No. 10-50219, 10-50264

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiffs-Appellee/Cross Appellant

v.

CHARLES LYNCH,
Defendant-Appellant/Cross-Appellee.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT/CROSS-APPELLEE SEEKING REVERSAL

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Dated: July 9, 2012

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Pursuant to Fed. R. App. P. 29(a)-(b), the law professors listed below respectfully move this Court for leave to file the submitted brief as *amici curiae* in support of the Defendant-Appellant/Cross Appellee in appeal Nos. 10-50219 and 10-50264.

Amici curiae are law professors and legal scholars from across the country with expertise in the areas of criminal procedure. *Amici* have an interest in the proper interpretation and application of the accused's right to a trial by an impartial jury as guaranteed by the Sixth Amendment of the U.S. Constitution. The a*mici* brief being filed herewith argues that the district court improperly curtailed the defendant's Sixth Amendment right to a jury when it gave an anti-nullification instruction and refused to instruct the jury on punishment. The district Court's decision was predicated on an unsupportable view of the Sixth Amendment as interpreted by the Supreme Court's recent rulings in the *Apprendi v. New* Jersey case line.

Amici believe that their perspectives on this issue, and on the relationship between the *Apprendi* case line and the Sixth Amendment right to jury, will be of assistance to this Court.

Following is a list of the *amici curiae* law professors. Institutional affiliations are provided for identification purposes only.

Laura I. Appleman
Associate Professor, Willamette University College of Law

Jenny E. Carroll
Associate Professor of Law, Seton Hall University College of Law

Mark Denbeaux
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Jonathan Hafetz
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L. Song Richardson
Professor of Law, University of Iowa College of Law

Simon Stern
Associate Professor, University of Toronto College of Law

WHEREFORE, the law professors listed above respectfully ask this Court to grant this motion and to permit them to file a brief as *amici curiae* in support of Defendant-Appellant/Cross Appellee.

DATED: July 9, 2012

Respectfully submitted,

/s/ Jenny E. Carroll
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No. 10-50219, 10-50264

IN THE

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UNITED STATES OF AMERICA,
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v.

CHARLES LYNCH,
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BRIEF OF CRIMINAL PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL

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INTEREST OF AMICI CURIAE

Amici curiae are law professors and legal scholars from across the country with expertise in the areas of criminal procedure. *Amici* have an interest in the proper interpretation and application of the accused's right to a trial by an impartial jury as guaranteed by the Sixth Amendment of the U.S. Constitution. *Amici* are concerned that the district court's decision below to give an anti-nullification instruction as well as its refusal to instruct the jury on punishment was predicated on an unsupportable view of the Sixth Amendment as interpreted by the Supreme Court's recent rulings in the *Apprendi v. New* Jersey case line. To endorse the district court's approach would run counter to the *Apprendi* line's underlying goal of returning the jury to its historical function.

Accordingly, *amici* respectfully submit this brief in appeal No. 10-50219 and 10-50264.[1] The list of *amici* is set forth in the appendix hereto. Concurrently with this brief, *amici* are filing a motion for leave to file pursuant to Fed. R. App. P. 29(b).

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici* or their counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The district court's decision to issue an anti-nullification instruction and its refusal to instruct the jury on the potential punishment of the defendant in this case was predicated on its conclusion that such matters exceeded the proper scope of the jury's deliberations under the Sixth Amendment. Specifically, the district court read the right to jury trial articulated in the Sixth Amendment as confining juror consideration to the facts of the allegations against the defendant and precluding juror consideration of the validity of the law, either generally or as applied to the defendant with regard to his substantive guilt or potential punishment. Based on this understanding of the Sixth Amendment, the district court instructed the jury that they could not consider the law in two key areas. First, the court instructed jurors that they were required to apply the law as informed by the court, regardless of whether the jurors agreed with the law or the court's characterization of it. In particular, the court indicated that jurors could not engage in nullification of the federal law with regard to narcotics enforcement even if they believed the law to be unjust or contrary to state law. Second, the district court declined to instruct the jury on the mandatory minimum punishments the defendant would face if convicted, and instead instructed the jurors that they "may not consider punishment in deciding whether the Government has proved its case against the Defendant beyond a reasonable doubt."

The district court's blanket prohibition on the jury's consideration of the law or punishment are contrary to the Supreme Court's admonition in *Apprendi* case line that juries should return to their historical function as a "bulwark of liberty" and a "safety valve against government oppression." The construction of the historical role of the jury as a mechanism to check either an unjust law or the government's unjust application of a law encompassed the right of the jury to consider the meaning of the law and the defendant's potential punishment in rendering a verdict in a particular case. In enshrining the right to a jury trial in the Bill of Rights, the Founders relied on their conception of the jury as the ultimate judges of the facts of a case, as well as the law that formed the basis of the accusation and the punishment that would flow from conviction. By denying the jury the ability to consider the validity of the law or the punishment that a conviction will visit on a defendant, the district court improperly precluded the jury from assuming the role contemplated by the Supreme Court's most recent decisions with regard to the role of the jury. *See Southern Union Co. v. United States*, 132 S. Ct. 2344, 2349-50 (2012). In *Southern Union Co.* the Court emphasized that "*Apprendi*'s rule is 'rooted in longstanding common-law practice'" that "preserves the 'historic function'" of the jury. *Id.* (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007), and *Oregon v. Ice*, 555 U.S. 160, 163 (2009)). While the *Apprendi* line to date has focused on whether the

prosecution has proven every *fact* that forms the basis of the defendant's conviction and/or punishment beyond a reasonable doubt, both the Court's continued characterization of the underlying goal of the case line to preserve the historical function of the jury and the Court's emphasis on the functionalism of the jury (as opposed to a formalist construction of topics appropriate for juror consideration) suggests an endorsement of a historical conception of the jury, which indisputably includes the jury's right to consider the law and the defendant's punishment in their contemplation of his culpability and, ultimately, his guilt.

ARGUMENT

I. THE DISTRICT COURT'S JURY INSTRUCTION REGARDING NULLIFICATION IS CONTRARY TO THE SUPREME COURT'S HOLDING IN THE *APPRENDI V. NEW JERSEY* CASE LINE AND UNDERMINED THE JURY'S HISTORICAL ROLE

The district court's instruction barring juror consideration of the validity of the law at issue in the case is inconsistent with the Supreme Court's efforts to revitalize the historical role of the jury as articulated in the *Apprendi* case line. *See Apprendi v. New Jersey*, 530 U.S. 460, 477-484 (2000). *Apprendi*'s holding is grounded in a desire to return the Sixth Amendment jury right to its historical construction. In response to criticism from dissenting Justices, Justice Thomas noted in his *Apprendi* concurrence that "[t]oday's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante* – the status quo that reflected the original meaning of the Fifth and Sixth Amendments."

Id. at 518. In subsequent cases, the Court reiterated the importance of the revival of the historical jury in the strongest rhetoric, describing the jury as a "guard against a spirit of oppression and tyranny on the part of rulers [and to function] as the great bulwark of [our] civil liberties." *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004). In establishing the parameters of the *Apprendi* doctrine, the Court has repeatedly stressed that it is "rooted in longstanding common-law practice." C*unningham*, 549 U.S. at 281. Its "animating principle" is the "preservation of the jury's historic role as a bulwark between the State and the accused at trial for an alleged offense." *Ice*, 555 U.S. at 168. In its most recent decision in this line, the Court reiterated that the underlying principle of *Apprendi* was the restoration of the jury's historical role as informed by an analysis of the historical record with regard to the creation and ratification of the Sixth Amendment. *See Southern Union Co. v. United States*, *supra*, 132 S. Ct. at 2351-52.

While the *Apprendi* line to date has focused on whether the prosecution has proven every *fact* that forms the basis of the defendant's conviction and/or punishment beyond a reasonable doubt, the Court's discussion of the jury's role post-*Apprendi* suggests a broader underlying principle. *See* Jenny E. Carroll, *The Jury's Second Coming,* 100 GEO. L.J. 657 (2012). First, the case line seeks to preserve the jury's historical function, which clearly encompassed juror consideration of both fact and law. Second, the Court has repeatedly emphasized a

preservation of the jury's functional power over formalistic or procedural restrictions on this function. *See* Arie M Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 977 (2006). Finally, the rhetoric surrounding the Court's discussion of the historical role of the jury can only be realized if jurors serve as an independent body free to judge the facts and law of the case before them. *See* Carroll, *supra*, 100 GEO. L.J. at 688.

A. A Brief History of the Sixth Amendment Right to Jury

The Anglo-American concept of the jury has been tied to notions of juror nullification of the law since at least 1670, with the decision known as *Bushell's Case*. *See* Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After* Bushell's Case, 111 YALE L.J. 1815 (2002). The named defendant in the case, Edward Bushell, had been a juror in the unlawful assembly and breach of the peace trial of William Penn and William Mead. *See The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly: 22 Charles H.A.D. 1670*, in COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 951, 954-55 (London, R. Bagshaw 1810). While both Mead and Penn declined to admit they had violated the law, they nonetheless implored the jury to consider the validity of the law itself. *See id.* at 958-60. Penn, arguing on behalf of himself and Mead, urged the jury to set

aside the law as dictated by the court, and to impose a higher standard – that of morality and conscience. *Id.* The argument itself was hardly novel, and it likely would have escaped historical notice had Penn's jurors not been willing to defiantly assert their conscience in the face of the trial judge's efforts to suppress the possibility of nullification. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF IDEAL OF DEMOCRACY 71-73 (1994); Stern, *supra*, 111 YALE L.J. at 1822. Despite the judge's repeated efforts to "persuade" the jury to return a verdict of guilty (including incarcerating the jurors without food or water until they reconsidered their positions), the judge eventually was forced to accept a verdict of not guilty, but in response "he charged all of the jurors for returning a verdict contrary to the evidence and contrary to his instructions." *See* Stern, *supra*, 111 YALE L.J. at 1823. When the jurors refused to pay the imposed fine and were sent to prison they appealed their incarceration. *See* Thomas Andrew Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 225 (1985). Chief Justice Sir John Vaughn ruled that jurors could not be fined and imprisoned for his verdicts. *See* Bushell's Case, (1670) 127 Eng. Rep. 1006 (C.P.) 1007. He stressed the need for juror independence as a means to legitimate the system and jurors' verdicts. *Id.* at 1010. While scholars may debate whether the *Bushell's Case* in fact sanctioned nullification, or simply prevented judges from punishing jurors for returning

verdicts that appeared contrary to the facts of case, this may well be a distinction without difference. *See* Carroll, *supra*, 100 GEO. L.J. at 666. Regardless of the underlying meaning of Chief Justice Sir John Vaughn's opinion, *Bushell* is significant to the question of nullification for two reasons. First, it fortified the notion that the jury was an independent body whose role was to check the government's application of the law on the citizenry. Second, and not unrelated, it opened up a sanctioned space whereby jurors could return verdicts of conscience without risk of punishment.

It is not hard to imagine that this vision of an independent jury that could check an oppressive government was attractive to the American colonist. *See* Carroll, *supra*, 100 GEO. L.J. at 668. In 1735, when presented with their own opportunity to cast off the judiciary's construction of the law in favor of their own conscience, colonial American jurors followed Bushell's example. In the seditious libel trial of John Peter Zenger, a printer of the *New York Weekly Journal*, jurors disregarded the judge's de facto instruction to return a verdict of guilty, and instead followed the urgings of Zenger's counsel to follow their conscience. *See* James Alexander, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 1, 28, 62, 78-79, 93, 96, 99 (Stanley Nider Katz ed., 1963); 'MR. ZENGER'S MALICE AND FALSHOOD': SIX ISSUES OF THE NEW-YORK WEEKLY JOURNAL 1733-34, at 5 (Stephen Botein ed., 1985). In

acquitting Zenger of charges he all but admitted to, the jurors were hailed as heroes who had struck a blow against oppression and colonial rule by preserving early concepts of free speech and press. *See* ALEXANDER, *supra*, at 28. Verdicts like that in the *Zenger* case were viewed as a means of expressing the growing colonial discontent with the state of the law and the government's application of the law to the governed. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994); *see also* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 17 (1985).

This vision of the jurors and their role as political actors animated the Founders' discussion of the Constitution and the role of the law in post-Revolutionary America. *See* Carroll, *supra*, 100 GEO. L.J. at 670. John Adams wrote extensively about the role of the jury in the newly formed republic. In his descriptions of the jury, he stressed repeatedly that jurors must be free to render verdicts based on this conscience even if that conscience was "in direct opposition to the direction of the court." Charles Francis Adams, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253-55 (Boston, Charles C. Little & James Brown 1850). Responding to the question of whether jurors should only consider questions of fact, Adams wrote:

> Every Man of any feeling or Conscience will answer, no. It is not only his right, but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court…. The English Law

obliges no Man … to pin his faith on the sleve of any mere Man.

2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 5 (L.H. Butterfield et al. eds. 1961). To the Founders, the jury was a forum where citizens could decide the meaning of the law, not just have that meaning dictated to them by a judge or some other formalized body such as a legislative or executive branch. *See* Carroll, *supra*, 100 GEO. L.J. at 671-72 & n.73; *see also* Donald M. Middlebrooks, *Revising Thomas Jefferson's Jury:* Sparf *and* Hansen v. United States *Reconsidered*, 46 AM. J. LEGAL HIST. 353, 388 (2004) (noting that "[r]evolutionary colonials refused to define law as an instrument of the state which could not be judged by the common man. Rather, they viewed it as the reflection of their community which ordinary men were equally capable of judging for themselves.").

Early jury instructions reflected this view of the jury. Carroll, *supra*, 100 GEO. L.J. at 672. Chief Justice John Jay, sitting as a court of original jurisdiction in the 1794 case of *Georgia v. Brailsford*, instructed the jury that they should judge both law and fact in reaching a verdict. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794). In creating the instruction, the Chief Justice drew on a long tradition of not only instructing jurors to nullify, but also encouraging them to do so. *See* Carroll, *supra*, 100 GEO. L.J. at 672-73 n.80.

The notion that ordinary citizens sitting as jurors would lend meaning to the law by interpreting it in the context of criminal trials would not only have been

consistent with the Founders' notion of the role of the jury, but also with the conception of the law itself. *See* Carroll, *supra*, 100 GEO. L.J. at 670-73. To the Founders, each person's common sense and conscience was as legitimate a source of the meaning of the law as a judge's characterization of the law. *Id.* at 673-74. The law sprang from the community it served and the jurors played an important role in ensuring that the law, and the government's application of the law, remained true to communal values by nullify in moments when the law and their communal sense of justice diverged. *Id.* For all the disagreements the Founders may have suffered in drafting the Constitution and forming the new government, they did not contest the importance of the jury system as a vital component of the new democracy. *See* THE FEDERALIST NO. 83, at 257-58 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins University Press 2d ed. 1981) . In describing the discussion of the Sixth Amendment's right to a jury at the Constitutional Convention, Alexander Hamilton noted:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as valuable safeguard to liberty; the latter represent it as the very palladium of free government.

Id. To the Founders, an independent jury that could judge facts and law was "at the heart of the Bill of Rights." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991).

Despite this early agreement among the Founders with regard to the role of the jury as an independent force to lend meaning to the law through verdicts, the tide soon shifted and faith in the nullifying jury waned. *See* Carroll, 100 GEO. L.J. at 675-76. Concern soon arouse that jurors, unfettered by any formal dictate on the meaning of the law, were free to return inconsistent verdicts that reflected community prejudices as a much as they reflected a "just outcome." *See id.* at 675-77 & n.104. Concern over a lack of uniformity in verdicts across the nation, particularly in the periods immediately prior and following the Civil War sparked an internal revolution of sorts within the judiciary to dismantle the juror's role as nullifier. *Id.* at 676-78. By 1895, the Supreme Court weighed in with its decision in *Sparf v. United States*, 156 U.S. 51 (1895). While the Court acknowledged the historical ability of jurors to nullify the law, the Court nonetheless upheld a jury instruction informing jurors that they were to follow the law as described by the judge. *Id.* at 64-80. The *Sparf* Court did not explicitly bar nullification, but it characterized the jury in formalist, rather than functional, terms. *See* Rubenstein, *supra*, 106 COLUM. L. REV. at 966. *Sparf* characterized the jury as a body of citizens whose sole purpose was to confirm the presence or absence of particular facts in the case before them. *See Sparf*, 156 U.S. at 102-03. The two Justices who dissented in *Sparf* argued that the constitutional right to a jury meant something more than the creation of a rubber stamp to the judiciary's mandates on

the law. *See Sparf*, 156 U.S. at 110 (Brewer, J. dissenting); *id.* at 113-14 (Gray, J. dissenting). The dissenters invoked the Founders' ideal of the jury as the community's opportunity to have real and direct control over the meaning and application of the law at least with regard to the case before them. *Id.* Twenty-five years later when the Court revisited the question of the jury's role in judging law in *Horning v. District of Columbia*, the Court again declined to find error in a judge's instruction that forbid them from considering the law beyond what the court had dictated. 254 U.S. 135 (1920). Justice Brandeis, in his dissent, warned that the Court's holding usurped the power of the jury and reduced the constitutional right to a jury to a mere formality. *Id.* at 140 (Brandeis, J. dissenting).

Despite this restrictive characterization of the jury, nullification survived. Jurors, insulated by procedural protections for their verdicts including the double jeopardy clause and the use of general verdict forms, as well as *Bushell's Case* promise of freedom from persecution for nullifiers, all served to protect verdicts of acquittal that appeared inconsistent with the application of the facts to the law as instructed by the judge free from review or consequence for the juries returning them. *See* Carroll, *supra*, 100 GEO. L.J. at 680-85. Perhaps this persistence of nullification, despite the Supreme Court's best efforts to reduce the jury to a "mere formality," was a testament to the Founders' original vision of the jury as a moment of citizen activism against perceived government oppression. Jurors were

simply unwilling to relinquish their free exercise of conscience in the face of injustice when they took their seat in the jury box and swore their oaths. Regardless of the underlying reasons for its persistence, the rise of modern jury case law seeks to revitalize the jury's historical role – including that of nullifiers.

B. The Revitalization of the Jury's Historical Role

By 1968, the Supreme Court itself began to reconsider its conception of the jury, redefining the jury as more than a formality, but as "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *Duncan*, the Court returned to a characterization of the function of the jury as "to prevent oppression by the [g]overnment … [and f]ear of unchecked power." *Id.* at 155-56. This was a fundamental shift in the Court's conception of the jury from a purely formalistic one of judging only facts within the judicially dictated context of the law, to a vision of the jury rooted in democratic principles and requiring a functional analysis. *See* Carroll, *supra*, 100 GEO. L.J. at 685-86. The jury of *Duncan* was once again a political actor, that by necessity could contemplate the meaning of the law as applied to the defendant and could nullify, or redefine, a law that had become a tool of government oppression. *See id.* at 686. This vision of the jury was reiterated later the same year in *Witherspoon v. Illinois*, where the Court stated that "[o]ne of the most important functions any jury can perform … is

to maintain a link between contemporary community values and the penal system…." 391 U.S. 510, 519 n.15 (1968).

The Court returned to the rhetoric of these cases in *Taylor v. Louisiana*, 419 U.S. 522 (1975). In *Taylor*, while the Court held that the Sixth Amendment's right to an impartial jury did not include a right to a jury composed of a particular population, it did prohibit the states from excluding certain groups from juror eligibility. *Id.* at 538. This inclusive vision of the jury was critical, according to the Court, because a key function of the jury was "to guard against the exercise of arbitrary power – to make available commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge." *Id.* at 530 (citing *Duncan*, 391 U.S. at 155-56). In short, who made up the jury pool mattered because the jury represented the citizen's opportunity to check the power of the government. *See* Carroll, *supra*, 100 GEO. L.J. at 687. The *Taylor* Court called on the citizen to use the same judgment that had informed the common law – that common sense of justice that springs from citizen judgment of the law and its application. *Id.* With *Duncan*, *Witherspoon* and *Taylor* the Court proclaimed that this concept of the jury was more than an archaic holdover from common-law days. *Id.* The jury was a crucial safeguard to democracy and was critical to the construction of the law itself. A jury that considers broadly the meaning and

application of the law served as a bridge between the written law and the community's values. As such it could not be reduced to a mere formality.

This vision of the jury reappears in the Court's most recent cases on the role of juries. In the *Apprendi* case line, the Court purports to revitalize the historical notion of the jury. *See Southern Union Co.*, *supra*, 132 S. Ct. at 2350-52. At its core, *Apprendi* is about returning the assessment of a defendant's culpability to the citizen jurors. While *Apprendi* and the cases that have followed may have spoken only of a determination of facts, they evoke a historical image of the jury consistent with the Court's earlier holdings in *Duncan, Witherspoon*, and *Taylor,* where the function of the jury is not obscured or overridden by a blind adherence to formalism. *See* Carroll, *supra*, 100 GEO. L.J. at 688. The jury is recognized as a vital component in determining whether the defendant's actions rise to the level of criminal and so warrant sanction. *Id.* The Court, in describing the jury it envisions, evoked the rhetoric of the earlier jury decisions, casting the jury in political terms as a "guard against a spirit of oppression and tyranny on the part of the rulers [and] the great bulwark of [our] civil liberties." *Apprendi*, 530 U.S. at 477 (second alteration in the original) (internal citations omitted).

In subsequent cases, as the Court sought to define the parameters of the A*pprendi* holding, it returned again and again to the historical notion of the jury as a bridge between the power of the formal government to construct law and the

application of the law to the citizenry. *See* Carroll, *supra*, 100 GEO. L.J. at 688-89. In 2004, the Court noted in *Blakely v. Washington* that the right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure [the people's] control in the judiciary." 542 U.S. 296, 305-06 (2004). Central to that function, the Court concluded, is the jury's role as "circuitbreaker in the States' machinery of justice." *Id.* at 306. This role cannot be achieved if the jury is "relegated to making a determination the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* wants to punish." *Id.* at 307 (emphasis in the original). The Court further reiterated that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Ice*, 555 U.S. at 170. In short, in order for the jury to achieve its true historical purpose as described above, it must be an independent body that is able to judge both law and fact. In its most recent decision in the line, the Court repeatedly stressed that at its core *Apprendi* sought to restore the jury to its historical role. *See Southern Union Co.*, *supra*, 132 S. Ct. at 2350-52. Included in that role is the power of the jury to consider the proper application of the law to a particular defendant, to nullify.

When the district court judge in this case issued an anti-nullification instruction, it sought to block one of the primary and historic functions of the jury as judges of law and facts. In doing so it acted contrary to the Supreme Court's most recent conceptualization of the jury. So instructed, the jury failed to achieve the function envisioned by the Founders as a means to check the overzealous power of the government. That jurors might have found the federal law inconsistent with their own views on narcotics enforcement or the laws of their home state is *exactly* the type of vital debate surrounding conflicting values that the Founders contemplated when they created the Sixth Amendment right to jury. The district court judge's decision to prevent the juror's evaluation of the law therefore contradicts the Supreme Court's mandate to consider the historical basis of the right to jury in criminal cases.

II. THIS DISTRICT COURT'S REFUSAL TO INSTRUCT THE JURY ON THE MANDATORY MINIMUMS THE DEFENDANT FACED IF CONVICTED IS CONTRARY TO THE SUPREME COURT'S HOLDING IN THE *APPRENDI V. NEW JERSEY* CASE LINE AND UNDERMINES THE JURY'S HISTORICAL ROLE IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

As discussed in Part I, the *Apprendi* case line seeks to restore the jury's historical role. On a practical level, this case lines force evidence that might have previously circumvented juror consideration to undergo juror scrutiny in the name of promoting the legitimacy of the outcome. *See Blakely*, 542 U.S. 296; *Apprendi*, 530 U.S. at 490. These are cases about allowing the community members sitting

as jurors to weigh in on the validity of the application of the law to a particular defendant. In doing so they fundamentally change the relationship between the governed and the government, promoting the governed to a more active role in assessing when the government's exercise of power (through accusation, conviction and punishment) is justified and when it is not.

Included in this historical construction of the role of the jury was the jury's knowledge of potential punishments defendants faced if convicted. Just as jurors historically held a right to nullify, they also were informed of potential punishments as a key component of their assessment of the appropriate application of the law. *See United States v. Polizzi*, 549 F. Supp. 2d 308, 322 (E.D. New York, 2008) (noting that "in exercising its excessive discretion, the [colonial] jury was expected to be aware of, and understand, the sentence that would flow from its decision."). Information about a potential sentence was considered critical to ensure that jurors could exercise their power to prevent the government from engaging in cruel or overreaching action. *See* ABRAMSON, *supra*, at 22-29, 32, 34-35; NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 49 (2007).

Once again, the district court's decision with regard to a jury instruction – this time to decline to inform the jury of the potential mandatory minimums the defendant would face if convicted – served to curtail the jury's ability to achieve its historical function and stands in stark contrast to the Supreme Court's

admonition that courts should look to a historical vision of the jury in constructing the Sixth Amendment jury right.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence should be vacated.

DATED: July 9, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C), the attached brief *amici curiae* is proportionally spaced, has a typeface of 14 points or more, and contains 7000 words or less. This certificate was prepared in reliance on the word count feature of the word-processing system (Microsoft Word) used to prepare this brief.

DATED: July 9, 2012 /s/ Jenny E. Carroll

APPENDIX

Following is a list of the *amici curiae* law professors. Institutional affiliations are provided for identification purposes only.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *amici curiae* brief and the accompanying motion for leave to file with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 9, 2012.

Participants in the cases who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Jenny E. Carroll