No. 18-763

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rule

The government's central contention is that this Court should ignore the circuits' own acknowledgements of the division over the proper standard for evaluating alleged juror misconduct. That is wrong. Contrary to the government's assertion that "[t]he courts of appeals apply essentially the same standard," Br. in Opp. 11, the Third Circuit expressly embraces the "leeway" of the Ninth and Eleventh Circuits' "reasonable possibility" standard as being "superior" to the D.C. and Second Circuits' "no possibility" standard. *United States* v. *Kemp*, 500 F.3d 257, 304 (3d Cir. 2007); see also Pet. App. 58a (relying on *Kemp*).

Indeed, the government reminded the Third Circuit of this division *in this very case*. The government dismissed petitioner's invocation of "varying decisions" by the D.C. and Second Circuits. Gov't C.A. Br. 114. Those other circuits, the government explained, apply a "stricter standard than the one adopted by [the Third Circuit]." *Ibid.* By contrast, it said, the Third Circuit "expressly rejected" those other circuits' "heightened standard," which prohibits juror removal "if 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." *Ibid.* (quoting *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) (double emphasis in government's brief)).

The government acknowledges none of those prior concessions in its opposition to *certiorari*. Its new position that there is no split is meritless. As this case illustrates, the more lax "reasonable possibility" standard makes it far too easy to remove a juror who has a

different view of the evidence. That reality jeopardizes the essential function of jury unanimity, "one of the indispensable features of federal jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring) (emphasis omitted). As with many legal standards, even a single word separating competing formulations makes all the difference—particularly when the word is as capacious as the "reasonable" qualifier at issue here.

The government is further mistaken that petitioner's disagreement with the court of appeals is factbound, and that the outcome would be no different under the "no possibility" standard. The undisputed facts demonstrate at least a *possibility* that complaints about Juror 12 stemmed from his view of the evidence. The very first jury note, after all, complained that Juror 12 would not "change his vote." Pet. App. 254a. That and other facts are closely aligned with those in *Brown*, 823 F.2d 591, and *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997), where the courts invoked the "no possibility" standard to reverse convictions following juror dismissals.

Notably, the government does not dispute the importance of this issue. See Br. in Opp. 17. Instead, it claims this case is a poor vehicle for addressing it because petitioner "failed to argue below" for the no-possibility standard. *Id.* at 18. Not so. Petitioner explicitly invoked the D.C. and Second Circuits' decisions. Pet. C.A. Br. 31–34. The government responded by asking the Third Circuit *not* to adopt its sister circuits' "stricter," "heightened" standard. Gov't C.A. Br. 114. The government won; petitioner lost.

The alleged vehicle defect in that is a mystery, and this well-developed record starkly frames the issue.

The government had it right the first time. The circuits are divided and the issue is squarely presented here.

I. There Is A Circuit Split

The government's Brief in Opposition to this Court argues that the federal circuits undertake the "same analysis" in juror dismissal cases. Br. in Opp. 15. But in this very litigation, the government specifically acknowledged the circuit split and encouraged the Third Circuit to continue to "expressly reject[]" the "stricter" standard that petitioner urges here. Gov't C.A. Br. 114.

The government offers no explanation for its change of heart. Instead, it claims that the circuits apply "consistent" rules because they focus on record evidence, value jury secrecy, and have attempted to harmonize their standards. Br. in Opp. 15–18. These observations are beside the point. Different standards may, and often do, require courts to consider the same factors. The difference comes in how courts judge those factors—here, do they demonstrate "no possibility" or merely "no *reasonable* possibility" that a juror is being targeted for his or her views on the evidence? It is the yardstick used that produces divergent outcomes. Compare *Brown*, 823 F.2d at 594–595, 600 (reversing the dismissal of a juror who *self-reported* his own inability to "discharge [his] duties" and "go along with [the law]"), with *United States* v. *Abbell*, 271 F.3d 1286, 1303–1304 (11th Cir. 2001) (upholding a juror's dismissal when *other* jurors

complained, and the juror's "own testimony on her commitment to following the law was not certain").

That is why numerous federal courts have acknowledged the split. See, *e.g.*, *United States* v. *Polouizzi*, 687 F. Supp. 2d 133, 199 (E.D.N.Y. 2010) (describing the "reasonable possibility" standard as not "in step with current Supreme Court practice on the Sixth Amendment"); *United States* v. *Siam*, 2000 WL 1130084, at *5 (E.D. Pa. Aug. 9, 2000) (describing the Ninth Circuit's standard as "slightly less strict" than the D.C. and Second Circuits' standard). The Ninth Circuit, for example, contrasted the competing standards in *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999). It first quoted the D.C. and Second Circuits' "no possibility" standard, and then stated its own, different standard by adding *and italicizing* the word "reasonable." *Id.* at 1087; see also *United States* v. *Patterson*, 587 Fed. Appx. 878, 896 (6th Cir. 2014) (Cole, J., concurring in part and dissenting in part) (describing the circuit split and urging the "better approach" of the "no possibility standard"). The government's assurances that the standards are "essentially" the same, Br. in Opp. 11, have not persuaded the lower courts.

The government also mistakenly claims that, in *Brown*, the D.C. Circuit used the phrases "any possibility" and "substantial possibility" interchangeably. Br. in Opp. 16. The court of appeals held, however, that the "no possibility" standard governed before observing that the record evidence before it happened to surpass that standard. 823 F.2d at 596 ("[I]f the record evidence discloses any possibility * * *.

The record evidence in this case indicates a substantial possibility.").

The difference between the standards is not merely semantic. Under the "no possibility" standard, the record evidence warranting dismissal must be "unambiguous." See *United States* v. *McIntosh*, 380 F.3d 548, 556 (1st Cir. 2004) ("In the absence of *unambiguous* evidence that a juror is attempting to thwart the deliberative process * * * the wisest course when a juror's views are known is to proceed cautiously.") (emphasis added); *Thomas*, 116 F.3d at 622 ("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 of the alleged nullification.") (emphasis added); *Brown*, 823 F.2d at 597 ("These statements, at the very least, create an *ambiguous* record.") (emphasis added). By contrast, circuits that have adopted the "reasonable possibility" standard liken it to a "beyond a reasonable doubt" standard. See *Kemp*, 500 F.3d at 305 ("Given that the 'reasonable possibility' test we have adopted is similar to the beyond-a-reasonable-doubt standard."); *Abbell*, 271 F.3d at 1302 ("[A] juror should be excused only when no substantial possibility exists that she is basing her decision on the sufficiency of the evidence. We mean for this standard to be basically a beyond reasonable doubt standard.") (internal citation and quotation marks omitted); *Symington*, 195 F.3d at 1087 n.5 ("We believe that the standard of 'reasonable possibility' in this context, like the standard of 'reasonable doubt' in the criminal law generally, is a threshold at once appropriately high and conceivably attainable.").

The circuits translate those distinct concepts into different instructions for evaluating record evidence. Circuits applying the "reasonable possibility" standard let trial judges weigh equivocal record evidence. See *Kemp*, 500 F.3d at 304; *Abbell*, 271 F.3d at 1202; *Symington*, 195 F.3d at 1087.[1] Circuits applying the "no possibility" standard, by contrast, prohibit juror dismissal if credible evidence discloses a possibility that complaints about the juror's conduct stem from his or her view of the evidence. See *Brown*, 823 F.2d at 596; *Thomas*, 116 F.3d at 622. That is the essence of the disagreement: The "reasonable possibility" standard requires judges to evaluate and balance competing evidence; the "no possibility" standard acknowledges that if there is evidence consistent with the juror performing his duties, it is not the province of the trial court to invade the jury's deliberations.

[1] A decision by the District of Columbia's highest court demonstrates the flexibility of the "reasonable possibility" standard. In *Braxton* v. *United States*, the court held that applying that standard meant not "second-guessing" a decision to dismiss a juror despite "less than overwhelming" evidence of juror misconduct. 852 A.2d 941, 948–949 (D.C. 2004). Less than overwhelming evidence would not, however, pass muster under the heightened "no possibility" standard.

II. The Circuit Split Is Squarely Implicated

A. The Government Misconstrues Petitioner's Argument

The government misconstrues petitioner's argument as asking "this Court to second-guess the factual determinations of both the district court and the court of appeals." Br. in Opp. 13. Petitioner is not challenging the district court's findings about the jury notes and testimony. Petitioner argues, rather, that the *undisputed* facts lead to a different conclusion under the "no possibility" standard than the lower courts reached using the "reasonable possibility" standard.

The government nevertheless chides petitioner for failing to explain how the dismissal of Juror 12 here could have satisfied the "reasonable possibility" standard but not the "no possibility" standard. Br. in Opp. 19. That complaint betrays the government's misunderstanding of petitioner's argument. The difference between the standards is not that one standard accommodates "unreasonable or speculative possibilit[ies]." *Id.* at 20. Rather, as explained above, courts applying the "no possibility" standard allow juror dismissal only when triggered by misconduct unambiguously unrelated to disagreement about the strength of the government's evidence. See pp. 5–6, *supra*.

And it is absurd to say this record is unambiguous in showing that Juror 12's actions were not based on his views of the evidence. The initial note from the jury's foreman stated: "[Juror 12] will not, after proof, still change his vote. His answer will not change. * * *

We have zero verdicts at this time all due to Juror Number 12." Pet. App. 254a. Juror 3 later testified: "the rest of the jurors pounced on the gentleman with the * * * dissenting opinion." *Id.* at 281a. Finally, Juror 6 testified that "the majority of us, we can look at it. We can review the evidence and we can come to a conclusion. That's 11 of us. And then you have one person * * * and he just kind of holds out to be seen * * * and just takes a little longer." *Id.* at 288a.[2]

"These statements, at the very least, create[d] an ambiguous record," and, thus "*the possibility* * * * [that the request for Juror 12's dismissal] stemmed from his belief that the evidence was inadequate to support a conviction." *Brown*, 823 F.2d at 597. Only under the more capacious "reasonable possibility" standard—which allows courts to weigh ambiguous evidence, discounting or emphasizing certain pieces of evidence—could the district court dismiss Juror 12 and the Third Circuit affirm.

B. This Case Would Have Come Out Differently In Other Circuits

The government contends that petitioner has "failed to identify any decision from another court of appeals that reached a different result under materially similar circumstances." Br. in Opp. 20. Petitioner identified at least two such cases:

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[2] The government is mistaken that Juror 12's status as the jury's lone dissenter and holdout was based only on "Juror 12's own characterization." Br. in Opp. 14. The undisputed record is to the contrary.

1. The Second Circuit's decision in *Thomas* is one such example. 116 F.3d 606. The *Thomas* jurors lodged complaints about the removed juror that are strikingly similar to the complaints made against Juror 12 here. For starters, both cases involved complaints that the targeted juror would not change his vote and that the disagreement within the jury room was disruptive or unruly:

Thomas	***Fattah***
"[J]uror number five, had, at each time a vote was taken, voted not guilty and had indicated verbally that he would not change his mind." 116 F.3d at 611	"[Juror 12] will not, after proof, still change his vote. His answer will not change." Pet. App. 254a.
Juror 5 was "'hollering' at fellow jurors." *Ibid.*	"[Juror 12] constantly scream [sic] at all of us." *Ibid.*
Juror 5 "had come close to striking a fellow juror." *Ibid.*	"[Juror 12] put his hands on another juror." *Id.* at 270a.

Moreover, the record in both cases demonstrated that the targeted juror was focused on the evidence, albeit to a degree that other jurors found unacceptable:

Thomas	***Fattah***
"Juror No. 5 was discussing the evidence." 116 F.3d at 611.	"[Juror 12] wants to read every detail not once, but twice, three times." Pet. App. 264a. "[Juror 12] pours over the documents very well." *Id.* at 291a.

And yet under the "no possibility" standard, the Second Circuit reversed dismissal of the juror. *Thomas*, 116 F.3d at 623.

The government nevertheless describes *Thomas* as a case with "starkly different facts." Br. in Opp. 20. The only factual difference it points to, however, is that the *Thomas* jurors had deliberated for "more than a day" whereas the jurors in this case were four hours in. *Ibid.* The difference between four hours and eight cannot explain the different results in these remarkably similar cases; the Second Circuit's use of a heightened standard does.

2. The D.C. Circuit's decision in *Brown* is another example that the government wrongly says does not exist. 823 F.2d 591. In that case, like this one, the dismissed juror made statements that, by themselves, might have suggested "just cause" for dismissal. Fed. R. Crim. P. 23(b)(3):

Brown	***Fattah***
"It's the way the R.I.C.O. conspiracy act reads * * * at this point I can't go along with the act." 823 F.2d at 594.	"I'm going to hang this jury. * * * [I]t's going to be 11 to 1 no matter what." Pet. App. 303a.

Those statements led the district court in each case to dismiss the targeted jurors on the ground that the juror refused to follow the law. *Brown*, 823 F.2d at 595 ("[The juror] would not follow the law and thus could not discharge his duty as a juror."); Pet. App. 315a ("[Juror 12 was intent on] hanging this jury no matter what the law is.").

In both cases, however, the record disclosed that, when questioned by the district court, the dismissed juror was focused on the government's presentation of its evidence:

Brown	***Fattah***
"It's the way it's written and the way the evidence has been presented." 823 F.2d at 594.	"My vote was different than everybody else's. * * * They asked me why. I explained to them why. I brang (sic) up the evidence." Pet. App. 274a.[3]

[3] Other jurors confirmed that Juror 12 was considering the evidence. See, *e.g.*, Pet. App. 264a ("[Juror 12] wants to read every detail not once, but twice, three times").

Despite these similarities, *Brown* and the decision below reached opposite conclusions. The governing standard made all the difference: The D.C. Circuit in *Brown* reversed the juror's dismissal because "the record evidence disclose[d] *a possibility* that the juror believe[d] that the government * * * failed to present sufficient evidence." 823 F.2d at 597 (emphasis added); see also Gov't C.A. Br. 114. There is every reason to believe that Juror 12's dismissal would have been reversed had this case been in the D.C. Circuit.

III. This Case Is An Ideal Vehicle

The government does not deny the importance of the question presented. Nor does the government dispute that the decision below rests on a comprehensive and fully developed record. The government also does not claim that petitioner waived or forfeited the question presented, or that it was not pressed *and* passed on below.

Rather, the government contends that petitioner did not argue specifically for the "no possibility" standard instead of the "reasonable possibility" standard in the lower courts, and that this Court should wait for a case in which the defendant did so. Br. in Opp. 18–19. That is baseless.

Petitioner argued below that reversal was necessary under *any* standard. Pet. C.A. Br. 31–34 (citing *Brown*, *Thomas*, and *Symington).* He had little choice; the "reasonable possibility" standard was the law of the Third Circuit. See *Kemp*, 500 F.3d at 304. The government responded, however, by *distinguishing* the "no possibility" circuits' cases as applying "a stricter standard" than that applied by the

Third Circuit. Gov't C.A. Br. 114. The government thus invoked the circuit split *against* petitioner, and prevailed. There is no plausible vehicle defect here arising from any insufficient airing of the question presented below. The government's assertion that a criminal defendant on trial for his liberty must concede defeat under binding circuit precedent, upon pain of forfeiting this Court's review, is deeply misguided. It is doubly so when the government itself acknowledged the split of authority and successfully pressed for affirmation of the "stricter" standard. If anything, the procedural history of this issue counsels strongly in favor of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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