No. 18-8826

In the
Supreme Court of the United States

Omar Christopher Miller,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The question presented is neither "factbound" nor "case-specific." Brief in Opposition ("BIO") at 6, 12. It is purely legal: May prospective jurors conceal facts that objectively suggest bias if they "feel, personally," they can be fair? Pet. App. 3a. The Fifth and D.C. Circuits have said no; the Second Circuit says yes. This disagreement over the meaning of a bedrock constitutional guarantee – the right to trial "by an impartial jury," U.S. Const., Amend. VI – warrants this Court's review.

What's more, the Second Circuit is wrong. Often, "'the adequacy of *voir dire* is not easily subject to appellate review.'" BIO at 7 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality op.)). Here, however, the "defect in [the judge's] question[s] is obvious." *United States v. Littlejohn*, 489 F.3d 1335, 1344-45 (D.C. Cir. 2007). "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury," *Dennis v. United States*, 339 U.S. 162, 171-72 (1950), but bias cannot be proven (or even alleged) if jurors are allowed to conceal facts suggesting it. And that is what happened here. The judge allowed the jurors to conceal being (or having ties to) border agents, police officers, or employees of a prosecutor's office, as well as having strong views on immigration or Jamaicans, if they did not "feel, personally," they would be unfair to Omar Miller— a Jamaican charged with lying to U.S. law enforcement to enter this country.

"No surer way could be devised to bring the processes of justice into disrepute" than, as here, seating a jury after "inquiries designed to elicit the fact of disqualification were barred." *Aldridge v. United States*, 283 U.S. 308, 315 (1931).

ARGUMENT

I. The Circuits are Divided Over the Constitutional Question Here

In the Second Circuit, there are only "three limited circumstances in which 'voir dire may be so insufficient as to call for a reversal,'" and letting jurors who "feel" they are fair conceal facts suggesting bias is not one of them. Pet. App. 3a (quoting *United States v. Lawes*, 292 F.3d 123, 129 (2d Cir. 2002)).

The government says this rule "does not conflict with *United States v. Littlejohn*, 489 F.3d 1335 (D.C. Cir. 2007), or *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988)." BIO at 10. It plainly does.

In the Fifth Circuit, a "juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair." *Scott*, 854 F.2d at 699 (emphasis in original). The Second Circuit allows just that. Under its rule and its decision here, border agents and anti-immigration activists may conceal those facts about themselves and decide the fate of someone charged with visa fraud if they "feel, personally," they can be fair. That does not fly under *Scott*.

Nor does it under *Littlejohn*. The D.C. Circuit, there considering a judge's asking jurors to disclose ties to law enforcement only if "you believe that you, that you personally would be unable to be fair," 489 F.3d at 1341, said the "defect in that question is obvious." *Id*. at 1344-45. Had the jurors simply been asked if they had ties to law enforcement, the defense would have had the "opportunity to explore that potential source of bias." *Id*. at 1345. But given the questioning, ties had to be revealed only if a "juror, in his or her own opinion, believed [they] would make it

impossible to serve impartially." *Id.* That is no good, as "whether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness." *Id.*

The circuits are thus conflicted. Under *Scott* and *Littlejohn*, jurors' concealing facts relevant to bias because they feel they can be fair is incompatible with the Sixth Amendment. The Second Circuit disagrees.

It makes no difference that, as the government notes, the juror in *Scott* concealed facts "in response to a direct question" to the venire, namely "whether any 'close relatives' were 'serving as law enforcement officials.'" BIO at 14. The circuit's rationale for ordering a new trial applies equally to a juror who conceals facts because the judge lets him: he "censored the information. He believed that it was *his* place, and not the place of the court or defense counsel, to determine whether his relations were a bar to jury service." *Scott*, 854 F.2d at 699 (emphasis in original). "A juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair." *Id.* (emphasis in original). Whether a juror conceals facts in defiance of a question or because the judge lets him, the result is the same: there is no adequate "means of discovering actual or implied bias" or "basis upon which the parties may exercise their peremptory challenges intelligently." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994).

In such cases, as here, facts relevant to bias need not be disclosed if jurors consider themselves fair. *See, e.g.,* 2d Cir. Docket No. 17-2140, Entry 57 at S.A. 22 (disclosure of ties to a prosecutor's office required only if the juror decides the ties

"would prevent you from being fair and impartial"); S.A. 23 (disclosure of ties to law enforcement required only if the juror decides the ties "would prevent you from being fair and impartial"); S.A. 24 (disclosure of any other fact suggesting bias required only if the juror decides the fact "would prevent you from being fair and impartial"); S.A. 26 ("[I]s there anything else that I did not mention that makes you feel, personally, that you could not be an impartial and fair juror in this case?").

That is no way to seat a jury, as most people regard themselves as fair and will not tell themselves – or a roomful of strangers – they are incapable of fairness. (Those who say so just to get out of jury duty, as some of Miller's jurors might have, don't really think they can't be fair: they simply don't want to sit through a trial.) Thus, many facts suggesting bias never come to light when disclosure depends on declaring oneself unfair. The government does not disagree. Rather, it cites the fact, as did the Second Circuit, that some of Miller's prospective jurors "'brought numerous relations with law enforcement personnel to the [district court's] attention.'" BIO at 10. Yet neither the government nor the Second Circuit has any answer to the obvious question their point begs: How many jurors did *not* mention such ties or other material facts because they did not "feel, personally," they would be unfair? As the government does not deny, the answer cannot reasonably be said to be zero. *See* Pet. at 17-20.

The government instead notes there is "no substantial indication that any juror was affected by prejudice." BIO at 8. Again, however, the government has no answer to the obvious question: As the seated jurors were not required to disclose

facts suggesting prejudice and did not volunteer any, how could there be an indication of prejudice? To assume Miller's jury was impartial is like assuming a trial was fair because, though the accused was not allowed to cross-examine or present a defense, the government's witnesses did not volunteer any problems with their own testimony. That does not pass constitutional muster for the same reason Miller's *voir dire* does not: the procedure essential to fairness was denied.

The D.C. Circuit therefore vacated Littlejohn's conviction even though he, like Miller, "failed to allege that any member of the jury actually harbored bias." *Littlejohn*, 489 F.3d at 1346. The obvious and fatal defect with the *voir dire* was procedural: the judge "denied Littlejohn 'a full and fair opportunity to expose bias or prejudice on the part of the veniremen.'" *Id.* (citation omitted). *See also id.* at 1347 ("I do not take [language in another case] to establish a requirement that in order to prove a violation of Sixth Amendment rights by an inadequate voir dire or other prejudicial error in jury selection, a defendant must identify an actually biased juror who sat on the case. Such a hurdle seems to me to be impractical and in most cases impossible.") (Sentelle, J., concurring).

The government notes, as does *Littlejohn*, that the D.C. Circuit had earlier found "'the same compound question' not to be reversible error." BIO at 11 (citing *United States v. West*, 458 F.3d 1 (D.C. Cir. 2006)). But that does not mean *Littlejohn* does not conflict with the ruling here. As shown, it does. And if the D.C. Circuit is internally divided over the question here, this Court's review will resolve that discord as well as the one among the Second, Fifth and D.C. Circuits.

The government says the question here is "factbound" and "case-specific," BIO at 6, 12, but that simply is not so. The question presented is "[w]hether the Sixth Amendment right to an impartial jury is violated when prospective jurors are allowed to conceal facts that indicate possible bias – including, as here, ties to law enforcement – if they 'feel, personally,' they can be fair." Pet. at i. That is a purely legal question over which the circuits disagree. The "factbound" and "case-specific" inquiry is whether, if the Sixth Amendment is indeed violated by the approach here, a violation "require[s] reversal" in a particular case. BIO at 11. The Second Circuit did not reach that question, as it found no violation in the first place.

Finally, besides the circuit conflict here, there is also discord between the Second Circuit and state high courts. *See, e.g., Collins v. State*, 205 A.3d 1012, 1026 (Md. 2019) ("[T]he record leaves us in the dark regarding whether any prospective juror had strong feelings about burglary and/or theft, but nonetheless judged him- or herself to be able to be fair and impartial. Critically, by asking compound 'strong feelings' questions, the circuit court failed to elicit significant information, in response to which Collins's counsel could have followed up with further questions, and moved to strike prospective jurors for cause. As this Court explained in *Dingle*, 361 Md. at 21, 759 A.2d at 830, compound questions 'deprive the defendant's counsel of the ability to challenge certain prospective jurors for cause' because compound questions fail to elicit 'information bearing on the relevant experiences or associations of the prospective jurors.'") (internal punctuation and citations omitted); *Edmondson v. Commonwealth*, 526 S.W.3d 78, 85-86 (Ky. 2017) (A

"critical error occurred when [the judge] compounded her questions so as to only obtain affirmative answers if the juror believed he or she was unable to decide the case impartially. In doing so, Mr. Danhauer believed he was qualified to sit on the jury and not disclose the relationship [with a prosecutor]. Yet, it is the trial court's evaluation, not Mr. Danhauer's, that determines if the proneness to bias impedes the ability to serve. . . . Appellant was denied his constitutional right to a fair and impartial jury."); *Brioady v. State*, 396 P.3d 822, 825 (Nev. 2017) (where a juror did not disclose being a crime victim because "she believed [it] 'wasn't relevant to me being an impartial juror,'" the court ordered a new trial because "Juror Three's ability to be impartial was not a determination for her to make" and the information "would have very likely provided a basis for a challenge for cause. . . . As a result of Juror Three's failure to disclose, Brioady was [also] deprived of any opportunity to use his remaining peremptory challenge to excuse Juror Three.").

Only this Court can resolve the conflict over the meaning of the constitutional right here— a right at issue every day in courtrooms across the United States.

II. The Second Circuit is Wrong

The government does not dispute that Miller's jury, deciding the fate of a Jamaican accused of lying to the U.S. government to enter this country, may have included a border agent, a cop, an anti-immigration activist, an employee of a prosecutor's office, and/or someone with particular notions about Jamaicans.

In *Scott*, for example, where the venire was asked plainly if people were "law enforcement officials" or had "close relatives" in that field, 854 F.2d at 698, one man

who was seated on the jury remained silent despite his brother being "a deputy sheriff in the Jefferson Parish Sheriff's Office. That office performed some of the investigation in this case." *Id.* He kept quiet "because he did not think that it would affect his judgment in the case," and the judge "found that [he] 'sincerely' believed that his brother's position would not affect his impartiality as a juror." *Id.* Sincere or not, however, a defendant must have that kind of information: "A juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair." *Id.* at 699 (emphasis in original).

Scott underscores the problem with Miller's *voir dire*. If the brother of a cop whose office investigated the crime can think he will be a fair juror, anyone can. And where, as here, people are allowed to keep quiet about facts that would prompt dismissal for cause, a peremptory strike or, at least, some questioning, *voir dire* stops being "a means of discovering actual or implied bias," *J.E.B.*, 511 U.S. at 143, and devolves into a guessing game. The game, moreover, is rigged to never detect the bias of a juror unaware of it or, as in *Scott*, unwilling to declare it disabling.

There is no meaningful "opportunity to prove actual bias," and thus no enforcement of the "right to an impartial jury," *Dennis*, 339 U.S. at 171-72, when facts indicating bias need not be disclosed.

That is why the weight of authority on this issue, be it this question exactly or those close to it, is so overwhelmingly against the Second Circuit. *See Scott*; *Littlejohn*; *Collins*; *Edmondson*; *Brioady*; *Dennis*; *Aldridge*; *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992) ("'Without an adequate *voir dire* the trial judge's

responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'") (brackets in *Morgan*; citation omitted); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("*Voir dire* examination serves to . . . expos[e] possible biases, both known and unknown."); *United States v. Wood*, 299 U.S. 123, 134 (1936) (When "dealing with an employee of the government, the court would properly b[e] solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him.");*United States v. Segal*, 534 F.2d 578, 581 (3d Cir. 1976) ("[T]he defendants [who were charged with bribing an IRS agent] would reasonably need to know whether any member of the panel or any person in his family had ever been employed by the Internal Revenue Service."); *United States v. Martin*, 507 F.2d 428, 432 (7th Cir. 1974) ("[T]he prospective jurors' relationship with and attitude toward the Government and government agent witnesses, should have been addressed on voir dire. Of the four witnesses called by the United States, three were employees of government agencies. Thus, it was particularly important for the defendant to know of any prejudices the jurors may have had about the Government or about the credibility of government agents.") (footnote omitted); *United States v. Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979) (Where "the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error.");

McDonough, 464 U.S. at 558 (The "bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.'") (Brennan, J., joined by Marshall, J., concurring) (quoting *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring)). *See also United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009) (same); *Conaway v. Polk*, 453 F.3d 567, 587 (4th Cir. 2006) (same); *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (same); *United States v. Heller*, 785 F.2d 1524, 1527 n.1 (11th Cir. 1986) (same).

In the face of these precedents, the government says Miller's *voir dire* was adequate because the judge did inquire about some "potential sources of law-enforcement-related bias." BIO at 8. As noted, however, those questions carried the qualifier that jurors need not answer if they did not feel their job in, or connection to, law enforcement "would prevent [them] from being fair."

As this Court knows, even when a juror is asked outright if he can be fair, "the juror's assurances that he is equal to th[e] task cannot be dispositive." *Murphy v. Florida*, 421 U.S. 794, 800 (1975). *See also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) ("Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations."); *Morgan*, 504 U.S. at 734-35 (rejecting "suggest[ion] that general fairness and 'follow the law' questions . . . could detect those jurors with views preventing or substantially impairing their duties"); *Bedford v. Collins*, 567 F.3d 225, 232 (6th Cir. 2009) (The judge did not "restrict either side to abstract questions about whether a juror would . . . perform

his duties impartially.") (citing *Morgan*, 504 U.S. at 734-35).

As asking jurors directly if they can be fair does not make *voir dire* adequate, neither does letting them decide (silently and for themselves) if they can be fair.

The government notes the judge brought the prospective jurors to sidebar and "made clear to the lawyers that they could request further questions." BIO at 9. The government ignores, however, that when defense counsel did request further questions, the judge refused to ask them. Most notably, after a man volunteered that he "fe[lt] strongly on border patrol," 2d Cir. Docket No. 17-2140, Entry 57 at S.A. at 182, the judge refused even to ask him if he "could be fair." *Id*. at S.A. 183.

The government also repeats the Second Circuit's incorrect claims, *see* BIO at 12-13, that "the evidence against Miller was strong and did not depend on an assessment of law enforcement witnesses' credibility." Pet. App. 4a.

First, the evidence was not strong. Conviction required proof Miller entered the U.S. using a visa "knowing it . . . to have been procured by means of any false claim or statement." 18 U.S.C. § 1546(a). But as detailed, *see* Pet. at 6-8, 20-21, no one qualified to speak to whether Miller *knew* his application had two wrong answers gave evidence: neither Miller nor the man who filled out and submitted the online visa application, Ian Clarke, testified. (And, in any event, the right to "trial by a panel of impartial, 'indifferent' jurors" applies "regardless of the . . . apparent guilt of the offender." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).)

Second, conviction did indeed depend on crediting law enforcement witnesses. Each of the government's six witnesses worked in law enforcement: three in U.S.

law enforcement and three in Jamaican law enforcement. *See* Pet. at 7. The witness the government called in an effort to prove Miller's knowledge was U.S. State Department Officer Andrew Daehne. He read to the jury language on the application form saying an applicant certifies the answers are true, and he told the jury an applicant is "absolutely" responsible even if, as here, a third party prepares and submits the application. The prosecutor then argued in summation that Miller "was warned that his electronic signature certifies that he had read and understood the questions in the application and that his answers were true." Pet. at 8. There was, of course, no evidence Miller "was warned," as neither he nor Clarke testified. But the prosecutor used the testimony of a U.S. government officer to argue Miller must have known of the two wrong answers and thus was guilty. The jury, finding Officer Daehne a credible fellow, agreed.

* * *

This case is not about some stray remark at *voir dire* or the failure to ask a question not needed to reasonably assure an impartial jury.

This case is about a system of jury selection that, by not requiring the disclosure of basic facts relevant to bias, invites the seating of biased jurors who are either unaware of being partial or unwilling to declare themselves so because they do not "feel, personally," they are unfair. The lower courts are conflicted over whether this method comports with the Sixth Amendment. This Court can resolve the discord and, given the foundational importance of the right at stake, it should.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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