. See App. 13a-17a. The panel characterized the statements as "gross generalizations built upon prejudice [that] had no place in the jury room," but found that they were nonetheless inadmissible. *Id.* at 17a. As the panel recognized, *id.* (citing *Tobias*, 468 F. Supp. at 1290), lower courts are also divided about this interpretation of Rule 606's exceptions. Compare *Henley*, 238 F.3d at 1119-20 ("evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony), *Hard*, 812 F.2d at 486 (same), and *Tobias*, 468 F. Supp. at 1290 (same), with *Shillcutt* v. *Gagnon*, 827 F.2d 1155, 1159-60 (7th Cir. 1987) (applying Rule 606(b) to exclude a white juror's statement that "'[the defendant is] black and he sees a seventeen year old white girl – I know the type'"), and *Smith* v. *Brewer*, 444 F. Supp. 482, 488 (S.D. Iowa) (applying Rule 606(b) to exclude jurors' mimicking of black attorney during deliberations), *aff'd*, 577 F.2d 466 (8th Cir. 1978).[2]

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[2] *See also* 27 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure, Evidence* § 6074, at 507-08 & n.117 (2d ed. 2007) ("if bias manifests itself in the form of comments made by jurors during deliberations to sway the vote of other jurors,

Finally, the Tenth Circuit rejected "Mr. Benally's most powerful argument" – "that Rule 606(b) is unconstitutional as applied in this case" because it violates his Sixth Amendment right to an impartial jury. App. 20a (citing 27 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure Evidence* § 6074, at 513 (2d ed. 2007) (suggesting that the Sixth Amendment may require admission of statement of racial bias by jurors and noting that a balance must be struck in such cases)). Several cases have found exclusion may be unconstitutional in this setting, including *Shillcutt*, 827 F.2d at 1159, and *Tobias*, 468 F. Supp. at 1290. The panel here stated that it was "skeptical of this approach," and that even if an exception could be made, the facts in this case did not warrant its application. App. 25a. It reached this conclusion despite the district court's finding that the jurors were actually biased and the fact that the biased statements went directly to the defendant's propensity to commit the crime at issue. *Id.* at 25a-26a.

The Tenth Circuit relied on *Tanner* v. *United States*, 483 U.S. 107 (1987) in rejecting all of the defendant's arguments. As Judge Briscoe's dissent from denial of rehearing en banc explained, however, *Tanner* involved a drug- and alcohol-impaired jury. App. 40a. And, it did not involve jurors alleged to have lied on voir dire. Thus, it simply did not resolve the questions presented here.

The importance of the issue was highlighted by the court below even as it denied rehearing en banc. As the panel noted, "racial prejudice is an especially odious, and especially common, form of Sixth Amend-

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the comments may be thought of as the function equivalent of 'information' even if not in the form of hard data").

ment violation." App. 24a. Moreover, in urging rehearing en banc, the dissent from denial not only cited the conflict, but also observed that "[t]he impartiality of the adjudicator goes to the very integrity of the legal system." App. 37a (Briscoe, J., dissenting from denial of rehearing en banc) (citing *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion)). The legal rule announced by the Court below will shield evidence that some jurors stated that the defendant was more likely to be guilty of the crime at issue because he was Native American.

REASONS FOR GRANTING THE PETITION

Together, the opinions of the Tenth Circuit and the dissents from denial of rehearing en banc make a compelling case of conflict among the lower courts and of importance, fulfilling this Court's traditional criteria for certiorari review, as the petition showed. The conflict on the question whether racist statements in deliberations are admissible to demonstrate that a juror lied on voir dire is fully developed and recognized. The importance of uniform administration of the Federal Rules of Evidence and the Sixth Amendment to criminal justice is uncontested.

In addition, the conflict here raises an important question of interpretation of the text of Rule 606(b), which on its face prevents only post-trial juror testimony "upon an inquiry into the validity of the verdict" and does not preclude admission of such testimony to prove that a juror lied during voir dire. In the decision under review, the Tenth Circuit went beyond the text of the Rule and refused to admit evidence that revealed a fundamental structural defect in Mr. Benally's trial.

Although the Tenth Circuit relied on this Court's decision in *Tanner* v. *United States*, 483 U.S. 107 (1987), in reaching its decision in this case, *Tanner* did not address the question whether juror statements in deliberations must be excluded to show that a juror lied on voir dire. Moreover, critically, *Tanner*'s interpretation of Rule 606 rested in part on the fact that a defendant's interest in a competent jury would be *protected by voir dire*. See *id.* at 127. Plainly, that process cannot serve its protective function if it is undermined by deceptive juror responses. Indeed, in allowing defendants to question jurors about racial prejudice during voir dire, this Court has made clear that racism is a particularly heinous breach of the Sixth Amendment's impartial-jury guarantee. See *Turner* v. *Murray*, 476 U.S. 28, 35-36 (1986) (plurality opinion); *McDonough Power Equip.* v. *Greenwood*, 464 U.S. 548, 554 (1984).

NCAI will not rehash the arguments for conflict and importance in the petition. It files this *amicus* brief (i) to demonstrate the enormous importance of this case to Native Americans, and (ii) to explain why this petition is a uniquely appropriate vehicle for resolution of the legal conflicts presented by Rule 606(b) and racially discriminatory juror statements.

I. THE INTERPRETATION AND APPLICATION OF FRE 606(b) AND THE SIXTH AMENDMENT ARE UNIQUELY IMPORTANT TO INDIAN DEFENDANTS AND COMMUNITIES.

This Court has upheld the Federal government's ability to assert jurisdiction over criminal offenses in Indian country since it resolved *United States* v. *Rogers*, 45 U.S. 567 (1846), and *United States* v. *Kagama*, 118 U.S. 375 (1886). See also *United States* v. *Antelope*, 430 U.S. 641, 648 (1977) ("Congress had

undoubted constitutional power to prescribe a criminal code applicable in Indian country").

Today, Federal law grants federal courts jurisdiction when Native American defendants commit the crimes set forth in the Major Crimes Act of 1885 in "Indian country." See 18 U.S.C. § 1153.[3] "Indian country" in turn is defined as all land within the boundaries of an Indian reservation including dependent communities and Indian allotments as provided in 18 U.S.C. § 1151.

Thus, "Federal criminal jurisdiction is an important fact of life for Indian people on Indian reservations in a way different than for other Americans." U.S. Sentencing Comm'n, *Report of the Native American Advisory Group* (Nov. 4, 2003) ("*Advisory Group Report*"). For most Americans, any prosecution of a routine felony offense would be conducted by state authorities and governed by state laws. Federal authorities would prosecute only where the crime relates to a federal interest or relates to national or international concerns (*i.e.*, international drug trade, terrorism). Indeed, before passage of the Major Crimes Act in 1885, tribal governments handled such crimes as tribal offenses, and the United States only rarely prosecuted Indian country crimes. See *id.* at 1.

The Major Crimes Act represented a fundamental change in this jurisdictional allocation, federalizing first six and now more than 20 felonies in Indian

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[3] The United States transferred criminal jurisdiction over reservations to some states in Public Law 280, Act of Aug. 15, 1953, ch. 505, §2, 67 Stat. 588, 588-89, *see* 18 U.S.C. § 1162(a). Some of those states have retroceded jurisdiction to the tribes. Now states cannot assume such jurisdiction without tribal consent.

country, including manslaughter and aggravated assaults. (Misdemeanors are still prosecuted by trial governments in tribal courts.) The federal government has displaced the tribes as the chief source of law enforcement in cases involving serious crimes in Indian country.

As the *Advisory Group Report* concluded, "[i]n singling out particular communities defined by tribal membership and geography and by displacing tribal governments that handle many of the other important governmental responsibilities in these communities, the United States has undertaken a substantial responsibility for public safety and criminal justice in Indian communities." *Id.* at 3.

The effect of federal jurisdiction over Indian country on the makeup of the federal courts' docket of cases involving violent crimes is breathtaking. The *Advisory Group Report* stated:

> While Indian offenses amount to less than five percent of the overall federal caseload, they constitute a significant portion of violent crime in federal court. Over eighty percent of manslaughter cases and over sixty percent of sexual abuse cases arise from Indian jurisdiction. Nearly half of all the murders and assaults arise from Indian jurisdiction.

Id. at 1-2 (citing U.S. Sentencing Comm'n, *2001 Sourcebook of Federal Sentencing Statistics*; U.S. Sentencing Comm'n, *Manslaughter Working Group Report to the Commission* (1997)). With respect to the crime at issue here – aggravated assault – the *Advisory Group Report* observed that while Indians represent 2% of the U.S. population, "they represent about 34% of individuals in federal custody for assault." *Id.* at 31 & n.58. See also Bureau of Justice

Statistics, U.S. Dep't of Justice, *American Indians and Crime: A BJS Statistical Profile 1992-2002* (Dec. 2004).

This state of affairs has not improved since the *Advisory Group Report* issued. The Bureau of Justice Statistics reports that for Fiscal Year 2007, Native American offenders constitute 61% of those sentenced for murder, 70% of those of those sentenced for manslaughter, 35% of those sentenced for sexual abuse, and 46% of those sentenced for assault. See Fed. Justice Statistics Res. Ctr., *data available at* http://fjsrc.urban.org (last viewed Aug. 12, 2009).

The vast overrepresentation of Native Americans among federal offenders charged with the most serious violent crimes both heightens the importance of the legal issues presented and shows that this case is a particularly appropriate vehicle for their resolution:

First, the questions of the interpretation and application of Federal Rule of Evidence 606(b) and the Sixth Amendment are uniquely important to Native American defendants and communities because they are disproportionately subject to federal criminal jurisdiction.

Second, addressing juror prejudice is critical in cases involving violent crimes. Such crimes carry the longest sentences and are the most likely to elicit strong emotional reactions from jurors as occurred here. For example, they create a powerful desire in the jury to "'send a message back to the reservation'" and they draw to the surface existing prejudices, including that "'[w]hen Indians get alcohol, they all get drunk' and . . . when they get drunk, they get violent." App. 3a (alteration in original).

Finally, because charges against Indians constitute such a large percentage of the federal criminal docket, this case is an appropriate context for resolution of the conflicts in federal law arising from racist statements by jurors during deliberations.

II. DISCRIMINATION AGAINST NATIVE AMERICANS REMAINS A SUBSTANTIAL PROBLEM IN STATES WHICH INCLUDE INDIAN RESERVATIONS.

A jury venire for a federal trial involving a crime in Indian country comes from the federal district including the relevant Indian reservation. There have been significant improvements in race relations in states encompassing Indian country, but discrimination against Native Americans remains a serious issue.

As recently as 2007, the United States Commission on Civil Rights held hearings on the significant discrimination against Native Americans in regions including Indian reservations. See, *e.g.*, U.S. Comm'n on Civil Rights, *Commission Briefing: Discrimination Against Native Americans in Border Towns* (Sept. 9, 2007). These hearings were only the most recent reports of discrimination against Native Americans in such states.

In November 2005, the New Mexico Advisory Committee to the Commission issued *The Farmington Report: Civil Rights for Native Americans 30 Years Later* (Nov. 2005). This Report addressed relations between the Navajos and local residents of the Farmington, New Mexico area thirty years after "the brutal murder of three Navajo youths and numerous complaints from Navajo leaders concerning unequal protection and enforcement of the laws." *Id.* at ii. The Report concluded that while significant improvements have been made, "[p]roblems . . . persist" with

respect to "equal protection and enforcement of laws for Native Americans." *Id.* In 2006, the South Dakota Equal Justice Commission issued its *Final Report and Recommendations* to the South Dakota Supreme Court ("*South Dakota Report*") on perceptions of unfairness to Native Americans, *inter alia*, in the State's judicial system, including in criminal cases and in the jury system. And, it was the post-hearing recommendations of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, that led to the creation of the Ad Hoc Native American Advisory Group, and its 2003 Report on disparities in federal sentencing of Native Americans under the Major Crimes Act. See *Advisory Group Report* at 3.

This Court once said that Indians "owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies." *Kagama*, 118 U.S. at 384. Plainly, this description of the State-Indian relationship and local hostility is too extreme today. Indians are now citizens, see Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253; and, in the modern era, there exists substantial state and tribal cooperation on law enforcement issues. Nonetheless, as the hearings and other reports cited above reflect, "[r]acism and bias remain strong, particularly in states where Indians compete with non-Indians for limited resources." K. Washburn, *supra*, at 764 & n.271 (citing Bryan H. Widenthal, *Fighting the* Lone Wolf *Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 Tulsa L. Rev. 113, 145 (2002); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through*

a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 521 n.88 (1976)).

In this regard – and suggestive of the depth of this racial issue – FBI statistics reveal that Native Americans are among the most persistent victims of hate crimes. See S.E. Ruckman, *FBI Hate Crime Report Shows Indians Remain Most Often Assaulted*, NativeTimes.com, http://nativetimes.com/index.php?option=com_content&task+view&id=516&Itemid=1 (last viewed Aug. 13, 2009). Indeed, one of the primary justifications for federal jurisdiction in Indian country is the federal duty to protect the Indian people from state authority. See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 566-67 (1983) (there is a "good deal of force" to the argument that "State courts may be inhospitable to Indian rights").

The reality of discrimination against Native Americans in the states including Indian reservations supports review here. The Federal government chose to take on responsibility for the prosecution of serious crime in Indian country. And, Native American defendants have a demonstrated need for federal protection from discrimination, including in the criminal justice system.

Moreover, the general legitimacy of that system and its legitimacy specifically with respect to the Native American defendants and communities it governs will turn on its perceived equality of treatment and impartiality. Most Americans would agree with this Court's view that the Constitution forbids race discrimination to infect adjudication. But, if a jury found by the district court to be biased renders a guilty verdict that stands, Native Americans understandably would view the process as tainted by discrimination. See also *South Dakota Report* at 1 (Native Americans perceive that the

South Dakota "judicial system shows favoritism to non-minorities"); *id.* at 8 (finding that "[m]inority people have a general distrust of the criminal justice system and exclusion from being seated on juries fosters that distrust"). In this case, jurors made discriminatory statements reflecting racial stereotyping that supported a conviction for assault, and yet the Constitutional guarantee of an impartial jury was deemed upheld.

It is critically, indeed constitutionally, important that administration of the federal criminal justice regime be free from discrimination against Native Americans and other minorities. This Court should grant review to determine whether the legal rulings of the Tenth Circuit with respect to Federal Rule of Evidence 606(b) and the Sixth Amendment are correct and consistent with these important federal and constitutional goals.

III. JURY VENIRES FOR FEDERAL CRIMES ARISING IN INDIAN COUNTRY GENERALLY DO NOT INCLUDE MEMBERS OF THE DEFENDANTS' INDIAN COUNTRY COMMUNITY.

The Sixth Amendment is framed as a guarantee of certain rights to criminal defendants, but this Court has made clear that it also serves the important interest of community participation in our criminal justice system. Thus, juries are "instruments of public justice" and must be "truly representative of the community." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). Our system "'presupposes a jury drawn from a pool broadly representative of the community.'" *Taylor* v. *Louisiana*, 419 U.S. 522, 530-31 (1975). See also *Glasser* v. *United States*, 315 U.S. 60, 85 (1942) (a representative jury is fundamental to the "basic

concepts of a democratic society and a representative government").

As a practical matter, the residents of Indian country generally are not well represented in the jury venires or juries deciding Indian country cases. See generally K. Washburn, *supra*, at 747-50. Indians constitute only a small percentage of any given state's population even in states with substantial Indian populations. *Id.* at 747 n.188. Jury venires are drawn from state voter registration rolls. While Indian voter participation in state elections is increasing, Indians, who are "among the poorest Americans," *id.* at 747 & n.189, and often focused on tribal rather than state government, are somewhat less likely than other state citizens to be registered to vote. *Id.* at 747-48 & nn.190-93.

Finally, and critically, most federal districts including Indian reservations are physically large – meaning that the courts are located in cities or towns hundreds of miles from Indian country. *Id.* at 748-50 & nn.194-95. This case illustrates that point. Mr. Benally's trial was held in Salt Lake City, a lengthy drive from the Ute Mountain Ute reservation. The relatively impoverished residents of Indian country tend to lack the resources to be jurors in federal district courts hundreds of miles away.

Native American defendants in federal criminal trials are thus unlikely to have jury venires, let alone juries, that include any residents of Indian country. Instead, the jury venires are composed of state citizens. These individuals, like residents of Indian country, are U.S. citizens, but their legal status differs from that of Native Americans in significant ways. See *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879) ("the very idea of a jury is a body of men composed of the peers or equals of the person whose

rights it is selected or summoned to determine; that is, of . . . persons having the same legal status in society as that which he holds").

Thus, an Indian who commits a serious crime in Indian country is likely subject to a different legal regime than any member of his or her jury, see 18 U.S.C. § 1153. That Indian is subject to federal law and federal punishment, while a state citizen committing the same crime in a community governed by state law would face state and local criminal regimes. And, the federal laws at issue are intended for the protection of the Indian country community. Indeed, the Major Crimes Act applies only within Indian country, and that term is defined in the U.S. Code. The crimes covered by the Major Crimes Act are quite serious, but they are "of a local nature with significant local effects and few effects beyond the locality." K. Washburn, *supra*, at 762.

There was no allegation in this case that the jury pool in this case was unconstitutionally constituted. NCAI's point is simply that, as a practical matter of geography, economics, and local government affiliation, Indian defendants generally are not tried by a jury of their peers or even a jury with members from their distinctive Indian country community. These federal juries do not represent the Indian country communities where the crimes they adjudicate occur.

Most jurors will not openly announce their biases at voir dire or in deliberations; but those unstated biases will affect deliberations and the administration of justice. The absence of relevant Indian-country community members on a jury makes bias more likely and its discovery less likely. This situation presents a serious challenge to our criminal justice system. Where, as here, juror misrepresentations are made in voir dire and where, as here, jurors

make biased statements during deliberations that are directly related to guilt, the defendant has not received a fair trial and is entitled to a new trial that is untainted by racial bias.

CONCLUSION

For these reasons and those set forth in the petition, the petition for certiorari should be granted.

Respectfully Submitted,

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street, N.W.
Washington, D.C. 20005
(202) 466-7767

VIRGINIA A. SEITZ*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

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