CA NO. 14-50585

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NOAH KLEINMAN, Defendant-Appellant.	DC NO. CR 11-893-ODW

BRIEF OF FEDERAL PUBLIC AND COMMUNITY DEFENDERS FOR ALASKA, ARIZONA, THE CENTRAL, EASTERN, NORTHERN, AND SOUTHERN DISTRICTS OF CALIFORNIA, GUAM, HAWAII, IDAHO, MONTANA, NEVADA, OREGON, AND THE EASTERN AND WESTERN DISTRICTS OF WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE OTIS D. WRIGHT II
United States District Judge

HILARY POTASHNER
Federal Public Defender
ALEXANDRA W. YATES
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5059
Facsimile: (213) 894-0081
E-mail: Alexandra_Yates@fd.org
Attorneys for *Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

I. STATEMENT OF CONSENT

All parties have consented to the filing of this brief.

II. STATEMENT OF AUTHORSHIP AND FUNDING

No party's counsel authored this brief in whole or in part. No party, party's counsel, or person, other than *Amici Curiae* and its counsel, contributed money to fund the preparation or submission of this brief.

III. IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, the Federal Public and Community Defenders for Alaska, Arizona, the Central, Eastern, Northern, and Southern Districts of California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and the Eastern and Western Districts of Washington ("Ninth Circuit Defenders") submit this *amici curiae* brief in support of Defendant-Appellant Noah Kleinman's Petition for Rehearing and/or Rehearing En Banc. The Ninth Circuit Defenders represent indigent defendants in federal court in this Circuit pursuant to the Criminal Justice Act. *See* 18 U.S.C. § 3006A.

The Ninth Circuit Defenders have amassed significant experience related to the anti-nullification-instruction issue presented in the petition for rehearing. They expect the Court's decision on this matter to impact instructions in every federal criminal case in the Circuit where the possibility of nullification arises. As the institutional defenders for the fourteen districts of the Ninth Circuit, the Ninth

Circuit Defenders have a unique interest in, and a well-developed perspective on, the issue presented in this case.

IV. INTRODUCTION

Noah Kleinman operated medical marijuana dispensaries in California, where doing so is legal. State prosecutors declined to pursue criminal charges against him, based on California's medical marijuana laws. But federal prosecutors were undeterred; they sought and obtained convictions and a sentence of more than seventeen years in prison. *See United States v. Kleinman*, 859 F.3d 825, 830-31 (9th Cir. 2017).

This is precisely the sort of case where our Founding Fathers might have envisioned a jury exercising its power to nullify. Indeed, a three-judge panel of the Court recognized that Kleinman's jury had a "well established . . . power to nullify," a "power . . . protected by freedom from recrimination or sanction." *Id.* at 835 (emphasis and internal quotation marks omitted). But the district court stripped the jury of that undisputed power when it gave a coercive anti-nullification instruction that implied jurors could be punished for nullifying and that a nullification-based acquittal would be invalid. *See id.* at 836-37. This, the panel held, was error. *See id.* at 843.

And yet, the panel gave Kleinman no relief, on the faulty premise that "depriving a defendant of a jury that is able to nullify is plainly not a constitutional

violation." *Id.* at 837. That holding flies in the face of Supreme Court cases that interpret the Sixth Amendment as the Founders did—to guarantee to every defendant a criminal jury with the power to nullify.

Because this case presents a question of exceptional importance, and because the panel's resolution of that question conflicts with binding Supreme Court precedent, this Court should grant Kleinman's petition for rehearing.

V. ARGUMENT

The three-judge panel that decided this case overlooked relevant Supreme Court precedent, and issued a decision at odds with that controlling authority. The Court should correct this mistake.

A. The Panel Held That a Defendant Has No Constitutional Right to a Jury with the Power To Nullify

Upon finding error in the district court's anti-nullification instruction,[1] the panel turned to possible relief. "Kleinman argue[d] that the jury instructions were

[1] The court's instruction was:

> You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.

structural error, not subject to review for harmlessness, because they deprived him of his right to trial by jury." *Kleinman*, 859 F.3d at 837. The panel's sole basis for rejecting that argument was its conclusion that Kleinman did not have any right to a jury with the power to nullify:

> However, for the error to be structural, it must have deprived Kleinman of a constitutional right. There is no constitutional right to jury nullification, so depriving a defendant of a jury that is able to nullify is plainly not a constitutional violation.

Id. at 837. The panel found the instructional error harmless using similar logic:

> It is not fundamentally unfair for a defendant to be tried by a jury that is not fully informed of the power to nullify, or even that is stripped of the power to nullify, because there is no right to nullification. . . . Thus, the error was not structural and was harmless.

Id. at 837-38.

In sum, the panel found no constitutional right to a jury with the power to nullify. However, as discussed below, a defendant's right to trial by jury includes the right to a jury with the power to nullify, just as it did at the time our country ratified the Sixth Amendment. By stripping Kleinman's jury of that power, the district court deprived him of a constitutional right.

Kleinman, 859 F.3d at 835.

B. The Supreme Court Recognizes a Defendant's Constitutional Right to a Jury with the Power To Nullify

The Supreme Court repeatedly has emphasized that appellate courts must "examine the historical record" in addressing Sixth Amendment claims, "because the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *S. Union Co. v. United States*, 567 U.S. 343, 353 (2012) (internal quotation marks omitted); *see Oregon v. Ice*, 555 U.S. 160, 170 (2009); *Cunningham v. California*, 549 U.S. 270, 281-82 (2007); *see also Johnson v. Louisiana*, 406 U.S. 356, 370-71 (1972) (Powell, J., concurring) ("The reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law."). Thus, "the salient question" for this Court in deciding whether Kleinman had a constitutional right to a jury with the power to nullify "is what role the jury played in prosecutions" at the time of the Founding. *S. Union Co.*, 567 U.S. at 354; *cf. Crawford v. Washington*, 541 U.S. 36, 42-69 (2004) (taking similar originalist approach to determine meaning of Sixth Amendment's Confrontation Clause).

As numerous scholars have explained, cases of jury nullification were celebrated at common law and front and center in the minds of the Founders who drafted and ratified the Sixth Amendment. *See, e.g.*, Jenny E. Carroll, *The Jury's*

Second Coming, 100 Geo. L.J. 657, 663-75 (2012); Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 Santa Clara L. Rev. 775, 775-807 (2011); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 681-86 (1996); *see also United States v. Polizzi*, 549 F. Supp. 2d 308, 404-21 (E.D.N.Y. 2008), *rev'd sub. nom. United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009). Indeed, it is largely undisputed that when "[t]he Sixth Amendment was adopted in 1791 . . . [i]t was then understood that the jury had the power to refuse to convict even if the facts and law indicated guilt," i.e., to nullify. *Polizzi*, 549 F. Supp. 2d at 405.

And so it is no surprise that the Supreme Court has recognized the Framers adopted the Sixth Amendment's right to trial by jury with the knowledge and intent that the jury, and jury nullification specifically, would serve as "the grand bulwark" to protect defendants from overzealous prosecutions by the government. *Jones v. United States*, 526 U.S. 227, 246 (1999) (internal quotation marks omitted); *see id.* at 244-48; *United States v. Gaudin*, 515 U.S. 506, 510-15 (1995); *Duncan v. Louisiana*, 391 U.S. 145, 151-58 (1968). Nor is it remarkable that the Court has lauded "the historical and *constitutionally guaranteed right* of criminal defendants to demand that the jury decide guilt or innocence on every issue," including "find[ing] a verdict of guilty or not guilty as their own consciences may direct." *Gaudin*, 515 U.S. at 513-14 (emphasis added) (internal quotation marks

omitted). For as the Court has explained, "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan*, 391 U.S. at 157. The Court has never retreated from its position that a defendant's right to a jury encompasses the right to a jury with the power to nullify.

That power to nullify need not be explained to a sitting jury—or at least that is what this Court (though not the Supreme Court) has held. *See United States v. Powell*, 955 F.2d 1206, 1212-13 (9th Cir. 1992) (as amended); *United States v. Simpson*, 460 F.2d 515, 518-20 (9th Cir. 1972). This Court, like the Supreme Court, nonetheless accepts that nullification is a valuable, sometimes desirable outcome, and that trial courts must not interfere with the jury's power to nullify. *See Simpson*, 460 F.2d at 519 & n.11 (discussing desirability of occasional exercise of jury's "freedom to grant acquittals against the law" and citing early nullification cases as examples of "how well our society's interests have been served by acquittals resulting from application by the jurors of their collective conscience and sense of justice"); *Finn v. United States*, 219 F.2d 894, 900 (9th Cir. 1955) ("Of course, in a criminal case a jury has the power to fly in the teeth of the evidence and the law and acquit a defendant; that is something that cannot be taken away

from it."); *Morris v. United States*, 156 F.2d 525, 528-32 (9th Cir. 1946) (rejecting encroachment on jury's traditional role, including power to nullify, by trial courts).

Pro-nullification instructions are unnecessary only because, even in their absence, "jurors often reach 'conscience' verdicts without being instructed that they have the power to do so" and "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." *Simpson*, 460 F.2d at 520; *see United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972). Thus, in the usual case, "the existing safeguards"—the jury's independent role in the judicial system and courts' non-interference with this role—"are adequate" to protect a defendant's right to a jury with the power to nullify. *See Simpson*, 460 F.2d at 520.

In *Kleinman*, the district court disrupted that delicate balance by issuing an anti-nullification instruction that the panel acknowledged was improper. Under Supreme Court precedent, that interference with the jury's power to nullify deprived Kleinman of his Sixth Amendment right to trial by jury. The panel's holding otherwise conflicts with that precedent and must be corrected.

VI. CONCLUSION

For the foregoing reasons, *Amici Curiae* Federal Public and Community Defenders for Alaska, Arizona, the Central, Eastern, Northern, and Southern Districts of California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and the Eastern and Western Districts of Washington urge this Court to grant rehearing in this case.[2]

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender for the Central District of California

DATED: October 2, 2017

By *s/ Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

Attorneys for *Amici Curiae*

[2] *Amici Curiae* also join and support Kleinman's additional arguments, set forth in his petition for rehearing, on why his case merits further review.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 29-2(c)(2), the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 1909 words.

DATED: October 2, 2017

By *s/ Alexandra W. Yates*
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2017, I electronically filed the foregoing **BRIEF OF FEDERAL PUBLIC AND COMMUNITY DEFENDERS FOR ALASKA, ARIZONA, THE CENTRAL, EASTERN, NORTHERN, AND SOUTHERN DISTRICTS OF CALIFORNIA, GUAM, HAWAII, IDAHO, MONTANA, NEVADA, OREGON, AND THE EASTERN AND WESTERN DISTRICTS OF WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lorena Macias
LORENA MACIAS