No. 21-581

IN THE
Supreme Court of the United States

ALLEN H. LOUGHRY, II,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

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The courts below refused a hearing under *Remmer v. United States*, 347 U.S. 227 (1954), simply because Justice Loughry had no *direct* evidence of a juror's extrajudicial social-media contacts with reporters about his high-profile criminal trial. They did so despite the substantial *circumstantial* evidence that Justice Loughry offered as support for a hearing that would uncover what actually happened. This categorical refusal to consider circumstantial evidence conflicts with the Sixth Circuit's holding in *United States v. Harris*, 881 F.3d 945, 954 (6th Cir. 2018), and with *Remmer* itself, which explained that a hearing can be granted to determine "what actually transpired," 347 U.S. at 229. The petition thus presents an important legal question regarding *Remmer*'s applicability in this case and all others: can circumstantial evidence alone ever be sufficient for a defendant to obtain a *Remmer* hearing?

Critically, the decisions below foreclose *Remmer* hearings in the cases where they are most needed and at a time when they are most critical, given the ever-increasing prevalence of social media and ease of access to prejudicial information. The Government does not contest (nor could it) that social media presents a growing, never-before-seen threat to defendants' Sixth Amendment right to an impartial jury. As this Court has already recognized, the American public's use of smartphones and similar devices is "a pervasive

and insistent part of daily life." *Riley v. California*, 573 U.S. 373, 385 (2014). And social media access on those devices allows highly prejudicial, extrajudicial influences to reach directly into the jury room without leaving any trace.

The Government's main response is to attempt to rewrite the actual question raised by the petition, asserting that the petition presents merely a fact-bound challenge to one particular application of *Remmer*. But that is plainly incorrect. And the Government's effort to avoid the question should only underscore for this Court the need to grant certiorari.

The Government's remaining arguments are unavailing. For example, the Government contends that the courts below did not, in fact, refuse a hearing based solely on the lack of direct evidence. This, however, is easily disproven by a review of the record. The Government also introduces a new obstacle to obtaining a *Remmer* hearing—namely, that a defendant must proffer additional evidence showing that the juror disobeyed the trial court's jury instructions. But this Court has never imposed any threshold requirement based on jury instructions; *Remmer* is an independent protection of a defendant's Sixth Amendment right to an impartial jury.

Contrary to the Government's assertions, this case is an excellent vehicle for the Court to address a critically important question that has resulted in a split in the circuits, a split in the panel below, and a rare equally divided, en banc split of the Fourth Circuit. As a direct appeal of a federal criminal conviction, this case does not present the limitations that arise in habeas proceedings. It also does not require the Court to

decide precisely how much circumstantial evidence is sufficient to obtain a hearing, given that it is difficult to imagine a case with more compelling circumstantial evidence than this one. This Court should grant review.

I. The Government mischaracterizes the question presented.

The question presented in this case is whether any defendant can obtain a *Remmer* hearing based on circumstantial evidence alone. As explained in the petition, the courts below denied Justice Loughry a hearing solely "on the ground that Loughry had not presented *direct* evidence." Pet. 3. This is both inconsistent with *Remmer* itself and creates a "diverg[ence] in the [lower courts] over whether a defendant must proffer direct evidence or may rely solely on circumstantial evidence to justify a hearing." *Id.* at 13. Accordingly, the petition asks this Court to decide "whether circumstantial evidence alone can ever justify a *Remmer* hearing." *Id.* at 26-27.

The Government's primary response is to ignore this question. The Government argues that "petitioner does not object to the legal standard applied by the panel," but rather "contends that it misapplied that standard when it found that petitioner had not raised a credible allegation of extrinsic influence on the jury." Brief in Opposition (BIO) 12. But that is plainly incorrect. The petition presents a question not of the *sufficiency* of the factual evidence but whether the *character* of that evidence—circumstantial rather than direct—is decisive under *Remmer*. That is—in no uncertain terms—a challenge to the legal standard applied by the courts below.

The Government's clear effort to avoid, rather than respond to, the question presented should only underscore for this Court the numerous reasons for granting review.

To begin, the decisions below are inconsistent with *Remmer* itself. *Remmer* explicitly states that a hearing may be granted to determine "what actually transpired," which plainly contemplates that a defendant may obtain a hearing based on circumstantial evidence alone. 347 U.S. at 229. If the defendant had direct evidence of the extrajudicial contact, there would be no need to look into "what actually transpired." The Government never acknowledges, much less explains, this language in *Remmer*.

Furthermore, in direct conflict with the decisions below, the Sixth Circuit has granted a *Remmer* hearing based solely on circumstantial evidence that a juror obtained extrajudicial information about a defendant online. *United States v. Harris*, 881 F.3d 945, 954 (6th Cir. 2018). In *Harris*, the Sixth Circuit *required* a district court to hold a hearing even though the defendant had only shown it "possible" that a juror was exposed to unauthorized communication. In the decisions below, the Fourth Circuit has taken exactly the opposite approach, refusing a hearing because Justice Loughry had only shown "the *possibility* that Juror A saw the reporters' tweets about the trial." App. 19 (emphasis in original).

In addition, smartphones and social media have vastly increased the likelihood that a defendant lacks direct evidence of a prejudicial, extrajudicial contact. Jurors can now receive a curated feed of information

about a case through a pocket-sized telephone. And direct evidence of that extrajudicial contact exists only where the juror publicly interacts with social media about the case, such as by commenting or sharing it with others, or in the far-fetched scenario where a third party looked over the juror's shoulder the moment a tweet or other social media post was on the screen. In any other scenario, there is absolutely no public trace, and therefore no direct evidence, of the juror's encounters with the harmful content. Under the Fourth Circuit's judgment and in the Government's view, a hearing is not permitted in the latter (far more common) scenario, regardless of how much circumstantial evidence the defendant proffers. And yet a juror who leaves no trace of reading a prejudicial tweet or social media post poses at least the same risk to a defendant's fair trial as one who publicly "liked" the tweet or post.

Indeed, this case presents a prime example of the inability to gather *direct* evidence in the social media context despite the availability of ample and undisputed *circumstantial* evidence. Before trial, Juror A "liked" and "retweeted" numerous tweets and a news article criticizing Justice Loughry. This included a tweet that she read, liked, and retweeted that was highly critical of Justice Loughry and linked to an article that reported allegations central to the federal indictment and alleged that he had "clearly lied" and misled the public. App. 45 to App. 46. During trial, she accessed Twitter multiple times and "followed" two reporters who tweeted about the case 73 times between them. One of these reporters both was a subject of the trial (his interview of Justice Loughry was published

to the jury) and commented on the strength of the evidence, tweeting the day before deliberations began: "There seems to be quite a bit of evidence against the Justice." App. 34. It was undisputed that Juror A used Twitter on at least two days during the six-day trial, and other social media on additional trial days. App. (Diaz, J., dissenting in part). After the jury reached a verdict, Juror A contacted this reporter's television station for an interview. App. 47.

Accordingly, this Court should grant certiorari to answer a legal question that will impact the rights of innumerable defendants: is circumstantial evidence alone ever sufficient to obtain a *Remmer* hearing?

II. The Government's other arguments also fall short.

Beyond attempting to simply ignore the question presented, the Government also offers a few other passing arguments against review. All fail.

First, according to the Government, the Fourth Circuit panel majority did not "preclude[] a defendant from relying on 'circumstantial evidence' of improper contact with a juror." BIO 11. But it clearly did. The panel majority specifically faulted Justice Loughry for presenting no direct evidence that Juror A actually read the reporters' tweets. See App. 16 ("But there is no evidence that Juror A read that tweet."). It criticized Justice Loughry for showing only that Juror A "*could have seen* the reporter's tweet on October 9 or other tweets by the reporters," and held that his evidence was insufficient because it showed a mere "*possibility* that Juror A saw the reporters' tweets about the trial." App. 16, 19 (emphasis in original).

Judge Diaz homed in on this issue in his dissent. He rejected the demand by the district court and the panel majority that Justice Loughry "prove with certainty that Juror A saw the reporters' tweets," App. 37, and agreed instead that "it's impossible to obtain direct evidence of which tweets Juror A saw without a hearing," App. 36. In Judge Diaz's view, the majority's inflexible rule put it squarely at odds with the Sixth Circuit, which concluded in *Harris* that the "mere possibility of inappropriate communication with a juror was enough to warrant a *Remmer* hearing." App. 37.

Second, the Government argues that the Sixth Circuit's decision in *Harris* is "readily distinguishable," but its reasoning is unpersuasive. The Government argues that the circumstantial evidence in *Harris* clearly "suggested that the juror 'must have discussed the trial with'" his girlfriend. BIO 11 (quoting *Harris*, 881 F.3d at 952). But the Government ignores the *multiple inferences* the Sixth Circuit made from the circumstantial evidence. The court assumed that because the girlfriend had viewed one website (LinkedIn), she also: (1) may have viewed a different website (Google), (2) may have read information on that second website, and (3) may have communicated what she read on that second website to the juror. The circumstantial evidence here is plainly far stronger. Unlike in *Harris*, Justice Loughry offered numerous pieces of evidence with just one missing link that he sought to confirm in the hearing: whether Juror A saw any of the tweets about the case that were undoubtedly in her Twitter feed while she was indisputably on social media during trial.

Third, the Government argues that there is no circuit split here because "[a]n affirmance by an equally divided court is not entitled to precedential weight and thus cannot create a circuit conflict," and the panel opinion was vacated. BIO 10. But it is well established that this Court reviews judgments, not opinions. *Jennings v. Stephens*, 574 U.S. 271, 277 (2014) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*."); *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). There is a conflict here because the Fourth Circuit's judgment denied Justice Loughry a *Remmer* hearing that he would have received in the Sixth Circuit under *Harris*.

Indeed, this Court has previously reviewed a lower court when the en banc court was equally divided. See, e.g., *Hutto v. Davis*, 454 U.S. 370, 372 & 388 (1982) (per curiam & Brennan, J., dissenting); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 382 (1982); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969). And while the cases cited by the Government recognize that "[a]n affirmance by an equally divided court is not entitled to precedential weight," none hold that such an affirmance "cannot create a circuit conflict." BIO 10. To the contrary, the Court has granted certiorari to resolve a circuit conflict that included, on one side of the split, a decision of the en banc Eighth Circuit affirming by an equally divided vote. See *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981); *Fair Assessment*

in Real Estate Ass'n, Inc. v. McNary, 622 F.2d 415 (8th Cir. 1980) (per curiam).

Fourth, the Government contends that review is not warranted because Justice Loughry failed to proffer direct evidence showing that Juror A disobeyed the district court's instructions to avoid extrajudicial contacts. BIO 9, 11. But there is no such requirement for a *Remmer* hearing. District courts give instructions in every case, and *Remmer* exists as an additional and independent protection of "the guarantee of an impartial jury that is vital to the fair administration of justice," free from "various external influences that can taint a juror." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1893 (2016) (citing *Remmer*, 347 U.S. at 229); *Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").[1]

The Sixth Circuit rejected *precisely* this argument in *Harris*. There, the district court refused a *Remmer* hearing because it had "admonished the jury not to

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[1] *Remmer* is not alone in serving as an independent safeguard of a defendant's Sixth Amendment rights. For example, this Court has provided avenues for relief where a juror fails to answer a voir dire question honestly even though the juror was instructed to be forthcoming, *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), and where a juror is discovered to be actually biased against the defendant, *Smith v. Phillips*, 455 U.S. 209, 215 (1982). These protections all work toward the same critical goal—impartiality—but operate independently of each other and any instructions given.

discuss the case with others," and the juror in question "responded in the negative" when the court inquired about extrajudicial communications. 881 F.3d at 953 & n.4. But the Sixth Circuit held that these facts were not sufficient to reject a *Remmer* hearing because, despite the juror's attestations, "it is quite possible" that the juror ignored the court's admonishment. *Id.* at 953.

The Government is thus also wrong when it suggests that the antidote to the dangers of social media is simply to give additional jury instructions. BIO 13. *Remmer* exists independently of jury instructions because jurors sometimes do not adhere to those instructions. Jury instructions are important, but they do not negate the need for a hearing when there is substantial evidence—circumstantial or direct—that a juror has had a prejudicial, extrajudicial contact.

III. This case presents an excellent vehicle to reaffirm *Remmer*'s vitality in the digital age.

This case comes to the Court at the right time and in the right posture to decide the question presented.

Smartphones and social media have made *Remmer* more important than ever before. Pet. 13, 19-21. As noted, the Government does not (and cannot) dispute the dangers to criminal trials posed by social media. This Court, of course, is well familiar with the new challenges posed by those technologies, having confronted them in *Dietz v. Bouldin*, 136 S. Ct. 1885, 1893 (2016), *Riley v. California*, 573 U.S. 373, 385 (2014), and most recently during arguments in *United States v. Tsarnaev*, No. 20-443. And the Second, Fourth, and

Sixth Circuits have all specifically faced *Remmer* questions in the social-media context in recent years. It goes without saying that those dangers will only worsen and intensify in the coming years.

This case also presents an ideal posture to decide the question presented. This direct appeal from a federal criminal trial presents the rare opportunity where the *Remmer* issue is squarely presented, unadorned with the fetters of habeas review.[2] Moreover, the facts tee up the issue cleanly. It is undisputed that there is no direct evidence of external contact. At the same time, it is hard to imagine a case with more compelling circumstantial evidence of extrajudicial contact. As the panel dissent observed, Loughry provided "the most he could possibly offer without the opportunity to conduct discovery or question Juror A" on the ultimate question. App. 36 (Diaz, J., dissenting).

[2] The Government notes that the request for a *Remmer* hearing was made in a reply brief to the district court, BIO 4, but there is no serious dispute about whether the issue was adequately raised and preserved below, as it was fully "passed upon" by the district court and the Fourth Circuit. *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (issue is preserved if it is pressed or passed upon below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (same).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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