No.

In the Supreme Court of the United States

CHAKA FATTAH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRUCE P. MERENSTEIN
SAMUEL W. SILVER
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

MARK T. STANCIL
Counsel of Record
MATTHEW M. MADDEN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, NW
Washington, DC 20006
(202) 775-4500

JOSHUA S. JOHNSON
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500

QUESTION PRESENTED

Federal criminal defendants may be convicted only by unanimous juries. That unanimity may not be achieved by removing a holdout juror because of how he views a case. This Court has not had occasion to consider the standard by which district courts should determine whether to dismiss a juror during deliberations when complaints of misconduct might stem from that juror's view of the evidence. Three circuits apply what the government acknowledged below to be a "stricter," "heightened standard," and allow juror removal only if there is "no possibility" that complaints about a juror arise from his view of the evidence. Three other circuits, including the Third Circuit, allow juror removal so long as a district court deems that possibility not to be "reasonable." The question presented is:

Whether, to remove a juror for alleged misconduct during deliberations, a district court must determine that there is no possibility that the allegations of misconduct stem from the juror's view of the evidence.

PARTIES TO THE PROCEEDINGS BELOW

In addition to Chaka Fattah, Sr., and the United States of America, Karen Nicholas, Robert Brand, and Herbert Vederman were parties in the consolidated proceeding in the court of appeals.

TABLE OF CONTENTS

Page

Question Presented i

Parties To The Proceedings Below ii

Table Of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Introduction 1

Statement 3

Reasons For Granting The Petition 12

I. The Courts Of Appeals Are Divided Over the Standard For Removing Jurors During Deliberations In Criminal Trials 12

A. Three Circuits Prohibit Juror Removal Unless There Is No Possibility That Complaints About A Juror Stem From That Juror's View Of The Evidence 13

B. Three Circuits Prohibit Juror Removal Unless The Court Finds That There Is Not A Reasonable Possibility That Complaints About A Juror Stem From That Juror's View Of The Evidence 17

II. The Decision Below is Wrong 19

A. The Decision Below Undermines The Unanimity Requirement 20

B. The Decision Below Invades The Secrecy of Jury Deliberations 26

III. This Case Presents An Ideal Vehicle To Address A Question of Significant Practical Importance To Federal District Courts..... 28

Conclusion 32

Appendix A (Court of appeals opinion, Aug. 9, 2018) 1a

Appendix B (District court opinion, Oct. 20, 2016) 147a

Appendix C (District court order, Oct. 20, 2016) 234a

Appendix D (District court opinion, Dec. 16, 2016) 236a

Appendix E (District court order, Dec. 16, 2016) 241a

Appendix F (District court opinion, Dec. 20, 2016) 242a

Appendix G (District court order, Dec. 20, 2016) 251a

Appendix H (Court of appeals order on petition for rehearing, Sept. 13, 2018) 252a

Appendix I (Excerpted Transcript of Proceedings) 254a

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. *United States*,
164 U.S. 492 (1896) 21, 30, 31

Clark v. *United States*,
289 U.S. 1 (1933) 26

Dennis v. *United States*,
339 U.S. 162 (1950) 24

Johnson v. *Louisiana*,
406 U.S. 356 (1972) 20

Patton v. *United States*,
281 U.S. 276 (1930) 20

Peña-Rodriguez v. *Colorado*,
137 S. Ct. 855 (2017) 24, 25

Tanner v. *United States*,
483 U.S. 107 (1987) 27

United States v. *Abbell*,
271 F.3d 1286 (11th Cir. 2001) 17, 18

United States v. *Baker*,
262 F.3d 124 (2d Cir. 2001) 14

United States v. *Barone*,
114 F.3d 1284 (1st Cir. 1997) 16

United States v. *Boone*,
458 F.3d 321 (3d Cir. 2006) 11

United States v. *Brown*,
823 F.2d 591 (D.C. Cir. 1987) ..... *passim*

United States v. *Edwards*,
303 F.3d 606 (5th Cir. 2002) 26

United States v. *Essex*,
734 F.2d 832 (D.C. Cir. 1984) 25

United States v. *Kemp*,
500 F.3d 257 (3d Cir. 2007) 3, 11, 18, 19

United States v. *McIntosh*,
380 F.3d 548 (1st Cir. 2004) 16

United States v. *Polouizzi*,
687 F. Supp. 2d 133 (E.D.N.Y. 2010) 19

United States v. *Symington*,
195 F.3d 1080 (9th Cir. 1999) 17, 19, 21

United States v. *Thomas*,
116 F.3d 606 (2d Cir. 1997) ..... *passim*

Statutes

28 U.S.C. § 1254(1) 1

Other Authorities

Benchbook for U.S. District Court Judges (6th ed. 2013) 31

Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications For and From Psychology*, 20 Current Directions in Psychol. Sci. 63 (2011) 30

Giles Duncombe, Trials per pais: or, the law of England concerning juries by nisi prius, &c. (8th ed., 1766) 20

Paula L. Hannaford-Agor et. al., *Are Hung Juries A Problem?*, The National Center for State Courts (2002) 29

Mark M. Lanier & Cloud Miller III, *The Allen Charge: Expedient Justice or Coercion?,* 25 Am. J. Crim. Just. 31, (2000) 31

Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J.L. Reform 569 (2007) 25

Sarah Thimsen, Brian H. Bornstein, Monica K. Miller, *The Dynamite Charge: Too Explosive for Its Own Good?*, 44 Val. U. L. Rev. 93 (2009) 31

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–146a) is reported at 902 F.3d 197. The opinions of the district court (App., *infra*, 147a–233a, 236a–240a, 242a–250a) are reported at 223 F. Supp. 3d 336, 224 F. Supp. 3d 403, and 224 F. Supp. 3d 437.

JURISDICTION

The Third Circuit entered judgment on August 9, 2018, and denied rehearing on September 13, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

INTRODUCTION

This criminal case involves the standard under which a district court may remove a juror during deliberations after other jurors allege his misconduct. The D.C., First, and Second Circuits apply what the government called a "stricter," "heightened standard," and allow juror removal only if there is "no possibility" that complaints about a juror's conduct stem from his views on the merits. The Third, Ninth and Eleventh

Circuits, however, give district courts more "leeway" to remove jurors so long as that possibility is deemed to be not sufficiently "reasonable."

That leeway made the difference here. Prosecutors tried petitioner and four co-defendants on more than two dozen financial offenses arising out of petitioner's unsuccessful bid to become mayor of Philadelphia. The trial lasted a month, and delivering jury instructions alone took half a day. Just four hours into deliberations, however, some jurors were already frustrated that they had not reached unanimity. The foreperson wrote to the district court to identify Juror 12 as the reason they had "zero verdicts." App., *infra*, 254a. The foreperson reported that "[w]e showed [Juror 12] all the proof" and "[h]e will not, after proof, still *change his vote*" or his "*answer*." *Ibid.* (emphasis added). The foreperson had concluded from Juror 12's intransigence that he had "an agenda or an ax to grind" with the government. *Ibid.*

Over defense counsel's objection, the district court interviewed Juror 12 and four other jurors about what was happening in the jury room. All five jurors testified that the jury was engaged in a vigorous debate pitting Juror 12 against the other 11 jurors. Four of the jurors testified that Juror 12 was paying close attention to the jury instructions and the details of the case.

The district court nevertheless dismissed Juror 12. It did so after a courtroom deputy testified that, during hallway conversations in the midst of the district court's inquiry, Juror 12 remarked that "I'm going to hang this jury" and "it's going to be 11 to 1 no matter what." App., *infra*, 303a–304a. Juror 12 explained to the court what he had meant: "I'm not

just going to say guilty because everybody wants me to, and if that hangs this jury, so be it." *Id.* at 310a. The district court concluded that Juror 12's explanation was not reasonable, and so removed Juror 12 for intending to hang the jury "no matter what the law is" and "no matter what the evidence is." *Id.* at 315a. The district court added an alternate juror in Juror 12's place, and petitioner's new jury convicted him on multiple counts.

The Third Circuit affirmed. The court of appeals held that a juror may be dismissed so long as "there *is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence*." App., *infra*, 58a (quoting *United States* v. *Kemp*, 500 F.3d 257, 304 (3d Cir. 2007)). The Ninth and Eleventh Circuits have adopted the same standard. The D.C., First, and Second Circuits apply a more rigorous standard, however, allowing juror removal only if there is "*no possibility*" that the allegations of misconduct stem from the juror's view of the evidence.

This case presents an opportunity to resolve that split among circuits and clarify the proper standard for removing jurors during deliberations in a criminal trial. The requirement of jury unanimity is fundamentally undermined when dissenting jurors are plucked from deliberations because of complaints triggered by their view of the evidence. This case provides an excellent vehicle to provide guidance to lower courts on a consequential question of federal criminal practice.

STATEMENT

1. a. Petitioner, Chaka Fattah, Sr., served in the Pennsylvania General Assembly during the 1980s and

1990s and was elected to the United States House of Representatives in 1995. App., *infra*, 7a–8a. In 2006, he began an unsuccessful campaign for Mayor of Philadelphia. *Id.* at 8a. The government alleged that, during the campaign, petitioner received illicit loans and engaged his co-defendants in a series of complex and illegal financial schemes. *Id.* at 7a.

Petitioner and his associates were charged on a total of 28 counts. App., *infra*, 147a–148a, 148a n.1. The 22 counts against petitioner included wire fraud, money laundering, conspiracy, and other crimes. *Id.* at 148a.

Trial lasted more than four weeks. App., *infra*, 36a. The district court ultimately charged the jury with 120 pages of instructions, which the court read over more than three hours. Emphasizing the complicated nature of the case, the court instructed that the indictment charged 28 separate offenses, several counts charged multiple defendants, the jury had to separately consider the evidence against each defendant on each charge, and it had to return separate verdicts for each defendant on each offense.

b. Deliberations started late in the afternoon and continued the following day. After four hours of total deliberations, the jury's foreperson wrote to the judge that:

> Juror Number 12 refuses to vote by the letter of the law. He will not, after proof, still change his vote. His answer will not change. He has the 11 of us a total wreck knowing that we are not getting anywhere in the hour of deliberation yesterday and the three hours today. We have zero verdicts at this time all due to

> Juror Number 12. He will not listen or reason with anybody. He is killing every other juror's experience. We showed him all the proof. He doesn't care. Juror Number 12 has an agenda or ax to grind w/govt.

App., *infra*, 254a. Soon afterwards, eight jurors plus an alternate juror sent the judge a second note stating that "[w]e feel that [Juror 12] is argumentative, incapable of making decision[s]. He constantly scream [*sic*] at all of us." *Ibid.*

The district court told counsel that he intended to question the foreperson and Juror 12.[1] App., *infra*, 255a. Defense counsel objected. *Id.* at 255a–256a. The jury notes, defendants argued, reflected only jurors' "disagreement over the evidence." *Id.* at 256a. Defendants urged the court to "admonish the jurors" of their duties and send them back to work. *Id.* at 255a. It would be "far less intrusive," defense counsel explained, to "try to calm down whatever contretemps may be going on in the jury room." *Id.* at 256a. By contrast, questioning jurors only four hours into deliberations in a "very long, complex case" would "send[] a message that if there's a block of jurors with one opinion they can immediately get personal court intervention by complaining." *Id.* at 257a.

The district court nevertheless questioned five jurors. App., *infra*, 38a. It began with the foreperson, who described Juror 12 as the lone holdout only four hours into deliberations. Juror 12 was "on his own,"

---

[1] At times, the transcript mistakenly identifies Juror 12 as Juror 2, and the foreperson (Juror 2) as Juror 12. See App., *infra*, 237a n.2.

the foreperson testified, and "[i]t was everybody pretty much against this guy." *Id.* at 265a, 270a. Pitted against all 11 of his peers, Juror 12 was "very argumentative" about his dissenting view. *Id.* at 265a. The foreperson admitted that he had "personally ended up telling [Juror 12] to sit down and shut up." *Ibid.* But the foreperson agreed that Juror 12 had "calmed down pretty much today." *Id.* at 269a.

As the foreperson saw things, the other 11 jurors were "totally frustrated" by Juror 12. App., *infra*, 264a. "[W]e've gone over this over and over and over," the foreperson said, "and a monkey would know what we're talking about at this point." *Id.* at 270a. Juror 12 nevertheless "wants to read every detail not once, but twice, three times" and "wants to add on that maybe somebody didn't mean to do that." *Id.* at 263a–264a.

Juror 12 was questioned next. He confirmed that his view of the evidence was "different than everybody else's." App., *infra*, 274a. He described the ongoing deliberations over those different views: His fellow jurors "pointed to the indictment" to support their arguments, but Juror 12 said he kept reminding them that "the indictment is not evidence." *Ibid.* Juror 12 also said that he was busy "reading this and * * * reading that" along with "three other [jurors]," while the rest of the jurors "just wait[ed] for me to finish up so they can take another vote." *Id.* at 274a–275a. From Juror 12's perspective, he had been "the only one deliberating" in any meaningful way ever since the rest of the jurors had voted in unison "within the first half hour." *Id.* at 273a–274a.

Like the foreperson, Juror 12 related that "[a] lot of people have been raising their voice and

screaming." App., *infra*, 273a. He emphasized that he "do[es] not want to yell at anybody," but that "naturally I have to raise my voice" when there were "three people screaming at me." *Id.* at 275a. Other jurors, he said, had already "threatened to have me thrown off" the jury. *Id.* at 274a. Those tensions had eased since the previous afternoon, however, and there had been "very little yelling, hardly any at all," during the second day of deliberations. *Id.* at 275a.

Next, Juror 3 confirmed that Juror 12 and the majority disagreed about the evidence. App., *infra*, 281a. There had been a "count" on which "all the jurors except for one [were] decided." *Id.* at 280a. In short order, "the rest of the jurors pounced on the gentleman with the * * * dissenting opinion." *Id.* at 281a. Juror 3 said that Juror 12 became "defensive and just a little bit of [*sic*] impatient" when he was faced with that onslaught. *Ibid.* At the same time, though, "the other jurors were very impatient with him" and "roll[ing] their eyes." *Ibid.* Juror 3 described the previous day's one-hour deliberations as "kind of a screaming match between a couple of the jurors," but said that "apologies were made" on the second day and that, since then, there had been "loud voices, but not really screaming." *Id.* at 280a–281a.

After Juror 3's testimony, the government "ask[ed] that [the trial court] voir dire another juror." App., *infra*, 282a. The defense objected "vehemently." *Ibid.* The judge overruled that objection, stating that "I can examine every one of them." *Ibid.*

Juror 6 then testified that Juror 12 "just takes a little longer." App., *infra*, 288a. "[T]he majority of us," he said, "can look at it * * * and we can come to a conclusion," but Juror 12 was "obstinate" and

"different." *Id.* at 284a, 288a. This was "very frustrating to everybody." *Id.* at 288a. Juror 6 refused to say that Juror 12 was not following the jury instructions, however. *Id.* at 287a. Instead, in Juror 6's view, Juror 12 was "just reading maybe too deeply into" them. *Ibid.* Juror 6 recalled that Juror 12 had raised his voice "to be seen" and heard "about a particular matter." *Id.* at 284a.

Despite the frustration, Juror 6 testified that progress was being made. Juror 12 was considering the evidence, and had "finally, you know, agreed" with the majority on something. App., *infra*, 287a. Juror 6 was worried, however, about how long it would take to persuade Juror 12 and reach agreement on each count. *Ibid.*

Juror 1 was the fifth (and last) juror to testify. Juror 1 said that Juror 12 had "his own path" and was "very opinionated" and "forceful" about it. App., *infra*, 290a–291a. He was "pour[ing] over" the jury instructions "very well." *Id.* at 291a. As Juror 1 saw the evidence, however, the verdict-sheet questions were "not hard." *Ibid.* The problem, from Juror 1's view, was that Juror 12 was "going way beyond" those questions and considering things that Juror 1 thought were "not part of the question," like "what did this [defendant] feel." *Id.* at 292a. In response, the district court promptly reminded Juror 1 that "of course intent is part of it." *Ibid.*[2]

---

[2] The foreperson testified that Juror 12 had "put his hand on another juror's shoulder." App., *infra*, 270a. Juror 1 recalled that Juror 12 had "put his hand on my shoulder at least once," *id.* at 293a, and Juror 6 said that Juror 12 "might have put his arm around my shoulder or hand on my shoulder" and "also did it maybe" to another juror. *Id.* at 285a. Juror 12 told the court

The government argued that the five jurors' testimony had provided "ample evidence" that Juror 12 was "disrupting the process and should be removed." App., *infra*, 294a. The defense countered that Juror 12 was "deliberating against 11 people," and that his dismissal four hours into deliberation would be "entirely premature," especially without the court first issuing "a supplemental instruction." *Id.* at 295a.

The next day, the district court asked a courtroom deputy to testify about her interactions with Juror 12 following his interview with the judge. App., *infra*, 302a–304a. The deputy stated that while she was escorting Juror 12 from chambers, he said he was "going to hang this jury." *Id.* at 303a. According to the deputy, Juror 12 later emerged from the jury room and "said more about how they're treating him and what he's saying to them," commenting that "it's going to be 11 to 1 no matter what." *Id.* at 304a.

The judge then questioned Juror 12 again. App., *infra*, 306a–310a. Juror 12 confirmed his comments to the deputy, explaining them to mean that if "we don't agree; I'm not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it." *Id.* at 310a. Juror 12 also recalled telling the deputy "that there was a lot of name calling going on." *Id.* at 307a. In particular, he remembered saying that he "found it offensive" that "[s]omebody made a comment that I may have hit my head" while serving

---

that he might have unintentionally rested his hand on another juror's shoulder while they were "sharing the books." *Id.* at 279a. The district court did not find that there had been inappropriate contact between jurors when it dismissed Juror 12. See *id.* at 314a–315a.

as a paratrooper in the 82nd Airborne. *Id.* at 308a–309a. Juror 12 nevertheless maintained that "I'm deliberating; I feel like I'm doing the best that I can." *Id.* at 308a.

c. The government again urged that Juror 12 "should absolutely be removed." App., *infra*, 314a. Defense counsel countered that removal was inappropriate "given this early stage of deliberations," and asked the court to issue "appropriate instructions" and give the jury at least "another day." *Id.* at 313a.

The district court sided with the government and dismissed Juror 12. It held that Juror 12's comments to the courtroom deputy meant that he was "intent on, as he said, hanging this jury no matter what the law is, no matter what the evidence is." App., *infra*, 315a.

Defendants asked the district court to declare a mistrial because removing Juror 12 tainted the proceedings and "sen[t] a message about yielding to the majority." App., *infra*, 316a. The court denied that request. It instead elevated an alternate to the jury, and deliberations restarted. After 15 hours of deliberations, the new jury found petitioner guilty on all 22 counts. *Id.* at 49a, 149a.[3]

In two post-trial memorandum opinions, the district court emphasized its conclusion that there was "no doubt that Juror 12 intentionally refused to deliberate when he declared *so early in the process* that he would hang the jury no matter what." App., *infra*, 239a–240a. The court also reiterated that Juror

---

[3] The district court acquitted petitioner on four of those counts, but denied his motion for a new trial. App., *infra*, 234a.

12 "could not possibly have reviewed all of the law and evidence of this five-week trial at the time he made his remark." *Id.* at 248a–249a.

2. Petitioner appealed and the Third Circuit affirmed. In pertinent part (App., *infra*, 36a–49a, 52a–62a), the court of appeals concluded that the district court had not erred by questioning five jurors and then dismissing Juror 12.

Turning first to the district court's decision to question five jurors, the court of appeals explained that "[r]einstructing the jury on its duty to deliberate will often be the better course at the first sign of trouble." App., *infra*, 57a n. 12. The court nevertheless held that district courts can investigate "substantial evidence of jury misconduct—including credible allegations of jury nullification or of a refusal to deliberate." *Id.* at 53a (quoting *United States* v. *Boone*, 458 F.3d 321, 329 (3d Cir. 2006)). The district court had not, according to the court of appeals, abused its discretion when conducting its inquiry. *Id.* at 57a n.12.

The court of appeals also held that the decision to remove Juror 12 was reasonable. A juror may be dismissed in the Third Circuit, so long as "there *is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence*." App., *infra*, 58a (quoting *United States* v. *Kemp*, 500 F.3d 257, 304 (3d Cir. 2007)). The court likened that standard to "the burden for establishing guilt in a criminal trial." *Ibid.*

Applying that standard to this case, the court held that the possibility that the jurors' complaints about Juror 12 stemmed from his dissenting votes and views was not "reasonable" enough. App., *infra*, 57a–62a.

The court emphasized accusations that Juror 12 "refuse[d] to vote by the letter of the law," would "not listen or reason with anybody," and had "an agenda or ax to grind." *Id.* at 53a (quoting *id.* at 254a). The court did not highlight, however, the jurors' notes and testimony about their frustration that Juror 12 would not "change his vote" and "answer" despite the "proof." *Id.* at 254a.

The court of appeals reached that conclusion even while acknowledging that the district court had misstated Juror 12's testimony. Contrary to the district court's holding, Juror 12 had never pledged to hang the jury no matter the law or evidence. App., *infra*, 61a–62a. There was "no evidence," the Third Circuit recognized, that Juror 12 had ever "uttered the phrases 'no matter what the law is' or 'no matter what the evidence is'" in connection with maintaining his dissent and thus hanging the jury. *Id.* at 62a. The court of appeals nevertheless held that the district court had permissibly discerned the import of Juror 12's belief, four hours into deliberations, that he was "going to hang this jury." *Id.* at 59a. The court did not, however, address Juror 12's testimony that he meant only that he was "not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it." *Id.* at 45a.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Divided Over The Standard For Removing Jurors During Deliberations In Criminal Trials

The circuits are split 3–3 on the standard that district courts must apply to remove a juror from deliberations in a criminal case after receiving complaints of that juror's misconduct. The D.C., First,

and Second Circuits require that there be "no possibility" that the complaints stem from the juror's view of the evidence. The Third, Ninth, and Eleventh Circuits afford trial courts more leeway by allowing juror removal so long as there is no "*reasonable* possibility" that the complaints stem from the juror's view of the evidence. As the government acknowledged below, the "no possibility" standard is "stricter" than the reasonableness inquiry that the court of appeals applied in this case. Gov't C.A. Br. 114.

A. Three Circuits Prohibit Juror Removal Unless There Is No Possibility That Complaints About A Juror Stem From That Juror's View Of The Evidence

The D.C., First, and Second Circuits prohibit juror removal during deliberations unless the record demonstrates "no possibility" that complaints about a juror's conduct arise from that juror's view of the evidence.

The D.C. Circuit stated these circuits' prevailing rule in *United States* v. *Brown*: "[I]f the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." 823 F.2d 591, 596 (1987) (emphasis added).

In *Brown*, the district court dismissed a juror who said that he was unable to "go along with" the RICO statute. 823 F.2d at 594. The juror discussed his difficulties with the way RICO "reads," "how it runs," and "the way it's written and the way the evidence has been presented." *Ibid.* The district court dismissed the juror after concluding that the juror "would not follow the law." *Id.* at 595.

The D.C. Circuit reversed. The court acknowledged that the dismissed juror's concerns about the text of the RICO statute provided some reason to believe that he might have refused to apply the law as instructed. *Brown*, 823 F.2d at 596–97. But, the court emphasized, the juror also "began to speak of the evidence offered at the trial." *Id.* at 597. "These statements, at the very least, create[d] an ambiguous record," and therefore "*the possibility* * * * that [the juror's] desire to quit deliberations stemmed from his belief that the evidence was inadequate to support a conviction." *Ibid.* (emphasis added). In such circumstances, removing the juror from deliberations "violated the appellants' right to a unanimous jury verdict." *Ibid.* When the record supports "any possibility" that "a request for dismissal stems from the juror's view of the sufficiency of the evidence," the district court "may not discharge the juror." *Id.* at 596.

The Second Circuit "adopt[ed] the *Brown* rule" in *United States* v. *Thomas*, 116 F.3d 606, 622 (1997).[4] The court held that "if the record evidence discloses *any possibility* that a complaint about a juror's

[4] The Second Circuit has explained that *Thomas*'s "no possibility" standard applies to allegations of jury nullification but not to abject refusals to deliberate. *United States* v. *Baker*, 262 F.3d 124 (2001). In *Baker*, a juror "refuse[d] to discuss anything with [the jury]" and "w[ould] not look at any of the evidence." *Id.* at 128. Juror 12, by contrast, was not so accused. Instead, the misconduct allegation was of not "bas[ing] [his] vote on the evidence," *id.* at 132, because of an "ax to grind" with the government. The district court ultimately held that Juror 12 was going to vote to acquit "no matter the law" and "no matter the evidence." The Second Circuit would thus apply its "no possibility" standard to these allegations.

conduct stems from the juror's view of the sufficiency of the government's evidence, the court must deny the [removal] request." *Ibid.* (emphasis added) (internal quotation marks omitted).

Applying that heightened standard, the court reversed the dismissal of a juror because the record supported the possibility that the misconduct allegations stemmed from the juror's view of the evidence. The district court had concluded that the juror was refusing to follow the law because he believed that defendants had "a right to deal drugs" based on "preconceived, fixed, cultural, economic, [or] social * * * reasons that are totally improper and impermissible." *Thomas*, 116 F.3d at 612. The record also showed, however, that the dissenting juror had sometimes "couch[ed]" his unpopular position "in terms of the evidence" and concerns he had about the "substantive evidence" of guilt. *Id.* at 611, 623.

That record's conflicting indications of misconduct versus disagreement meant that dismissal of the dissenting juror was improper. The Second Circuit held that a juror may not be removed "unless the record *leaves no doubt* that the juror was in fact engaged in deliberate misconduct" and "was not simply unpersuaded by the Government's case." *Thomas*, 116 F.3d at 625 (emphasis added). The court could not "say that it is beyond doubt that Juror No. 5's position during deliberations was the result of his defiant unwillingness to apply the law, as opposed to his reservations about the sufficiency of the Government's case" and therefore could not remove the juror. *Id.* at 624. That strict standard, the court of appeals explained, is necessary "to protect * * * holdouts from fellow jurors who have come to the

conclusion that the holdouts are acting lawlessly." *Id.* at 622.

The First Circuit likewise directs district courts to "proceed cautiously" before removing jurors from deliberations. *United States* v. *McIntosh*, 380 F.3d 548, 556 (2004). "[W]hether a juror is refusing to deliberate or has simply reached a conclusion contrary to the other jurors is a question of exquisite delicacy," the court has stated, because "[t]he line between the two can be vanishingly thin." *Ibid.*

In *McIntosh*, the First Circuit upheld a district court's "decision not to jettison" a jury's "lone holdout for acquittal" who testified that he was deliberating and weighing the evidence. 380 F.3d at 556. There was not "*unambiguous* evidence" that the holdout juror was attempting to thwart the deliberative process," and so he was properly retained on the jury. *Ibid.* (emphasis added) (citing *Brown*, 823 F.2d at 597); see also *United States* v. *Barone*, 114 F.3d 1284, 1309 (1st Cir. 1997) (upholding juror dismissal where, "in contrast to the juror in *Brown*," the juror had been dismissed "for a valid reason that was *entirely unrelated* to the issue of how he felt about the sufficiency of the government's proof") (emphasis added).

B. Three Circuits Prohibit Juror Removal Unless The Court Finds That There Is Not A Reasonable Possibility That Complaints About A Juror Stem From That Juror's View Of The Evidence

The Third, Ninth, and Eleventh Circuits allow juror removal even when the record demonstrates a possibility that complaints about a juror stem from that juror's view of the evidence, so long as the possibility is not deemed to be "reasonable."

The Ninth Circuit adopted the "*reasonable* possibility" standard in *United States* v. *Symington*, 195 F.3d 1080, 1087 (1999). The court acknowledged other circuits' "no possibility" standard, but held instead that "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Ibid.* Despite borrowing language from the "no possibility" circuits' opinions, the Ninth Circuit "emphasize[d] that the standard is any *reasonable* possibility, not any possibility whatever." *Id.* at 1087 n.5. It concluded that the consequence of adopting the other circuits' heightened standard "may be to prohibit dismissal in all cases." *Ibid.* The court deemed that its "reasonable possibility" standard would better provide "a threshold at once appropriately high and conceivably attainable." *Ibid.*

The Eleventh Circuit adopted the same permissive standard, holding that a juror may be removed "only when no '*substantial possibility*' exists that she is basing her decision on the sufficiency of the evidence." *United States* v. *Abbell*, 271 F.3d 1286, 1302 (2001) (emphasis added) (citing *Thomas*, 116 F.3d at 621–22,

and *Brown*, 823 F.2d at 596). The court took the terms "any possibility" and "substantial possibility" to be "interchangeable," *id.* at 1302 n.14, but the application of the standard shows the distinction is important. The Eleventh Circuit upheld the dismissal in *Abbell* under the more permissive standard even though, after supplemental instructions from the judge, the juror in question "made no more direct statements about her intention not to follow the law." *Id.* at 1303.

The Third Circuit, according to the government (at C.A. Br. 114), "expressly rejected" the "no possibility" standard in *United States* v. *Kemp*, 500 F.3d 257, 304 (2007). In *Kemp*, the court of appeals adopted the Ninth and Eleventh Circuits' more permissive standard, holding that a juror may be removed "when there is no *reasonable* possibility that the allegations of misconduct stem from the juror's view of the evidence." *Ibid.* (emphasis added). The court explained that it wanted to "provide district courts with some leeway in handling difficult juror issues." *Ibid.* It also concluded that affording courts greater discretion to determine reasonableness would "allow us to avoid abstract 'anything is possible' arguments" that it believed the other circuits' standard invites. *Ibid.* The Third Circuit characterized the "difference" between the circuits' two standards as "slight" and one of "clarification and not disagreement." *Ibid.* But acknowledging the space between the standards, it also emphasized that "[t]o the extent that there is a difference, we believe that the articulation of the Ninth and Eleventh Circuits is superior." *Ibid.*[5]

[5] At least one district court, in the Second Circuit, has recognized the significance of the difference. The "courts [that] have

The Third Circuit applied that more permissive standard below. Citing *Kemp*, the court invoked the "reasonable possibility" standard. App., *infra*, at 58a (emphasis omitted). Reviewing the record below, the court focused on Juror 12's statements to the courtroom deputy "that he was going to hang the jury, and that it would be 11 to 1 no matter what." *Id.* at 59a (internal quotation marks and emphasis omitted). The court held that "[t]hese statements, coupled with the District Court's finding that Juror 12 lacked credibility, provided a sufficient basis for Juror 12's dismissal." *Ibid.* This is notwithstanding the repeated references—by both the dissenting juror and the complaining majority—to the evidence presented at trial and votes taken in the jury room. App., *infra*, 36a–37a, 39a–42a.

II. The Decision Below Is Wrong

The Third Circuit's decision does serious harm to foundational principles of federal criminal jury trials. Permitting juror dismissal when there is a possibility that the dismissal is based on the juror's view of the evidence undermines the bedrock requirement of juror unanimity. A common (if unfortunate) facet of human nature is the temptation to perceive substantive disagreement—particularly by a lone dissenter—as reflecting bad faith or misconduct. Courts must diligently guard against allowing such tendencies to undermine a juror's right to disagree. What is more,

---

facilitated juror dismissal by requiring only 'any *reasonable* possibility' * * * appear not to be in step with current Supreme Court practice on the Sixth Amendment." *United States* v. *Polouizzi*, 687 F. Supp. 2d 133, 199 (E.D.N.Y. 2010) (citing *United States* v. *Kemp*, 500 F.3d 257, 303 (3d Cir. 2007) and *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999)).

the judicial inquiry invited under the "reasonable possibility" standard compromises the secrecy of the jury deliberations, as this case illustrates. The bright-line standard rejected below, by contrast, would ensure that district courts minimize their intrusion into the jury room by ending the need for further questioning when any possibility arises that alleged juror misconduct reflects disagreement over the evidence. This Court has long recognized that the unanimity requirement and jury secrecy serve central functions in our criminal justice system. The decision below threatens both.

A. The Decision Below Undermines The Unanimity Requirement

It is well established that federal criminal juries must reach unanimous verdicts. "In an unbroken line of cases reaching back into the late 1800's," this Court has "recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring) (emphasis omitted). Even at common law, courts required that "every one of the twelve Jurors must agree together of the Fact, before there can be a Verdict." GILES DUNCOMBE, TRIALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS, &C. 279 (8th ed., 1766). In short, the unanimity requirement is an "essential element[]" of our jury trial system. *Patton* v. *United States*, 281 U.S. 276, 288 (1930). The "reasonable possibility" standard undermines the unanimity requirement by inviting extended judicial inquiry into—and allowing juror dismissal based on—disagreements that may reflect jurors' views of the evidence.

By its nature, the unanimity requirement *embraces* conflict among jurors. "The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen* v. *United States*, 164 U.S. 492, 501 (1896). Where jurors persist in their disagreement on significant issues, it is unsurprising that allegations of misconduct sometimes arise. It is basic human nature—however regrettable—to misinterpret true disagreement as misconduct.

This human dynamic is not mere arm-chair psychology. Courts have recognized that disagreements on the merits "can certainly manifest themselves" as complaints about the competency of jurors holding opposing views. *United States* v. *Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999). That is all the more likely where a single juror disagrees with a united majority. "[J]urors favoring conviction may well come to view the 'holdout' or 'holdouts' not only as unreasonable but as unwilling to follow the court's instructions on the law." *United States* v. *Thomas*, 116 F.3d 606, 622 (2d Cir. 1997). The linchpin of our jury system is that the views of dissenting jurors—particularly a lone dissenter—will be protected from the majority's pressures. Only if the alleged misconduct cannot be the product of legitimate disagreement may the juror be removed. "If a court could discharge a juror" based upon his views of the merits, "the right to a unanimous verdict would be illusory." *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987).

This case illustrates the reality that a lone dissenter may well be viewed as unreasonable. The alleged misconduct that resulted in Juror 12's

dismissal could just as plausibly signal legitimate disagreement among deliberating jurors. The initial note complained that Juror 12 "will not, after proof, still *change his vote*" and therefore the jury had "zero verdicts at this time all due" to Juror 12. App., *infra*, 254a (emphasis added). Thus, the very first complaint singled out Juror 12's refusal to "change his vote" when confronted with *the majority*'s *view of the evidence*.

Further questioning suggested that Juror 12 was engaged in the deliberative process but disagreed with his peers on the evidence. While the other jurors "pointed to the indictment," Juror 12 reminded them—correctly—that "the indictment is not evidence." App., *infra*, 274a. Another complaint likewise targeted Juror 12's focus on the proper legal elements of the offenses. Specifically, two jurors criticized Juror 12 for considering the defendants' intent. The foreperson complained that Juror 12 was considering whether "somebody didn't mean to do that." *Id.* at 263a. Similarly, Juror 1 claimed that "[t]he problem with" Juror 12 was that he was trying to determine "what did this person feel." *Id.* at 292a. The court promptly reminded Juror 1 that intent was a proper consideration. *Ibid.* These complaints in fact reflect that Juror 12 listened to the district court's instructions and was intent on following them closely. Though frustrating to jurors who had already reached their own conclusions, that is not misconduct at all.

For his part, Juror 12 explained that he was "the only one deliberating" and that "within the first half hour [the other jurors] wanted to take a vote." App., *infra*, 273a–274a. He noted that while he discussed his views with some jurors, several were "just waiting

for me to finish up so they can take another vote." *Id.* at 275a. These exchanges illustrate that the majority's objections stemmed first and foremost from Juror 12's refusal to agree with their view of the evidence.

That Juror 12 was dismissed at an early stage of deliberations is all the more striking given the complexity and length of the proceedings in the district court. This trial lasted more than four weeks and included 28 charges against five defendants. The instructions took the district court at least three hours to read to the jury. Yet, despite the complex nature of the case, the court below acted on complaints from the majority of jurors after only four hours of deliberation. *Id.* at 36a–42a.

It is difficult to square this series of events with the unanimity requirement. The initial complaints against Juror 12—and the jurors' statements during subsequent questioning—illustrate that the jury had, unsurprisingly, failed to reach consensus after the long trial and brief deliberations. More troubling still, the decision below emphasized that Juror 12's exchange with the courtroom deputy took place "early in the deliberations, in a complex case, before any juror could reasonably be expected to have reached final verdicts on the twenty-[eight] counts before the jury." App., *infra*, 62a. But that criticism applies with equal force to the majority's complaints—also within hours of beginning deliberations—that Juror 12 would not "change his vote" and is "on his own" because "a monkey would know what we're talking about at this point." *Id.* at 254a, 270a. Several jurors echoed this sentiment, explaining that Juror 12 was continually examining and discussing the evidence,

"frustrating" the rest of the group. *Id.* at 288a, 290a–291a. A majority's rush to judgment is not entitled to greater protection than a dissenter's refusal to agree on a verdict.

The district court relied heavily on Juror 12's statement that he was "going to hang this jury," inferring that Juror 12 would do so "'no matter what the law is,' and 'no matter what the evidence is.'" App., *infra*, 61a. This inference ultimately formed the basis for Juror 12's dismissal under the "reasonable possibility" standard. *Ibid.* But even assuming that was a *reasonable* inference to draw, the opposite inference—that Juror 12 simply disagreed on the evidence—was equally likely. The record here amply supports that conclusion. Indeed, Juror 12 explained that his comment meant only that "we don't agree; I'm not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it." *Id.* at 310a.

Courts should avoid turning the jury room into a place where "every word is recorded and may be closely scrutinized for missteps." *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 874 (2017) (Alito, J., dissenting). Precisely because "an effort to act in good faith may easily be mistaken" for the types of juror misconduct alleged here, the propriety of the no possibility standard is "especially pronounced." *Thomas*, 116 F.3d at 618. As this Court has explained, it may be impossible to "know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Dennis* v. *United States*, 339 U.S. 162, 171 (1950). Jurors are "expected to speak,

debate, argue, and make decisions the way ordinary people do in their daily lives." *Peña-Rodriguez*, 137 S. Ct. at 874 (Alito, J., dissenting). It is unsurprising that a juror, unfamiliar with legal intricacies, explained his situation inartfully. The rule adopted below permitted Juror 12's layman characterization of his dissenting position—ignoring his subsequent clarification—to serve as the basis for his dismissal. The "no possibility" standard provides necessary protection against over-reliance on one-off statements by a dissenting juror, guarding against dismissal when a possibility exists that the juror's position reflects a differing view on the evidence.

Restraint in juror dismissal is doubly important when a juror is alone in dissent. A "lone holdout juror preventing a unanimous verdict is certainly subject to pressure, both internal and external, to vote with the majority." Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J.L. Reform 569, 606 (2007). Here, the district court's questioning occurred, according to Juror 3, after "the rest of the jurors pounced on the gentleman with the * * * dissenting opinion." App., *infra*, 281a. Courts have recognized that juror removal rules are especially important to prevent the removal of "a lone holdout for innocence in the face of a hostile pro-conviction majority." *United States* v. *Essex*, 734 F.2d 832, 844 (D.C. Cir. 1984). Allowing the dismissal of a dissenting juror when the alleged misconduct may stem from his differing view of the evidence undermines the unanimity requirement precisely when it is most important.

B. The Decision Below Invades The Secrecy Of Jury Deliberations

The standard adopted below also invites unwarranted intrusion into jury deliberations. "Once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important—safeguarding the secrecy of jury deliberations." *United States* v. *Thomas*, 116 F.3d 606, 618 (2d Cir. 1997). The "reasonable possibility" standard, which by its nature requires judges to weigh potentially competing evidence, invites district courts to intrude more readily into jury deliberations. By contrast, the "no possibility" standard requires a district court to end the inquiry as soon as the record indicates that alleged misconduct may actually reflect disagreement on the merits. "[D]ue to the sanctity of jury deliberations" and the risk of exposing jurors' views on the evidence, "the court will generally be unable to determine the true nature of the juror's difficulty." *United States* v. *Edwards*, 303 F.3d 606, 633 (5th Cir. 2002). Given these constraints, under the "no possibility" standard, "[a] presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation." *Thomas*, 116 F.3d at 622.

This Court has long recognized that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark* v. *United States,* 289 U.S. 1, 13 (1933). Courts applying the "no possibility" standard have warned against the harm to independent jury

deliberations "[w]ere a district judge permitted to conduct intrusive inquiries into—and make extensive findings of fact concerning—the reasoning behind a juror's view of the case." *Thomas*, 116 F.3d at 620. This case involved such an inquiry, despite indications of evidence-based disagreement. The district court justified extensive juror questioning—"examin[ing] every one of them," if necessary—"to get to the bottom of" the allegations against Juror 12. App., *infra*, 272a, 282a. But courts employing the "no possibility" standard have properly rejected this level of intrusion, recognizing that such inquiries give rise to "long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry." *Tanner* v. *United States*, 483 U.S. 107, 127 (1987).

Concerns about jury secrecy are amplified when there is evidence that the alleged misconduct stems from a juror's dissenting vote. Here, the district court warned the jurors to stay away from the merits of the case during questioning, but the nature of the accusations against Juror 12 made that practically impossible. Indeed, the alignment of the jury's votes was made explicit in the first note to the court stating that there were no verdicts for the government "all due to Juror Number 12." App., *infra*, 254a. The jurors' statements during questioning also revealed that Juror 12 had doubts regarding the defendants' intent, *id.* at 263a, 292a; he was, properly, not considering the indictment as evidence, *id.* at 274a; and while all of the other jurors had come to one conclusion, Juror 12 "holds out." *Id.* at 288a. The questioning and complaints evidenced the jurors' disagreement over the merits. That is where the inquiry should have ceased.

Our jury system necessarily—and deliberately—prevents courts and litigants from knowing what goes on in the jury room. As the court emphasized in *Thomas*:

> Achieving a more perfect system for monitoring the conduct of jurors in the intense environment of a jury deliberation room entails an unacceptable breach of the secrecy that is essential to the work of juries in the American system of justice. To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself.

116 F.3d at 623. Had the court below followed the "no possibility" standard used in the D.C., First, and Second Circuits, the district court's inquiry would have ceased once the possibility of juror disagreement on the merits was raised, and Juror 12 would not have been dismissed.

III. This Case Presents An Ideal Vehicle To Address A Question Of Significant Practical Importance To Federal District Courts

This case presents an opportunity to provide practical guidance to lower courts on an important issue. The decision below rests on a fully developed record, and squarely presents the question in a way that demonstrates the difference between the "no possibility" and "reasonable possibility" standards.

The record is comprehensive, reflecting the trial court's extensive inquiry into the alleged misconduct.

The initial notes from the jury detail their complaints about their fellow juror. The record contains a full transcript of numerous juror interviews—including with Juror 12—arguments by counsel, and a full explanation of the court's reasoning for the ultimate decision to dismiss. The thorough record requires no speculation about what was in the minds of the majority of jurors, Juror 12, or the district court.

That record leaves no serious question that the district court was presented with evidence raising the possibility that Juror 12 simply doubted the sufficiency of the government's case. Interviews revealed that Juror 12's view of the evidence was "different than everybody else's." App., *infra*, 274a. The key exchange that ultimately led to Juror 12's dismissal—that he was "going to hang this jury"—was also fully consistent with a disagreement on the merits. As Juror 12 explained, he was "not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it." *Id*. at 310a. This is precisely the sort of record that shows the difference between the standards. There was evidence pointing both ways. The "reasonable possibility" standard empowered the district court to dismiss Juror 12 based on a weighing of competing inferences. The "no possibility" standard would not have permitted such a dismissal.

This issue has the potential to arise frequently. The nontrivial number of juries that actually hang suggests that strong juror disagreement is commonplace. According to the Administrative Office of the U.S. Courts, hung juries occurred in between 2.1 and 3.0% of federal criminal cases between 1980 and 1997. Paula L. Hannaford-Agor et al., *Are Hung*

Juries A Problem?, The National Center for State Courts 22 (2002). Logic dictates that juries confront serious disagreement in many more cases, and district courts should have clear guidance as to how they should respond when that disagreement boils over into allegations of misconduct.

This issue is important. Requiring juries to work through disagreement—or else fail to reach a verdict—is a hallmark of our system. Holdout jurors tend to adopt the "majority position only when they become convinced, through careful deliberation, of the wisdom of the majority." Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications For and From Psychology*, 20 Current Directions in Psychol. Sci. 63, 65 (2011). A rule that cuts short that deliberative process values expediency over careful deliberation and unanimity. By contrast, a rule that requires juries to fulfill their duty—unless there is no doubt that a juror is attempting to short-circuit it—reaffirms the system's central tenets. Deliberation and unanimity may be difficult; and in some cases the latter may be unachievable. But that is how our system is designed to function.

What is more, dismissing jurors is seldom an appropriate remedy, as courts have developed legitimate, less-invasive techniques to avoid juror deadlock. In *Allen* v. *United States*, for example, this Court authorized trial judges to give an instruction to encourage deadlocked juries to reach a verdict. 164 U.S. 492, 501–02 (1896). So-called *Allen* charges generally consist of three basic instructions:

> "[First,] jurors should deliberate candidly, giving deference to views of other jurors with a disposition toward

> being convinced. Second, jurors in the minority should consider the reasonableness of their convictions when the majority does not concur. Third, no juror should abandon a conviction scrupulously held."

Mark M. Lanier & Cloud Miller III, *The* Allen *Charge: Expedient Justice or Coercion?*, 25 Am. J. Crim. Just. 31, 32 (2000). These instructions direct juries to deliberate further, *without* placing undue pressure on dissenting jurors. *Allen* charges are frequently given, illustrating the common occurrence of enduring jury disagreements, and often yield verdicts. See Sarah Thimsen, Brian H. Bornstein, Monica K. Miller, *The Dynamite Charge: Too Explosive for Its Own Good?*, 44 Val. U. L. Rev. 93, 101 n.52 (2009).

District courts—faced with conflicting decisions from the Courts of Appeals—are presently left with little direct guidance on dealing with ambiguous allegations of misconduct. This Court has not squarely addressed the question. Other resources at the disposal of district court judges do not provide sufficient assistance. For example, the U.S. District Court Judges' Benchbook directs only that a judge may "not inquire as to the numerical split of the jury" and if the judge is "convinced that the jury is hopelessly deadlocked," he may issue his "circuit's approved *Allen*-type charge" or declare a mistrial. BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 2.03 (6th ed. 2013). No decision of this Court offers more meaningful, direct instruction.

This Court should grant certiorari to establish a standard that is workable for judges, yet gives adequate protection to a defendant's right to a

unanimous verdict. Clear guideposts are essential for a workable standard when the stakes are so high. Requiring that a juror be removed only if there is "no possibility" that the juror's view stems from the evidence provides a clear standard that preserves the longstanding principle of unanimity. Rather than delve deeply into the juror's mind, a trial judge investigating alleged juror misconduct should stop the inquiry when any indication arises that the alleged misconduct is in fact a disagreement over the evidence. Such a standard is straightforward and easy to administer quickly, facilitating both fairness to the accused and judicial efficiency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRUCE P. MERENSTEIN
SAMUEL W. SILVER
SCHNADER HARRISON
SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA
22903

MARK T. STANCIL
Counsel of Record
MATTHEW M. MADDEN
ROBBINS, RUSSELL,
ENGLERT, ORSECK,
UNTEREINER & SAUBER
LLP
2000 K Street, NW,
Washington, DC 20006
(202) 775-4500

JOSHUA S. JOHNSON
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave.,
NW, Suite 500 West
Washington, DC 20037
(202) 639-6500

December 2018