No. 17-15470

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORRINE BROWN,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida,
No. 3:16-cr-00093

EN BANC BRIEF FOR DEFENDANT-APPELLANT ON REHEARING

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November 23, 2020

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, Appellant hereby certifies that the following is a complete list of the trial judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case on appeal.

Andrews, Barbara, victim;

Andrews, John, victim;

Baker, John D., II, victim;

Bentley, A. Lee, III, former United States Attorney;

Birk, Edward L., Counsel for Graham Media Group, Florida, Inc.;

Bittel, Stephen, victim;

Blacklock, Evelyn, Counsel for Defendant-Appellant Brown;

Bodnar, Roberta, Assistant United States Attorney;

Brown, Corrine, Defendant-Appellant;

Brown, Shantrel, Movant;

C.A.P. Contracting, Inc., victim;

CA Florida Holdings, Inc., Movant;

Caldwell, Leslie, former Assistant Attorney General, Criminal Division, United States Department of Justice;

Charter Communications (ticker symbol: CHTR), victim;

Chartrand, Gary, victim;

Clement, Paul D., Counsel to Defendant-Appellant Brown;

Community Leadership PAC, Inc., victim;

Conner, Timothy J., Counsel for CA Florida Holdings, Inc. & Multimedia Holdings Corporation;

Coolican, Michael, Assistant United States Attorney;

Corrigan, Hon. Timothy J., United States District Judge for the Middle District of Florida;

Cox Media Group Jacksonville, a subsidiary of Cox Media Group, which is majority owned by Apollo Global Management (ticker symbol: APO), Movant;

Cream, Anita M., Assistant United States Attorney;

Cronan, John P., Principal Deputy Assistant Attorney General, Criminal Division, United States Department of Justice;

CSX Corporate Citizenship (ticker symbol: CSX), victim;

Delaware North Companies, Inc., Buffalo, NY, victim;

DeMaggio, Bryan E., Counsel for Brown, terminated;

Duva, Andrew Tysen, Assistant United States Attorney;

Finker, Lonya, victim;

Flooring with Dimensions, dba S.L. Gresham Co., victim;

Florida East Coast Industries Company, LLC, victim;

Florida Association of Criminal Defense Lawyers, amicus curiae;

Fugate, Rachel E., Counsel for Cox Media Group Jacksonville;

Geraghty, Pat, victim;

Glober, Bonnie Ames, Assistant United States Attorney;

Graham Media Group, Florida Inc., a subsidiary of Graham Holdings Company (ticker symbol: GHC), Movant;

Greenpointe Holdings, LLC, victim;

Greenspoon Marder, victim;

Hall, Loretta, victim;

Halverson, Steven T., victim;

Hammer, Joshua B., Of Counsel to Defendant-Appellant Brown;

Handberg, Roger Bernard, III, Assistant United States Attorney;

Hass, David L., Counsel for Brown, terminated;

Hulser, Raymond N., former Chief, Public Integrity Section, United States Department of Justice;

Kachergus, Matthew R., Counsel for Brown, terminated;

Kent, William Mallory, Appellate Counsel for Brown;

Klindt, Hon. James R., United States Magistrate Judge for the Middle District of Florida;

Lazzara, Gaspar, victim;

Lipsky, Richard, victim;

Lopez, Maria Chapa, United States Attorney;

Ludwig Family Foundation, victim;

Mansfield, Jennifer A., Counsel for Multimedia Holdings Corporation & CA Florida Holdings, Inc.;

Marta Employees Charity Club, victim;

McFarland, Ryan E., Esq.;

McNamara, Linda Julin, Assistant United States Attorney, Deputy Chief, Appellate Division;

Mills, Harry, victim;

Mills, Rosa, victim;

Muldrow, W. Stephen, United States Attorney;

Multimedia Holdings Corporation, Movant;

Murphy, Erin E., Counsel for Defendant-Appellant Brown;

NeJame, Mark E., Counsel for Defendant Brown, terminated;

Olshan, Eric, Assistant United States Attorney;

Orange Park Mitsubishi, victim;

Pajcic & Pajcic, victim;

Patterson, Lea E., Of Counsel to Defendant-Appellant Brown;

Picerne Developmental Corporation, victim;

Picerne, John G., victim;

Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division;

Robinson, Sue-Ann N., Counsel for movant Shantrel Brown;

Russell, Keisha T., Of Counsel to Defendant-Appellant Brown;

Sasser, Hiram S., III, Of Counsel to Defendant-Appellant Brown;

Shackelford, Kelly J., Of Counsel to Defendant-Appellant Brown;

Sheppard, William J., Counsel for Brown, terminated;

Simmons, Elias, Co-defendant;

Simply Healthcare Plans, Inc., a subsidiary of Amerigroup, which is a subsidiary of Anthem, Inc. (ticker symbol: ANTM), victim;

Simpson, Allison Kirkwood, Counsel for Cox Media Group Jacksonville;

Smith, Daniel Austin, Counsel for Co-defendant, terminated;

Smith, James Wesley, III, Trial Counsel for Defendant Brown;

Stafftime, LLC, victim;

Stermon, Kent, victim;

Suarez, Anthony, Counsel for Co-defendant;

Tirol, AnnaLou, former Acting Chief, Public Integrity Section, United States Department of Justice;

Ufferman, Michael Robert, counsel for amicus curiae Florida Association of Criminal Defense Lawyers;

USSC, LLC, victim;

Walker, Samuel A., Trial Counsel for Brown;

Ward, Michael, victim;

White, Elizabeth Louise, Counsel for Brown, terminated;

Wiggins, Janet, victim;

Wiggins, Sidney, victim;

Wilkison, Jesse B., Counsel for Brown, terminated.

November 23, 2020

s/Paul D. Clement
Paul D. Clement

STATEMENT REGARDING ORAL ARGUMENT

This Court notified the parties that oral argument will take place the week of February 22, 2021.

TABLE OF CONTENTS

TABLE OF CITATIONS*

Cases

* Citations that Appellant primarily relies on are marked with asterisks.

Constitutional Provisions

Statutes

Rule

Treatise

Other Authorities

INTRODUCTION

This case concerns the fundamental right of a criminal defendant to a unanimous and uncoerced verdict by a jury of her peers—including peers with deep religious convictions who express their beliefs in varied and sometimes vivid ways. A nation that enshrines religious toleration in its founding document and invokes the religious beliefs of its citizenry to reinforce their public oaths cannot dismiss jurors based on the way they express their religious convictions. And a nation that enshrines the jury-trial right in that same charter cannot lightly deprive a defendant of a juror who has expressed a preliminary inclination to acquit. Yet that is precisely what happened below. That result cannot be squared with our Constitution, our traditions, or our commitments to liberty and basic fairness.

Appellant Corrine Brown was tried on several criminal charges. By the end of the second day of deliberations, the jury had not reached a verdict. That evening, the district court received a cryptic communication from a juror—not the foreperson—expressing "concern" about another juror's comment that a higher being had told him Brown was not guilty. After interviewing both jurors, the court decided to dismiss the juror who had made the comment, despite his assurances that he understood his oath and the law and had considered all the evidence.

That decision is irreconcilable with the demanding standard for removing a deliberating juror and with the most fundamental guarantees of our Bill of Rights.

Under established precedent, a deliberating juror cannot be removed unless it is clear *beyond a reasonable doubt* that he is unable or unwilling to follow the court's instructions and base his decision on the law and the evidence. Particularly when the government is seeking dismissal, that "tough" legal standard is critical to protecting defendants' Sixth Amendment rights, for it ensures that holdout jurors are dismissed only for clear misconduct, not based on the manner in which they express their view that the government has not proved its case. And when, as here, the government seeks to remove a juror based on religious expression that does not contradict the juror's oath, then the standard must be especially demanding, as it safeguards both the Sixth Amendment rights of the defendant and the First Amendment rights of the juror.

That demanding standard was nowhere close to being met here. Juror 13 repeatedly assured the court that his religious beliefs were not interfering with his ability to follow the law and the evidence, and the court expressly found those uncontradicted assurances "sincere." Juror 13 also consistently referred to the evidence developed at trial in explaining his decision-making process. In context, Juror 13's statements about the Holy Spirit—while vividly expressed—are entirely consistent with the unquestionably permissible practice of relying on divine guidance to make an important decision about another person's guilt or innocence. Our government asks a lot of a juror tasked with determining whether a "peer" will

be deprived of her most basic liberties. In a nation of religious peoples that values religious tolerance, the government should expect that religious jurors will pray about their daunting responsibilities. And the civil courts must be extraordinarily cautious about dismissing jurors based on the manner in which they express that they have done just that. To be sure, a juror may be disqualified if his faith precludes him from sitting in judgment on another, or from applying a specific law or imposing a particular punishment. But when a juror reaffirms that he is abiding by his oath and following the law and evidence, that should be the end of the matter, especially if the juror had indicated a preliminary inclination to acquit. The prospect of the federal government seeking to dismiss a juror who may be the last safeguard of the defendant's liberty based on the religious nature of the way the juror expressed his misgivings about the government's case is not one that should be encouraged.

In short, the district court's decision is belied by the record, is irreconcilable with the governing legal standard, and is at profound odds with two of our core constitutional traditions. The Court should reverse and remand for further proceedings.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. The district court had jurisdiction under 18 U.S.C. §3231. The district court entered the judgment against Corrine

Brown on December 6, 2017, and Brown timely filed a notice of appeal on December 11, 2017. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Whether Brown is entitled to a new trial because the district court committed reversible error when it dismissed Juror 13.[1]

STATEMENT OF THE CASE

A. Trial, Deliberations, and the Court's Interviews of Jurors 8 and 13

In 2016, Corrine Brown was indicted and tried on several tax- and fraud-related charges. Dkt.1. By the second day of deliberations, the jury had not reached a verdict, although deliberations were "progressing smoothly" with "no indication of problems." Dkt.182.at.9-10. That evening, however, Juror 8, who was not the foreperson, called the courtroom deputy to express "concern" about another juror who had made "comments" about "higher beings." Dkt.182.at.7.

The next morning, the district court brought Juror 8 in for an interview. Dkt.182.at.9-10, 15. Juror 8 offered the court a letter she had written, which stated that she was "a little concerned" about two comments Juror 13 had made: that a "Higher Being told [him] Corrine Brown was Not Guilty on all charges," and that

[1] In accordance with this Court's October 13, 2020 briefing notice, Brown's en banc briefs focus on the question whether the district court committed reversible error when it dismissed Juror 13. Brown refers the Court to her previously filed briefs for a discussion of additional issues presented in this appeal. *See* 11th Cir. Rule 35-7.

he "trusted the Holy Ghost." Dkt.200.at.5-6. According to Juror 8, Juror 13 made the first statement when the jury "first went into deliberation," and "the second one, shortly after, maybe within a few hours after." Dkt.182.at.23-24. Upon further questioning, Juror 8 affirmed that Juror 13 had not made any similar comments since and had been deliberating with the other jurors. She added that there was no obstacle "at all" to her own ability to deliberate, and that although she thought other jurors shared her concern, she had made the decision to call the courtroom deputy on her own, without telling any other jurors. Dkt.182.at.24-26.

The court then interviewed Juror 13. Dkt.182.at.35-37. Juror 13 denied "having any difficulties with any religious or moral beliefs" that were "bearing on or interfering with" his "ability to decide the case on the facts presented and on the law" as instructed. Dkt.182.at.39. When asked whether he had been deliberating with the other jurors, Juror 13 began to respond, "We have been going over all the individual numbers, as far as—," before the court cut him off, stating it did not "want to hear anything about the deliberations." Dkt.182.at.39-40. Juror 13 then replied more generally that he was "following and listening to what has been presented and making a determination from that, as to what I think and believe." Dkt.182.at.40.

The court then asked whether Juror 13 had "expressed to any of your fellow jurors any religious sentiment, to the effect that a higher being is telling you how—is guiding you on these—on these decisions, or that you are trusting in your religion

to—to base your decisions on?" Juror 13 replied that he had told the other jurors that "in listening to all the information, taking it all down, I listen for the truth, and I know the truth when the truth is spoken" and that "I prayed about this, I have looked at the information, and that I received information as to what I was told to do in relation to what I heard here today—or this past two weeks." Dkt.182.at.40-41. When the court asked whether it was fair to say that Juror 13 had "prayed about this" and "received guidance" about how to proceed, Juror 13 agreed. Dkt.182.at.41. On further questioning about whether his religious beliefs were "interfering with or impeding" his ability to base his decision on the law and the evidence, Juror 13 replied: "No, sir. I followed all the things that you presented. My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room." Dkt.182.at.42.

The court sent Juror 13 out briefly and then brought him back for a final question: "Did you ever say to your fellow jurors or to a fellow juror during your—during the time that y'all worked together, when the 12 started, something to this effect, A higher being told me that Corrine Brown was not guilty on all charges?" Juror 13 responded, "When we were giving why we were—insight, as far as not guilty or whatever for the first charge, yes." The court pressed: "Did you say the words, A higher being told me that Corrine Brown was not guilty on all charges?"

Juror 13 replied, "No. I said the Holy Spirit told me that." He added, "I mentioned it in the very beginning when we were on the first charge." Dkt.182.at.50-51.

B. The Court's Dismissal of Juror 13

At the government's urging, the court dismissed Juror 13. Although the court acknowledged that Juror 13 was "very earnest, very sincere" and "believe[d]" he was "rendering proper jury service," the court nevertheless held Juror 13's statement about the Holy Spirit "disqualifying." Dkt.182.at.58-59. The court characterized Juror 13 as "hesitant at first" to explain "how his religious views have come to the fore during deliberations." Dkt.182.at.60. But, the court continued:

> [A]s we progressed and as he told me he received information from a higher source, and then as he later confirmed the actual statement that the Holy Spirit told him that Ms. Brown was not guilty on all charges, that—that he has expressed views and holds views … inconsistent with his sworn duty as a juror in this case, because he's not able to deliberate in a way that follows the law and the instructions that the court gave him.

Dkt.182.at.60.

A juror who makes such a statement during deliberations, the court declared, is "injecting religious beliefs that are inconsistent with the instructions of the court" because "by definition, it's not that the person is praying for guidance …, it's that the higher being—or the Holy Spirit is directing or telling the person what disposition of the charges should be made." Dkt.182.at.59. The court reiterated what it saw as the "distinction" between a juror "who is religious and who is praying

for guidance [and] seeking inspiration" and one who "is actually saying that an outside force, that is, a higher being, a Holy Spirit, told him" that a defendant is not guilty. Dkt.182.at.60. To the court, that was "just an expression that's a bridge too far, consistent with jury service as we know it." Dkt.182.at.60.

Notwithstanding Juror 13's "sincere" and "earnest" assurances that he was following the court's instructions and considering all the evidence, the court concluded that there was "no substantial possibility" that Juror 13 would be able to base his decision "only on the evidence and the law" because he was "using external forces to bring to bear on his decision-making in a way that's inconsistent with his jury service and his oath." Dkt.182.at.61. The court therefore dismissed Juror 13, seated an alternate juror in his place, and instructed the reconstituted jury to start its deliberations afresh.

C. Jury Verdict and Motion for New Trial

The reconstituted jury deliberated for another day and a half before returning a guilty verdict on all but four counts. Brown moved for a new trial, arguing that the court erred in dismissing Juror 13. Dkt.187. The court denied the motion, repeating its earlier reasoning and rejecting Brown's argument that Juror 13's pronouncement "was simply his evaluation of the sufficiency of the evidence." Dkt.200.at.22. Instead, the court stated, Juror 13 "expressed a conclusion from the beginning of the deliberations and without discussion with his fellow jurors," and

"his statements necessarily had to impact the overall deliberations." Dkt.200.at.22. The court added that Juror 13 "announced" that he was "following instructions from an outside source" and "believed" he had "received instructions from an outside source before deliberations began," but "failed to appreciate the conflict that presented" with the court's instructions. Dkt.200.at.23-24.

D. Appeal and Petition for Rehearing En Banc

Brown appealed her conviction. A panel of this Court affirmed, concluding that the district court did not abuse its discretion when it dismissed Juror 13. Judge Pryor dissented, maintaining that the district court failed to abide by the requisite "tough legal standard" for excusing a juror during deliberations and thereby deprived Brown of her right to a unanimous and uncoerced verdict of an impartial jury of her peers.

Brown filed a petition for rehearing en banc. On September 24, 2020, this Court granted that petition and vacated the panel decision. The Court ordered the parties to focus their briefs on whether the district court committed reversible error when it dismissed Juror 13.[2]

SUMMARY OF ARGUMENT

The Constitution entitles a criminal defendant to trial by a jury of her peers—which in a religiously diverse country necessarily includes religious individuals,

[2] Brown is currently released on bond pending resolution of this appeal.

some of whom seek divine guidance and express the results in varied and sometimes vivid terms. It also entitles a criminal defendant to a verdict that is unanimous and uncoerced, critical protections against the danger of an overzealous prosecution. When the district court dismissed Juror 13, it deprived Brown of both rights.

Under this Court's precedents, the dismissal of a juror mid-deliberations, especially after expressing a preliminary inclination to acquit, should almost never happen. Dismissal is precluded unless it is clear *beyond a reasonable doubt* that the juror is unable or unwilling to follow the court's instructions and base his decision on the law and the evidence. That "tough" criminal standard of proof is appropriate because accusing a juror of defaulting on his oath is a serious charge. Jurors whose religious beliefs preclude them from sitting in judgment of others or from deeming certain actions criminal or imposing particular punishments are excused at the outset. But dismissing a juror without such scruples who swears to follow the law and evidence is no small matter. The stringent legal standard gives jurors a wide berth to express their views, even in religious terms, and helps protect the defendant's right to a unanimous and uncoerced jury verdict by ensuring that a juror is not lightly dismissed after expressing doubts about the government's case.

The record here came nowhere close to meeting that demanding standard. The district court's interviews with Juror 8 and Juror 13 established more than a reasonable possibility that Juror 13 was able and willing to base his decision on the

law and the evidence. Although Juror 8 expressed vague "concerns" about Juror 13's religious language, she affirmed that he was deliberating with the other jurors and was not interfering with her ability to deliberate. Juror 13 himself consistently couched his thought process in terms of the evidence developed at trial and indicated that he was seeking divine guidance only to assist him in sifting and weighing the evidence, and the district court found his statements both "earnest" and "sincere." Juror 13's comments about the Holy Spirit were entirely consistent with that account. In a religiously diverse country, it is to be expected that jurors will express their efforts to seek divine guidance in a wide variety of ways. As long as those views can be reasonably construed as consistent with the juror's oath, there is no basis for dismissal.

In concluding that Juror 13's statements about the Holy Spirit were "disqualifying" notwithstanding his sincere assurances that they were not interfering with his ability to follow the court's instructions, the district court committed a series of legal errors. The court confused an effort to seek divine guidance to assist deliberations consistent with the oath with the kinds of religious principles that act as external constraints on what a juror can do or consider. The court impermissibly second-guessed whether Juror 13's sincere assurances were correct as a matter of *fact*, based on its apparent skepticism that someone who believes the Holy Spirit speaks to him can follow the law. And above all, the court abdicated its duty to

resolve all doubts in favor of protecting the defendant's right to a unanimous and uncoerced jury of her peers.

The result is a decision that discriminates on the basis of religion, in service of depriving a defendant of her Sixth Amendment rights. Indeed, it is hard to understand the district court's decision as anything other than a holding that relatively abstract religious beliefs are permissible (even useful in ensuring that jurors follow their oaths) but more specific religious beliefs, including any notion that the divine could lead a juror to one view of the evidence, are verboten. The district court recognized that it is entirely natural and unobjectionable for a juror to pray for divine assistance, but it seemed to draw the line at a juror who believed his prayers had been answered. That is not a line that civil courts have any basis (or competence) to enforce. Any attempt to distinguish between acceptable and unacceptable experiences of divine guidance is unprincipled and threatens to run afoul of the Religious Freedom Restoration Act and the First and Sixth Amendments. By second-guessing Juror 13's sincere assurances that he could faithfully follow the court's instructions, the district court did just that, reaching a result at profound odds with free-exercise rights, with the beyond-a-reasonable-doubt standard that governs in this exceedingly sensitive context, and with Brown's Sixth Amendment right to a unanimous and uncoerced jury of her peers. This Court should reverse.

STANDARD OF REVIEW

This Court reviews a decision to dismiss a juror after the start of deliberations for abuse of discretion. *United States v. Register*, 182 F.3d 820, 839 (11th Cir. 1999). Abuse of discretion occurs "by definition" when the district court "makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). Moreover, the standard of review is informed by the underlying standard of proof, which requires proof beyond a reasonable doubt that a juror is unable or unwilling to base his decision on the law and the evidence. *See United States v. Abbell*, 271 F.3d 1286, 1302-03 (11th Cir. 2001). This Court therefore reverses for abuse of discretion if it concludes that the district court dismissed a juror "without factual support" under the reasonable-doubt standard, or "for a legally irrelevant reason." *Id.* at 1302.

ARGUMENT

I. Dismissal Of A Juror Is An Extreme Step That Must Be Justified Under An Exceedingly "Tough" Criminal Standard, Particularly When The Government Seeks Dismissal And Religious Exercise Is At Stake.

A. The Constitution Entitles Criminal Defendants to Trial by a Jury of Their Peers, Including Peers With Varied Religious Beliefs.

The Constitution entitles criminal defendants to trial by an impartial jury of their peers. *See* U.S. Const. amend. VI; *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). That fundamental constitutional guarantee ensures that criminal defendants may not be deprived of their liberty except by the studied and collective judgment of a set of their "equals and neighbours." *Id.* (quoting 4 W. Blackstone,

Commentaries on the Laws of England 343 (1769)). By protecting defendants "from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives," *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 875 (2017) (Alito, J., dissenting), the jury trial right "make[s] available the 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 a judge," *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

The "Sixth Amendment's promise of a jury of one's peers means a jury selected from a representative cross section of the entire community." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 n.47 (2020). And in this country, any such cross section is likely to include religious believers of many stripes. The United States has long been a predominantly "religious people," as reflected in the fact that many of our "institutions presuppose a Supreme Being," and that both the U.S. Constitution and virtually every state constitution "guarantee the freedom to worship as one chooses." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Indeed, the oath ("so help me God") that judges and jurors typically swear before accepting their duties, *see* Fed. Jud. Ctr., *Benchbook for U.S. District Judges* §7.08, at 269 (6th ed. 2013); 28 U.S.C. §453, presumes that most believe in a higher power, and one recent study found that nearly 9 in 10 Americans do, *see* Pew Rsch. Ctr., When Americans

Say They Believe in God, What Do They Mean? 4, 6 (2018) [hereinafter *2018 Pew Survey*]. The unamended Constitution accommodates the non-believer, allowing officers to bind themselves to support the Constitution "by Oath or Affirmation" and forbidding "religious test[s]" for public responsibility. U.S. Const. art. VI, cl.3. But the very fact that it envisions an oath to God as reinforcing fealty to the Constitution and faithful discharge of public duties speaks volumes.

The First Amendment's Religion Clauses reinforce that we are a nation of diverse faiths founded on the importance of religious toleration. Americans not only profess many different beliefs, but also experience the divine, and express that experience, in diverse ways. For example, about 3 in 4 report that they try to talk to God or another higher power, while 3 in 10 report that God talks back to them. *See 2018 Pew Survey* 6, 27. Some experience and express the role of religion in their lives in vivid, immediate, and very personal terms, reporting that God communicates directly with them and determines most or all of what happens in their lives. *See id.* at 27, 30. Others experience and express the role of the divine in more abstract terms, reporting that a higher power plays less of a role in determining the course of their lives and that communication goes one way. *Id.*

Those different ways of experiencing and expressing the role of religion often reflect denominational differences and life experiences. For example, 45% of evangelical Protestants and 60% of members of historically black Protestant

traditions believe that prayer is "a two-way street" and that "God[] talks directly with them," compared with 28% of all Americans, 23% of Catholics, and 9% of Jews. *Id.* at 27. And the nature of one's faith seems influenced by time spent on college campuses: Just one-third of college graduates believe that God determines the course of their lives most or all of the time, compared with almost twice that percentage for those with a high school education or less. *Id.* at 17-18.

As such studies reflect, the religious tolerance enshrined in the Religion Clauses protects both a wide variety of religions and a wide range of ways to express those religious beliefs. Any "jury selected from a representative cross section of the entire community," *Ramos*, 140 S. Ct. at 1402 n.47, thus is likely to contain jurors who not only hold a vast array of views, but also express those views in very different ways. For some, the divine will be abstract, and prayer will be a one-way street; for others, their relationship will be personal, and their prayer life very much a two-way street. To categorically exclude from service jurors who experience the divine in the latter manner, and candidly explain as much to fellow jurors or inquiring judges, would deprive criminal defendants of their constitutional right to a jury of their peers, drawn from "ordinary people" who "are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives." *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

Of course, that does not mean that a defendant is entitled to a jury with any particular composition of religious believers. But it does mean that a defendant is entitled to a jury from which potential jurors are not disqualified (particularly after indicating an inclination to acquit) because of how they express or experience their relationship with the divine. To be sure, a juror may be disqualified if her religious beliefs preclude her from performing the duties of a juror. *See, e.g.*, *Miles v. United States*, 103 U.S. 304, 310 (1880) (juror who believed polygamy was ordained by God properly excluded from bigamy trial); *United States v. Geffrard*, 87 F.3d 448, 451-52 (1996) (juror whose beliefs did not allow her to follow court's instructions on entrapment properly dismissed); *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992) (juror unable to vote for or against death penalty properly disqualified). But a juror may not be disqualified simply because she believes that when she asks God for guidance, sometimes God answers. To treat such a belief as categorically incompatible with faithful jury service not only would disqualify a significant chunk of "ordinary people" from serving as jurors in violation of the Sixth Amendment, but would impermissibly and unconstitutionally discriminate among religious beliefs. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244-46 (1982).

Courts must be particularly cautious, moreover, when an effort to disqualify a juror involves second-guessing the juror's own sincere assurances about the impact of his faith on his ability to serve as a juror. It is one thing to disqualify a juror who

agrees that his religious beliefs preclude him from applying the law. *See, e.g.*, *Miles*, 103 U.S. at 310; *Geffrard*, 87 F.3d at 451-52. But when a juror sincerely assures the court that his religious beliefs will *not* impede his ability to faithfully discharge his duties, courts have neither the authority nor the competence to second-guess that assurance, and to do so would be at odds with core free exercise principles. *Cf. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981); *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982). Accordingly, disqualifying a juror based on a court's view that the juror's sincere beliefs about his faith are *incorrect* not only would deprive the defendant of his Sixth Amendment right to a jury of his peers, but would subject the juror to the kind of hostility toward and distrust of religious views that the Free Exercise Clause guards against. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993).

B. The Very Demanding Standard for Dismissing a Juror Mid-Deliberations Is a Critical Constitutional Safeguard.

Depriving a criminal defendant of a "jury selected from a representative cross section of the entire community," *Ramos*, 140 S. Ct. at 1402 n.47, is always of constitutional moment, especially when a constitutionally protected trait is involved. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *United States v. Brown*, 352 F.3d 654, 666-70 (2d Cir. 2003); *State v. Hodge*, 726 A.2d 531, 553 (Conn. 1999). But the constitutional concerns are all the

more acute when it comes to *removing* a juror once deliberations have begun—especially if the removal request comes after a juror has expressed an inclination to acquit.

The Constitution entitles criminal defendants not only to trial by a jury of their peers, but also to a unanimous and uncoerced verdict. *See Ramos*, 140 S. Ct. at 1395-97; *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). The unanimity rule "furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.); *see also Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part); *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012). And the anti-coercion rule keeps the court from invading the jury's "constitutional responsibility" to "determine the facts," "apply the law to those facts," and "draw the ultimate conclusion of guilt or innocence." *United States v. Gaudin*, 515 U.S. 506, 513-14 (1995). Both rules add an extra layer of protection "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

Against that backdrop, the dangers of too easily allowing a juror to be excused—particularly a juror perceived to be favorable to the defendant—are readily apparent. Of course, both sides are entitled to a jury that abides by its sworn duty to render a verdict based on the law and the evidence, *see United States v. Kemp*, 500

F.3d 257, 304 (3d Cir. 2007), so a juror can and should be dismissed at any stage if he refuses "to apply the law or to follow the court's instructions," *Abbell*, 271 F.3d at 1302. But there is a "critical" and "often difficult" distinction between "the juror who favors acquittal because he is purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence." *United States v. Thomas*, 116 F.3d 606, 621 (2d Cir. 1997). Dismissing a juror who is simply unpersuaded would mean denying the defendant her right to a unanimous and uncoerced verdict. *Id.*; *see also United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). And particularly when done at the government's behest, it would mean destroying a critical layer of protection between defendant and prosecutor. *See Kemp*, 500 F.3d at 304 n.26 (warning against allowing government to "remove a holdout juror because of ambiguous allegations of improper behavior during deliberations, and replace this holdout with a more amenable juror").

To guard against "the danger that a dissenting juror might be excused under the mistaken view" that her dissent is the product of misconduct, this Court applies a "tough legal standard." *Abbell*, 271 F.3d at 1302. A juror may be dismissed "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *Id.* (citing *Thomas*, 116 F.3d at 621-22; *Brown*, 823 F.2d at 596); *see also Kemp*, 500 F.3d at 304; *United States v. Symington*, 195 F.3d 1080, 1087 & n.5 (9th Cir. 1999). The Court has described that standard as

"basically a 'beyond reasonable doubt' standard." *Abbell*, 271 F.3d at 1302. Applying a demanding standard that "corresponds with the burden for establishing guilt in a criminal trial" makes sense because accusing jurors of defaulting on their oath is no small matter. *Kemp*, 500 F.3d at 304. It is an accusation that they have violated their public promise, backed by oath or affirmation, to discharge a critical public function fairly and faithfully.[3]

The beyond-a-reasonable-doubt standard is the most demanding known to law. As the district court described it when instructing the jury in this case, it requires "proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs." Dkt.180.at.125; *see Holland v. United States*, 348 U.S. 121, 140 (1954). The "evidence must … *exclude any other reasonable conclusion*." *Hopt v. People*, 120 U.S. 430, 441 (1887) (emphasis added). If the evidence can be reconciled with "any reasonable hypothesis" consistent with innocence, the defendant must be acquitted. *Id.* Applying that standard in the juror-dismissal context, a court may not excuse a deliberating juror unless the evidence of misconduct is so convincing that it excludes *any reasonable possibility* that the juror is able and willing to follow the court's instructions. *See*

[3] The government's suggestion that Juror 13 likely committed misconduct by failing to disclose his religious beliefs about divine guidance during jury selection illustrates the gravity of such an accusation. *See* Dkt.190.at.8.n.1.

Kemp, 500 F.3d at 304. Any "lower evidentiary standard" could lead to the impermissible "removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence," rather than on any juror misconduct. *Thomas*, 116 F.3d at 622.

Consistent with that understanding, this Court has approved the dismissal of a dissenting juror only when the evidence of misconduct was unambiguous and was attested to by *all* the other jurors, the dissenting juror herself, or both. *See*, *e.g.*, *United States v. Godwin*, 765 F.3d 1306, 1315-16 (11th Cir. 2014) (court "questioned each juror individually," and 11 jurors unequivocally described twelfth juror as refusing to follow the law); *Abbell*, 271 F.3d at 1303 & n.18 (all 11 other jurors testified that twelfth juror stated she would not follow the law); *Geffrard*, 87 F.3d at 451-52 (dissenting juror wrote letter clearly indicating her own unwillingness to follow court's instructions on law due to her religious beliefs); *United States v. Augustin*, 661 F.3d 1105, 1129-34 (11th Cir. 2011) (court received "consistent answers" from 11 jurors that twelfth juror had stated she refused to follow the law, and twelfth juror herself indicated she was unwilling to deliberate); *United States v. Oscar*, 877 F.3d 1270, 1285-86 (11th Cir. 2017) (juror herself informed court she was biased and asked to be excused, and all 11 other jurors attested that she had stated she could not be impartial or follow the law). In each case, there was simply no way to reconcile the evidence of juror misconduct with any reasonable possibility

that the dissenting juror was actually able and willing to follow the court's instructions and render a decision based on the law and the evidence.

When the record discloses even a *possibility* that the juror was abiding by the duty to consider the evidence and apply the law, however, courts have not hesitated to disapprove decisions dismissing dissenting jurors. *See Thomas*, 116 F.3d at 623-24 (disapproving dismissal despite record of juror's disruptive behavior and difficulty following the law during deliberations because juror justified his position in terms of the evidence); *Brown*, 823 F.2d at 596-97 (disapproving dismissal despite juror's suggestion that he disagreed with the law because juror referred to the sufficiency of the evidence in explaining his difficulty). In such cases, there is at least a reasonable possibility that a dissenting juror's position results from "reservations about the sufficiency of the Government's case" rather than inability or unwillingness to follow the law and the evidence. *Thomas*, 116 F.3d at 624. Dismissing the juror in those circumstances would render the defendant's right to a unanimous and uncoerced verdict "illusory." *Brown*, 823 F.2d at 596.

* * *

Taken together, these core Sixth and First Amendment principles illustrate why the exacting legal standard for dismissing a deliberating juror must be applied with particular rigor in this case. Courts not only must operate with extreme caution whenever the government seeks to remove a deliberating juror who is inclined to

acquit, but may involuntarily exclude someone from civic participation on the basis of his religious beliefs and expressions only as a measure of absolute last resort. Simply put, when a government request for judicial action poses a serious risk of overriding two fundamental rights at once, all doubts should be resolved in favor of protecting the rights the Constitution guarantees.

II. The District Court Erred When It Dismissed Juror 13.

Applying these principles, the district court erred when it dismissed Juror 13, for the record came nowhere close to showing beyond a reasonable doubt that Juror 13 was unable or unwilling to base his decision on the law and the evidence. Juror 13 repeatedly affirmed his willingness to follow the court's instructions, and he repeatedly couched his deliberative process in terms of the evidence presented at trial. Nothing in the record contradicted those affirmations, and the district court did not question their sincerity. Instead, the court concluded that Juror 13's religious statements were "disqualifying" notwithstanding those sincere assurances because attesting to having received guidance from the Holy Spirit is "just an expression that's a bridge too far." Dkt.182.at.59-60. But taking guidance from prayer is no more disqualifying than seeking guidance from prayer, and even the district court saw no problem with the latter. Moreover, the court did not and could not identify anything beyond Juror 13's reference to the Holy Spirit that even suggested—let alone proved beyond a reasonable doubt—that his religious beliefs precluded him

from faithfully discharging his duties as a juror. The court thus failed to abide by the demanding standard for dismissing a juror, fundamentally misperceived what kinds of religious beliefs or statements are "disqualifying," or both. Whichever the answer, the dismissal of Juror 13 cannot stand.

A. The Record Readily Established That Juror 13 Was Deliberating and Basing His Decision on the Law and the Evidence.

To dismiss Juror 13 after deliberations had begun, the district court was required to determine that there was "no substantial possibility" that Juror 13 could follow the court's instructions and base his decision on the law and the evidence. *Abbell*, 271 F.3d at 1302-03. Unless the record revealed *beyond a reasonable doubt* that Juror 13 was unable or unwilling to base his decision on the law and the evidence, the court was required to allow him to continue deliberating with his fellow jurors until the jury reached a unanimous verdict. *See id.* The record here came nowhere close to establishing beyond a reasonable doubt that Juror 13 was unable or unwilling to discharge his duty.

At the outset, Juror 8 did not suggest that Juror 13 was refusing to deliberate, or to follow the court's instructions, or to consider the evidence. Instead, her concerns were grounded solely in her claim that, when deliberations commenced, Juror 13 said, "A Higher Being told me Corrine Brown was Not Guilty on all charges," and "[h]e later went on to say he 'trusted the Holy Ghost.'" Dkt.200.at.5-6. Juror 8 reported that "[w]e all asked that he base his verdict on the evidence

provided, the testimony of the witnesses and the laws of the United States court," and she did not suggest that Juror 13 refused to do so. Dkt.200.at.6; *see also* Dkt.182.at.23. To the contrary, when questioned by the court, Juror 8 confirmed that Juror 13 had not said anything else of that nature since, that his comments were not interfering with her ability to deliberate in accordance with the court's directions, and that he was participating in those deliberations along with the rest of the jurors. Dkt.182.at.24-25. She just expressed "concern" that his earlier comments were "going to interfere in his ability to do that." Dkt.182.at.24. Standing alone, that did not even merit further investigation, let alone support a finding that there was "no substantial possibility" that Juror 13 could follow the court's instructions and base his decision on the law and the evidence. *Abbell*, 271 F.3d at 1302.

The district court's first interview with Juror 13 likewise failed to turn up any proof of juror misconduct, let alone proof beyond a reasonable doubt. Throughout the interview, Juror 13 unwaveringly avowed that he could follow and was following the court's instructions on the law and the evidence, an avowal that the court found "earnest" and "sincere." *See* Dkt.182.at.57-59. Moreover, Juror 13 consistently and repeatedly explained his decision-making process in terms of the evidence presented at trial. At the beginning of the interview, he affirmed without hesitation that he had no "difficulties with any religious or moral beliefs" that were "bearing on or interfering with" his ability to "decide the case on the facts presented and on the

law." Dkt.182.at.39. When pressed, he began to describe how he and the other jurors were "going over all the individual numbers" before the court cut him off and told him not to reveal anything about the jury's deliberations. Dkt.182.at.39-40. Juror 13 then obediently pitched his response at a higher level, explaining that he had been "following and listening to what has been presented and making a determination from that" about what he thought and believed—clearly still referring to the evidence at trial to explain his decision-making process. Dkt.182.at.40.

Even after the court got "a little more specific" and asked him about his religious views, Juror 13 continued to explain his process in terms of the law and the evidence. The court began with a rather convoluted and ambiguous question, asking Juror 13 whether he had "expressed" any "religious sentiment" to the "effect that" a "higher being" was "telling you how—is guiding you on these—on these decisions, or that you are trusting in your religion to—to base your decisions on." Dkt.182.at.40. Although that question failed to distinguish among three distinct possibilities—being "told" what to do, being "guided" about what to do, and "trusting" in religion when making a decision—Juror 13 still referred to the evidence in giving his answer, stating that he was "listening to all the information" and "taking it all down." Dkt.182.at.40. When he added that he was "listen[ing] for the truth" and would "know the truth when the truth is spoken," he again referred to the

sufficiency of the evidence, expressing his confidence that he would be able to sort through the evidence and reach the right conclusion. Dkt.182.at.41.

As the district court itself acknowledged, Juror 13 was certainly free to seek divine guidance, and to have confidence he would receive it, while engaging in the process of sorting through the evidence. *See* Dkt.182.at.31, 47. And that is exactly how Juror 13 described the interaction between his consideration of the evidence and his reliance on divine aid. When asked whether he had "invoked a higher power or a higher being" during deliberations, Juror 13 replied that he had told the other jurors that he had "prayed about this" and "looked at the information," and that he had "received information" about what to do "in relation to" what he had "heard here" for the previous two weeks. Dkt.182.at.41. Seeking clarification, the court asked whether it was fair to say that Juror 13 had "prayed about this" and "received guidance from the Father in Heaven about how [he] should proceed." Dkt.182.at. 41. Juror 13 assented to that description, Dkt.182.at.41, which corresponded with the court's own understanding of a juror's proper discharge of his duty, *see* Dkt.182.at.31, 47.

Still not satisfied, the court asked whether Juror 13 "[felt] that there's any religious tension, or is your religion and your obvious sincere religious beliefs—do you believe it at all to be interfering with or impeding your ability to base your decision solely on the evidence in the case and following the law that I've explained

to you?" Dkt.182.at.42. Juror 13 responded "no" and couched his explanation yet again in terms of the evidence, stating that he had "followed all the things" the court had presented and adding: "My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room." Dkt.182.at.42. In other words, not only did Juror 13 refer to the evidence presented at trial in explaining his decision-making process; he indicated that his religious beliefs *required* him to discharge his duty by rendering a decision based on the law and the evidence (which, of course, is the whole point behind having a religious juror swear in taking the juror oath).

Juror 13's explanation of his decision-making process by reference to the evidence presented at trial is exactly the kind of record that courts of appeals rely on when disapproving a district court's dismissal of a dissenting juror. Indeed, courts have found reversible error in circumstances where the dissenting juror's statements were much more ambiguous than Juror 13's statements—where, for example, there was evidence that the dissenting juror disagreed with the law, or was having difficulty following the law during deliberations. Even with such mixed signals in the record, courts have held that a dissenting juror should not be dismissed if the record also shows that the juror was justifying his position in terms of the evidence. *See Thomas*, 116 F.3d at 623-24 (juror should not have been dismissed despite record

of disruptive behavior and difficulty following the law during deliberations because he justified his position in terms of, and assured the court he would base his decision upon, the evidence); *Brown*, 823 F.2d at 596-97 (juror should not have been dismissed despite his suggestion that he disagreed with the law because he referred to the sufficiency of the evidence in explaining his difficulty).

Conversely, Juror 13's repeated affirmations that he was able and willing to follow the court's instructions, together with his consistent reference to the evidence in explaining his process, stand in sharp contrast to the kinds of comments that this Court has held sufficient to justify dismissal of a dissenting juror during deliberations. In one case, for example, the court received a lengthy, screed-like letter from a dissenting juror that clearly conveyed her unwillingness to follow the court's instructions on the law due to her religious beliefs. *Geffrard*, 87 F.3d at 451-52 (stating that "my definition of truth may be different from your definition," indicating refusal to follow the court's instructions on entrapment, and adding that discussing "the teachings of Emanuel Swedenborg with the other jurors … would be like discussing the theory of relativity with my cocker spaniel dog"). In others, the dissenting juror unequivocally informed the court that she was biased or unable to deliberate, and all 11 other jurors independently affirmed that the dissenting juror had indicated her refusal to be impartial or to follow the law. *See Oscar*, 877 F.3d at 1285-86; *Augustin*, 661 F.3d at 1129-34.

The record here contains nothing of the sort, but instead contains repeated assurances from Juror 13—whom the district court found "earnest" and "sincere," *see* Dkt.182.at.58—that he understood and was faithfully discharging his duty to base his decision on the law and the evidence. The inquiry thus should have ended there, for Juror 13's sincere assurances, backed by his evidence-based explanation of his decision-making process, made it impossible to conclude beyond a reasonable doubt that he was incapable of faithfully discharging his duties as a juror. Juror 13's responses at the very least plainly supported "a tangible possibility, not just a speculative hope," *Abbell*, 271 F.3d at 1302 n.14, that he was simply seeking divine guidance in discharging the profound duty of determining an individual's innocence or guilt, which the district court itself readily agreed is by no means juror "misconduct." *See* Dkt.182.at.31, 47. That should have been the end of the matter.

B. The District Court Erred In Concluding That Juror 13's Religious Statements Were Disqualifying.

Not content with Juror 13's "earnest" and "sincere" assurances that his religious beliefs were not preventing him from deliberating in accordance with its instructions, the district court questioned Juror 13 yet again. In that brief second interview, the court asked whether he had ever said "something to this effect, A higher being told me that Corrine Brown was not guilty on all charges." Dkt.182.at.50-51. Juror 13 replied, "When we were giving why we were—insight, as far as not guilty or whatever for the first charge, yes." Dkt.182.at.51. The court

pressed, "Did you say the words, A higher being told me that Corrine Brown was not guilty on all charges?" Dkt.182.at.51. Juror 13 responded, "No. I said the Holy Spirit told me that," and indicated that he had made the comment "in the very beginning" when the jury was "on the first charge." Dkt.182.at.51. The court stopped the interview there and declined to inquire further into the context or import of Juror 13's comments, for in the court's view, those words alone were disqualifying.

That is clear from how the court explained its decision to dismiss Juror 13. The court readily agreed that there is nothing wrong with a juror "who is religious and who is praying for guidance or seeking inspiration, or whatever mode that person uses to try to come to a proper decision." Dkt.182.at.60. But in the court's view, it is one thing to ask for divine assistance and another thing to get it. When a jury says "a higher being, a Holy Spirit, told him that [the defendant] was not guilty, … that's just an expression that's a bridge too far." Dkt.182.at.60. The court further explained:

> [A] juror who makes that statement to other jurors and introduces that concept into the deliberations ... is a juror that is injecting religious beliefs that are inconsistent with the instructions of the court, that this case be decided solely on the law as the court gave it to the jury and the evidence in the case. Because, by definition, it's not that the person is praying for guidance so that the person can be enlightened, it's that the higher being—or the Holy Spirit is directing or telling the person what disposition of the charges should be made. And based upon my reading of the case law in other cases where religious beliefs have caused a juror to be struck, this statement by the juror ... is a disqualifying statement.

Dkt.182.at.59. That reasoning reflects several fundamental misunderstandings about the very high bar for removing a deliberating juror on the basis of his religious views or expression.

1. Juror 13's statements about the Holy Spirit do not reflect the kinds of extrinsic beliefs or "outside sources" that can be disqualifying.

At the outset, the district court confused disqualifying religious *beliefs*—*i.e.*, beliefs that act as an *external* constraint on what a juror can do or consider—with a request for divine assistance in considering the law and evidence in a particular case that the juror believes has been answered. Courts have long recognized, of course, that it is proper to exclude potential jurors who adhere to religious principles that are inconsistent with jury service. *See*, *e.g.*, *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998). For example, courts must exclude potential jurors whose religious beliefs do not allow them to sit in judgment on other people—a belief at odds with the very concept of jury service. *See*, *e.g.*, *United States v. Whitfield*, 590 F.3d 325, 360 (5th Cir. 2009); *United States v. Decoud*, 456 F.3d 996, 1003-04, 1017 (9th Cir. 2006). And courts must exclude jurors whose religious beliefs render them unable to apply a particular law or impose a specific penalty. *See*, *e.g.*, *Miles*, 103 U.S. at 310-11; *Geffrard*, 87 F.3d at 451-53; *Morgan*, 504 U.S. at 728-29. Because such beliefs are inconsistent with jury service, there is no danger that excluding jurors who hold them would deprive the defendant of her right to a unanimous and

uncoerced verdict from a jury of her peers. And because jurors who hold such beliefs are excused in part as a matter of religious accommodation, there is no danger that their exclusion would result in religious discrimination.

That is plainly not what this case involved. No one ever suggested that Juror 13 held the kind of religious belief that would render him unable to discharge his duty as a juror. Juror 13 never even hinted, in his own statements or any statements attributed to him, that he was unable to sit in judgment on another person. Exactly the opposite: Juror 13 stated that his religious beliefs *required* him to "go[] by the testimonies of people given here" and to "render a decision on those testimonies, and the evidence presented in the room." Dkt.182.at.42. Nor did Juror 13 express the slightest skepticism about, or reluctance to apply, the tax- and fraud-related laws at issue. Again, the opposite: Juror 13 repeatedly affirmed that he was able and willing to apply the law as instructed by the court, and he insisted that his religious beliefs posed no obstacle. *See* Dkt.182.at.39, 42. Juror 13's assertions were supported by Juror 8, who readily affirmed that Juror 13 was deliberating, *see* Dkt.182.at.24-25, and by the court's own observation that deliberations were progressing "smoothly," *see* Dkt.182.at.9-10.

Nor did or could anyone accuse Juror 13 of relying on or introducing into the jury room the kind of tangible "outside source" that typically forms the basis of a juror misconduct charge. No one suggested that Juror 13 did outside research or

considered or presented to his fellow jurors any information that was not presented in the courtroom. The record shows that Juror 13 was considering and deliberating about the same evidence as the other 11 jurors, "going over all the individual numbers" and "following and listening to what has been presented and making a determination from that." Dkt.182.at.39-40.

Instead, what the district court treated as an "outside force," Dkt.182.at.60, was Juror 13's expression of his personal experience in "praying over" the daunting task the law entrusts to the jury. Seeking divine assistance in discharging that awesome responsibility based on the law and facts is not an "external force" in the manner that the law contemplates. It is simply "a part of the personal decision-making process of many people, a process that is employed when serving on a jury." *State v. DeMille*, 756 P.2d 81, 84 (Utah 1988). To banish prayer from a juror's deliberative process thus would be at fundamental odds with the Sixth Amendment guarantee of a jury that "speak[s] the language of ordinary people," *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting)—not to mention our nation's longstanding tradition, pre-dating the founding but continuing to this day, of invoking divine assistance in ensuring that jurors deliberate faithfully, "so help me God." The notion that the government would enlist divine assistance to help keep the jury focused on its task, but then discharge a juror for sincerely believing that his prayers have been answered, should be a non-starter.

Moreover, considering the gravity of the juror's task and the centrality of prayer to many people's decision-making in less momentous matters, it would be incongruous for courts to discourage (let alone prohibit) jurors from seeking divine guidance during deliberations. Simply put, "[t]o ask that jurors become fundamentally different people when they enter the jury room is at odds with the idea that the jury be 'drawn from a fair cross section of the community."' *Robinson v. Polk*, 444 F.3d 225, 228-29 (4th Cir. 2006) (Wilkinson, J., concurring in denial of rehearing en banc) (quoting *Taylor*, 419 U.S. at 527).

Jurors who seek divine assistance, like all other jurors, must follow the court's instructions on the law and the evidence. But so long as a juror's prayer does not cause him to deviate from the court's instructions, there is no conflict between a juror's duty to base his decision on the evidence and his reliance on divine aid in reaching that decision. *See, e.g.*, *McNair v. Campbell*, 416 F.3d 1291, 1309 (11th Cir. 2005); *State v. Williams*, 832 N.E.2d 783, 790 (Ohio Ct. App. 2005). Courts thus have repeatedly approved both group and individual prayer by jurors, both before and during deliberations. *See, e.g.*, *State v. Young*, 710 N.W.2d 272, 283 (Minn. 2006) (individual); *Commonwealth v. Tedford*, 960 A.2d 1, 38-40 (Pa. 2008) (group); *State v. Setzer*, 36 P.3d 829, 832 (Idaho Ct. App. 2001) (before deliberations); *State v. Graham*, 422 So.2d 123, 135-36 (La. 1982) (during deliberations); *see also Joy v. Koenig*, No. 17-cv-1195, 2020 WL 4018815, at *10

(C.D. Cal. Mar. 12, 2020) (no AEDPA violation where judge did not dismiss juror who asked her church to pray for her, but sought only "wisdom and guidance" in decision-making, and assured the court that her religious beliefs would not interfere with applying the law); *Mammone v. Jenkins*, No. 16-cv-900, 2019 WL 5067866, at *40-41 (N.D. Ohio Oct. 9, 2019) (no AEDPA violation where jurors prayed before deliberating at penalty phase); *Sealey v. Chatman*, No. 14-cv-0285, 2017 WL 11477455, at *24 (N.D. Ga. Nov. 9, 2017) (no AEDPA violation where jurors engaged in group prayer repeatedly as part of decision-making process).

2. There is nothing categorically "disqualifying" about relying on the guidance that prayer produces.

The district court acknowledged, as it must, that "there's nothing wrong with praying for guidance." Dkt.182.at.47. But in the court's view, there is a fundamental (and "disqualifying") distinction between a juror who *asks* for divine guidance and a juror who *receives* it, which, in the court's words, is "a bridge too far." Dkt.182.at.60-61; Dkt.200.at.23-24; *see also* Dkt.182.at.47, 59. That makes no sense. If it is permissible to pray for divine guidance during deliberations (and it is), then it cannot be "a bridge too far" to rely on the guidance one receives. To treat that guidance as an impermissible "outside source" would be to disqualify from jury service every religious believer who believes that her prayers actually produce the guidance she seeks. The only thing worse would be to disqualify only the juror who

expresses the guidance in certain terms ("the Holy Spirit spoke to me") and not others ("I awoke with refreshing clarity about all I had heard").

To be sure, a juror may not "abandon his or her judgment" and substitute "what he or she perceives to be oracular signs" for deliberation about the evidence. *DeMille*, 756 P.2d at 84. But nothing in the record here suggests, let alone establishes beyond a reasonable doubt, that Juror 13 was consulting oracles or relying on "religious inspiration" to the exclusion of "considering the evidence at all." *United States v. Salvador*, 740 F.2d 752, 755 (9th Cir. 1984). Juror 13 did not arrive in the jury room one day and announce that the Holy Spirit had told him he must not vote to convict, so he was no longer interested in discussing the evidence or the law. According to both Juror 8 and Juror 13, he simply stated during the jurors' initial poll that the Holy Spirit had told him that the defendant was not guilty. When asked by the district court to expound upon the role his faith played in his deliberative process, he explained no fewer than three times that the way his "Father in Heaven" helped him was by helping him discern how to assess the evidence and testimony he saw and heard during the trial:

- "[I]n listening to all the information, taking it all down, I listen for the truth, and I know the truth when the truth is spoken." Dkt.182.at.40-41.
- "I told [the other jurors] that I prayed about this, I have looked at the information, and that I received information as to what I was told to do in relation to what I heard here today—or this past two weeks." Dkt.182.at.41.

- "My religious beliefs are going by the testimonies of people given here, which I believe that's what we're supposed to do, and then render a decision on those testimonies, and the evidence presented in the room." Dkt.182.at.42.

And when asked whether his religious beliefs were "at all … interfering with or impeding your ability to base your decision solely on the evidence in the case and following the law," he unequivocally answered "No." Dkt.182.at.42.

Those statements are entirely in keeping with—and at the very least certainly reasonably construed as reflecting—the common understanding of prayer and divine guidance as internal spiritual or mental phenomena, not "outside forces" "directing or telling" someone what they must do, Dkt.182.at.59. *See, e.g.*, T. M. Luhrmann, *When God Talks Back: Understanding the American Evangelical Relationship with God* 47 (2012) (describing evangelicals' experience of two-way conversations with God as "inner mental phenomena"); Richard J. Foster, *Sanctuary of the Soul: Journey into Meditative Prayer* 11 (2011) (divine guidance experienced as "an inward whisper, a deep speaking into the heart, an interior knowing" rather than "an outward voice"); *Catechism of the Catholic Church* ¶2706 (describing meditative prayer as a means of discovering and discerning "the movements that stir the heart"); *id*. ¶2654 ("Seek in reading and you will find in meditating; knock in mental prayer and it will be opened to you by contemplation.") (quoting Guigo the Carthusian, *Scala Paradisi:* PL 40, 998); C. S. Lewis, *The Problem of Pain* 92 (1940) (God "speaks in our conscience").

Indeed, the guidance of the Holy Spirit in particular is associated with divine indwelling, not external instruction. *See, e.g.*, *Catechism of the Catholic Church* ¶¶2652, 2681 (describing the Holy Spirit as the "interior Teacher" and the "living water welling up to eternal life in the heart that prays.") (emphasis and quotation omitted). Whether understood in religious terms as attunement of the mind and heart to the divine reason and will, or in secular terms as the self-produced internal mental experience of the person praying, prayer and divine guidance are not "outside forces" and do not produce "outside sources" of information that it would be a breach of duty for a juror to rely on. *See, e.g.*, *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1579 (9th Cir. 1989) (no improper extrinsic influence when juror "used prayer and a belief in a sign from God as part of her mental process"). They are in short how some religious people process information, make difficult decisions, and express the result. By comparison, a juror who hears all the evidence and knows in his heart that the defendant is innocent or says his gut tells him the defendant is lying could not be disqualified. That some jurors express similar convictions as the product of their interactions with a higher being does not make them any less qualified to abide by their oath to follow the court's instructions "so help me God."

The district court's contrary view not only would deprive criminal defendants of a "jury selected from a representative cross section of the entire community," *Ramos*, 140 S. Ct. at 1402 n.47—and in this context, a juror inclined to acquit, no

less—but reflects exactly the kind of second-guessing of religious beliefs that the Free Exercise Clause forbids. The court stated repeatedly that it found Juror 13's assurances that he could follow the court's instructions both "earnest" and "sincere." *See* Dkt.182.at.57-59. Yet the court nonetheless concluded that Juror 13 was *not really* capable of doing so, apparently based on the court's skepticism that anyone who believes the Holy Spirit speaks to him could abide by the law or engage in reasoned decision-making. *See, e.g.*, Dkt.200.at.20-21 (claiming, in direct contrast to Juror 13's representations, that his "religious beliefs compelled him to disregard" court's instructions).

But it is no more the role of a court to assess whether the belief that one can commune with the Holy Spirit compels or forbids him to follow the court's instructions than it is for a court to assess whether adherence to Catholicism renders someone incapable of imposing the death penalty. A court's role is to ask jurors whether they can faithfully follow the law and the court's instructions, and to assess the sincerity of their answers. Concluding that a juror's belief that he can faithfully apply the law is sincere, but mistaken, is just another form of forbidden inquiry into whether a religious believer has "correctly perceived the commands of [his] faith." *Thomas*, 450 U.S. at 716. Such second-guessing of the practical import of religious beliefs is impermissible in any context, but is particularly pernicious in the Sixth Amendment context, where guessing wrong will deprive a criminal defendant of her

constitutional right to a jury of her peers. And it is wholly antithetical to the demanding standard that governs efforts to dismiss a deliberating juror, under which even a reasonable *possibility* that the juror is capable of faithfully discharging his duties is supposed to foreclose dismissal.

3. Juror 13's statements about the Holy Spirit were not otherwise disqualifying.

Shorn of the mistaken belief that there is something *categorically* "disqualifying" about the statement "the Holy Spirit told me the defendant is not guilty," the district court's dismissal of Juror 13 is impossible to reconcile with the exacting beyond-a-reasonable-doubt standard, for the only other justifications the court offered find no support in the record at all.

For example, in reaffirming its ruling when denying Brown's motion for a new trial, the court expressed concern about the effect of Juror 13's statement on the other jurors, asserting that it "necessarily had to impact the overall deliberations." Dkt.200.at.22. But the only juror the court interviewed other than Juror 13 was Juror 8, who assured the court that Juror 13 had stopped expressing the role of faith in his deliberative process after his fellow jurors asked him to focus on the evidence, that he was deliberating with the other jurors about the evidence, and that her own ability to deliberate was not affected by his comments "at all." Dkt.182.at.23-25. She could not have been clearer that her sole "concern" was that Juror 13's religious beliefs were "going to interfere in *his* ability" to follow the court's instructions,

Dkt.182.at.25 (emphasis added)—a concern that the court's colloquies with Juror 13 did not substantiate at all, let alone prove beyond a reasonable doubt. There is thus precisely zero evidence that Juror 13's statements were interfering with the jury's ability to deliberate in accordance with the court's instructions.

The court also emphasized that Juror 13 had "expressed a conclusion from the beginning of the deliberations and without discussion with his fellow jurors," suggesting that the court thought he had irrevocably made up his mind based on perceived divine guidance before engaging with his fellow jurors. Dkt.200.at.22. But both Juror 8 and Juror 13 informed the court that his statement about the Holy Spirit was made in the context of the common practice of taking an initial poll at the beginning of deliberations. *See* Dkt.182.at.23-24 (Juror 8 indicating that Holy Spirit comment was made when the jury "first went into deliberation"); Dkt.182.at.51 (Juror 13 indicating that he made the statement when "we were giving why we were—insight, as far as not guilty or whatever for the first charge."). Presumably Juror 13 was not the only juror to express an initial view about the evidence during that poll, and no one suggested that any other juror who did so was thereby rendered incapable of further deliberation.

Moreover, while the court never bothered to ask Juror 13 if his initial view was set in stone, the answers of both Juror 8 and Juror 13 to the questions the court did ask do not begin to establish beyond a reasonable doubt that he was unwilling or

unable to reconsider it; to the contrary, the record reflects that Juror 13 was diligently deliberating with his fellow jurors right up until the court removed him a day and a half in. *See* Dkt.182.at.24-25 (Juror 8 indicating that Juror 13 was deliberating); Dkt.182.at.9-12 (court observing that jury was "diligent" and deliberations were proceeding smoothly); Dkt.182.at.39-40 (Juror 13 reporting that jurors were "going over all the individual numbers" and that he was "following and listening to what has been presented and making a determination from that"); Dkt.182.at.42 (Juror 13 indicating he was "going by the testimonies of people given here" to "render a decision on those testimonies, and the evidence presented in the room"). When viewed in that broader context, Juror 13's initial comment about his view of the case was *at least* reconcilable with a "reasonable hypothesis" that he remained capable of properly discharging his duty as a juror, *Hopt*, 120 U.S. at 441, and certainly was not so *in*consistent as to exclude any reasonable possibility that he was able to discharge his duty, which is all that was required to prevent his dismissal. *See Abbell*, 271 F.3d at 1302; *Kemp*, 500 F.3d at 304.

Ultimately, then, the district court's dismissal of Juror 13 can be explained only by an impermissible view that Juror 13's initial statement about the Holy Spirit was "by definition" "disqualifying," Dkt.182.at.59-60, or by a failure to apply the correct legal standard, for any other explanation the court suggested is irreconcilable with the "tough legal standard" that must be satisfied to dismiss a deliberating juror.

Either way, the dismissal was reversible error. Not only was there no evidence to support a finding that Juror 13's statement was *in fact* interfering with his or anyone else's ability to deliberate, but even a fact-finding that is not clearly erroneous cannot be sustained when the court mistakenly concludes that a fact was proven "*under the applicable standard of proof*"—here, proof beyond a reasonable doubt. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622-23 (1993) (emphasis added). If this record is enough for the government to procure the dismissal of a deliberating juror, then the defendant's right to a unanimous and uncoerced verdict of her peers is "illusory." *Brown*, 823 F.2d at 596.

III. The District Court's Decision Has Broader Negative Implications.

The district court's decision not only is wrong, but is wrong in ways that have profound implications far beyond the facts of this case.

First, by inviting courts to police the manner in which jurors express their religious beliefs and experiences, the court's decision risks excluding from jury service large swaths of the population who use vivid, direct, and personal expressions to convey their experience of prayer and divine guidance. No doubt many people, including many devout religious believers, would not use expressions as vivid as Juror 13's to convey their experience of divine guidance. Some would view their interaction with the divine in very different terms, while others would self-censor for fear of ridicule by secular elites. *See* Antonin Scalia, *The Christian*

as Cretin, in *Scalia Speaks* 108 (Christopher J. Scalia & Edward Whelan eds., 2017) (observing that one can pass for sophisticated and still believe in God as long as one avoids discussion of miracles). But others are happy to be "'fools for Christ's sake,'" *id.* at 115 (quoting St. Paul's First Letter to the Corinthians 4:10), while still others view talking about their interaction with God in immediate and almost graphic terms as perfectly natural. As discussed, substantial numbers of evangelical Protestants and members of historically black Protestant traditions believe that communication with God is "a two-way street" and that "God talks directly with them." *See 2018 Pew Survey* 27 (45% of evangelicals; 60% of members of historically black Protestant traditions). Even outside those traditions, moreover, belief in two-way communication with God is not uncommon: Three in ten Americans believe that when they pray, "God (or a higher power) talks back." *Id.* at 6. Although forms of religious expression vary widely, *see* Webb Keane, *Religious Language*, 26 Annu. Rev. Anthropol. 47, 19 (1997); Jonathan Merritt, *It's Getting Harder to Talk About God*, N.Y. Times (Oct. 13, 2018), many of those who believe God speaks with them would likely use vernacular similar to Juror 13's to express that belief, particularly if they were being as candid as Juror 13.

Yet under the district court's decision, people who use such expressions not only can be removed from deliberations, but would seem to be disqualified from jury service at all. That result not only would be unjustified as a legal matter, but also

would disproportionately tend to exclude members of certain faiths and certain ethnic groups—primarily evangelical Protestants and members of historically black Protestant traditions—from jury service, thereby undermining the concept of the jury as a representative cross section of the community that "speak[s] the language of ordinary people." *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting); *see also Ballew v. Georgia*, 435 U.S. 223, 229-30 (1978); *Robinson*, 444 F.3d at 228-29 (Wilkinson, J., concurring in denial of rehearing en banc) ("To ask that jurors become fundamentally different people when they enter the jury room is at odds with the idea that the jury be 'drawn from a fair cross section of the community.'" (quoting *Taylor*, 419 U.S. at 527)).

Moreover, it would discourage jurors who do rely on prayer as part of their deliberative process from being candid about that in their discussions with other jurors, lest they be accused of holding "disqualifying" religious beliefs. The district court's rule thus not only would exclude qualified jurors from the cross section to which defendants are entitled, but would deprive defendants of their right to a jury that is free to actually "speak the language of ordinary people."

Making matters worse, the district court's decision invites courts to engage in unprincipled line-drawing that risks running afoul of the First Amendment and the Religious Freedom Restoration Act (RFRA). The court repeatedly purported to draw a distinction between praying for divine guidance (acceptable) and being "directed"

or "told" what to do by a "higher being" (unacceptable). *See* Dkt.182.at.32, 47, 60. As discussed, that is not a valid or administrable line and would amount to a denominational preference for religions that view interactions with the divine as more abstract and less personal and interactive. *See supra* at 16-17. But even apart from those problems, the prospect of civil judges enforcing distinctions more suited for ecclesiastical courts is not a happy (or constitutional) one. Courts must inquire whether religious beliefs preclude a juror from considering all the evidence or imposing certain punishments. But even then, they must take believers at their word. *See Thomas*, 450 U.S. at 716. Beyond those necessary and limited inquiries, civil judges tread at their peril.

Indeed, even attempting to police the district court's distinction would run into RFRA and the First and Sixth Amendments. While there may be a compelling government interest within the meaning of RFRA, *see* 42 U.S.C. §2000bb-1(b), in ensuring that jurors are "able to follow the law and apply the facts in an impartial way," *United States v. Mitchell*, 502 F.3d 931, 954 (9th Cir. 2007), that interest is not advanced by treating jurors who experience or talk about divine guidance more vividly as though they were intrinsically unable to discharge their duties. To the contrary, conditioning eligibility to participate fully in civil life on how a court perceives someone's expression of his interaction with a higher being risks violating the cardinal rule that the government must not discriminate *among* religious beliefs.

See, e.g., *Larson*, 456 U.S. at 244-46. It is hard to see how embracing a rule like the one the district court employed here would not end up disproportionately disfavoring members of particular faiths, a result at odds with both First and Sixth Amendment tradition. *See Batson*, 476 U.S. 79; *J.E.B.*, 511 U.S. 127; *Robinson*, 444 F.3d at 229 (Wilkinson, J., concurring in denial of rehearing en banc) ("The Sixth Amendment does not require a rule that would actively discourage a broad section of our population from productive jury service.").[4]

In sum, Sixth and First Amendment principles work in tandem to compel courts to proceed with the utmost caution when the government asks them to disqualify a deliberating juror on the basis of his religious beliefs. Here, the district court failed to abide by that command. In doing so, the court crossed two constitutional lines, discriminating against a juror on the basis of his faith, in ultimate service of depriving the defendant of her right to a unanimous and uncoerced jury of

[4] This Court has not yet weighed in on whether *Batson* extends to religiously motivated peremptory strikes. *Compare, e.g.*, *Brown*, 352 F.3d at 666-70 (invalidating strikes based on religious affiliation but declining to invalidate on plain error strikes based on religious beliefs); *United States v. DeJesus*, 347 F.3d 500, 510-11 (3d Cir. 2003) (upholding "a strike motivated by religious beliefs" but declining to decide merits of strike based on religious affiliation); *United States v. Heron*, 721 F.3d 896, 902 (7th Cir. 2013) (noting tension). But whatever the answer to that developing circuit split, deeming jurors *disqualified* from jury service, as the district court did here, goes much further. *Cf.* Dkt.190.at.8.n.1 (government suggesting that Juror 13 committed misconduct by failing to disclose his religious belief concerning divine guidance during jury selection).

her peers. Under a correct application of the demanding beyond-a-reasonable-doubt standard, the conviction plainly cannot stand.

CONCLUSION

For the reasons set forth above, this Court should reverse Brown's conviction and remand the case for further proceedings.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,700 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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November 23, 2020

s/Paul D. Clement
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I hereby certify that on November 23, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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