No. _____

In the

Supreme Court of the United States

ALBERT PINEDO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for a Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Albert Pinedo was charged with attempted enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). Mr. Pinedo argued that he was engaged in a consensual sexual fantasy involving age roleplay with an adult pretending to be a minor—a common coping mechanism for minor-attracted persons to avoid acting on their sexual desires and committing a crime.

Jury selection for Mr. Pinedo's trial proved difficult because so many prospective jurors had strong, negative feelings about the allegations and even the idea of homosexual fantasies involving age roleplay. Many of those venire members were excused, except for two. Before oral *voir dire*, the two prospective jurors privately filled out a 69-question form and indicated they could be fair and impartial by checking the appropriate spaces next to four generic fairness-related questions. During oral *voir dire*, however, the two prospective jurors made several statements expressing their actual biases against not only the subject matter of the case, but also Mr. Pinedo's anticipated defense. But neither juror gave a subsequent unequivocal commitment to remain fair and impartial—at most, one juror said he would *try* to be as impartial as he could be, and the other equivocated each time she was asked her about her ability to be fair. The defense moved to excuse both

jurors for cause, but the district court denied the challenges, relying mostly on the jurors' checkmarks on generic fairness-related questions on the pre-oral *voir dire* written questionnaires. The two jurors were seated and ultimately decided to convict Mr. Pinedo. In a split decision, the Ninth Circuit affirmed.

These circumstances give rise to the following question presented:

Whether the Sixth Amendment requires a prospective juror to make an unequivocal commitment to impartiality *after* revealing their actual bias.

Statement of Related Proceedings

- *United States v. Albert Pinedo,*
  No. 21-50242 (9th Cir. May 7, 2024)

- *United States v. Albert Pinedo,*
  No. 2:20-cr-00148-GW-1 (C.D. Cal. Oct. 28, 2021)

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Albert Pinedo petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his conviction and sentence.

I. OPINIONS BELOW

The Ninth Circuit issued an unpublished order affirming Mr. Pinedo's conviction and sentence, and subsequently denied Mr. Pinedo's petition for panel rehearing and rehearing en banc. (App. 1a–17a, 22a) The district court denied Mr. Pinedo's for-cause challenges to Jurors 17 and 30 on July 20, 2021. (App. 18a–21a)

II. JURISDICTION

The Ninth Circuit issued its order affirming Mr. Pinedo's conviction on May 7, 2024. (App. 1a) Mr. Pinedo filed a petition for rehearing, which the Ninth Circuit denied on August 29, 2024. (App. 22a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Undersigned counsel acknowledges that this petition is untimely. For several reasons, however, he respectfully requests that the Court

retroactively grant his application for an extension and consider this petition. Mr. Pinedo's cert petition was originally due on November 27, 2024. On November 17, 2024—*i.e.*, ten days before the due date—counsel electronically filed an application for an extension of time to file Mr. Pinedo's cert petition ("Application"). On or about December 11, 2024, when counsel checked the status of the Application, he realized paper copies of the Application had not been sent to the Court. Counsel promptly sent the paper copies to the Clerk's Office. Because counsel had not received any ruling on the Application, he checked the status of the Application on January 24, 2025. The note on the Court's electronic-filing website indicated that the Application had been rejected on January 8, 2025, and that the reason for rejection would be sent in a separate email. Counsel never received that email, so he contacted the Clerk's Office, which promptly sent him a pdf of a letter dated January 8, 2025, it had mailed to counsel's office in Los Angeles. Counsel did not receive that letter because he had been out of the office due to a family medical emergency in another state and the wildfires in Los Angeles.

Per the instructions in the Clerk's Office's January 8, 2025 letter, counsel respectfully submits the instant petition for a writ of certiorari on behalf of Mr. Pinedo promptly after receiving notice of the Clerk's letter.

III. CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment to the United States Constitution

> 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.

IV. STATEMENT OF THE CASE

A. Trial Proceedings

In February 2020, Albert Pinedo published a post on Craigslist seeking a sexual encounter with "young men" and "twinks."[1] (App. 2a; 5-ER-1059)[2] Special Agent Paul Radlinski of Homeland Security Investigations in Los Angeles responded to Mr. Pinedo's post as a fictitious 14-year-old named "Robby." (App. 2a) Over the next month, Mr. Pinedo and "Robby" exchanged numerous emails and made plans to meet to engage in sexual activity. (App. 2a) When Mr. Pinedo arrived for the meeting, Mr. Pinedo was arrested and subsequently charged with one count of attempted enticement of a minor to

[1] "Twink" is a slang term for a gay male who looks younger. (4-ER-696-97)

[2] Record citations are to the excerpts of record filed in the Ninth Circuit Court of Appeals in *United States v. Pinedo*, No. 21-50242 (9th Cir.).

engage in sexual activity, in violation of 18 U.S.C. § 2422(b). (App. 2a) Mr. Pinedo argued that he was engaged in a consensual sexual fantasy involving age roleplay with an adult pretending to be a minor—a common coping mechanism for minor-attracted persons to avoid acting on their sexual desires and committing a crime. (4-ER-749-50, 950-53)

The process for selecting a jury proceeded as follows: Prospective jurors first "privately filled out a 69-question form, which was formulated by the parties and included questions specific to the case." (App. 3a) The last four questions on the questionnaire were generic fairness-related questions that asked about the juror's commitment to impartiality. (SER-13-14, 29-30) The jurors signed the questionnaires under penalty of perjury and declared their answers were true to the best of their knowledge. (App. 3a) After an initial review to remove disqualified jurors, the remaining venire members were brought into court individually for oral *voir dire*. (App. 3a)

Prospective juror #17 ("Juror 17"), "a father of two young children" had a "visceral reaction" to the "disturbing subject matter" of this case. (SER-5; 3-ER-457) He checked "yes" on the question asking if there was anything about the nature of the case that would interfere with his ability to be impartial. (SER-5) He wrote that "sexual fantasy . . . when children are involved (real or imagined) it feels wrong." (SER-7) (SER-8) At the end of the questionnaire,

Juror 17 placed checkmarks agreeing with the generic fairness-related questions. (SER-13-14)

During oral *voir dire*, the court asked Juror 17 if he could put aside the aforementioned feelings about the case, he answered: "Sure. Yeah, I would like to think I could. *** I really don't know how to answer these questions. I would like to think—I don't know, I don't know. It's so hard with like— *** In a way, it's really hard for me to answer. I don't know." (3-ER-457-58)

Defense counsel asked Juror 17 if he still believed the nature of the case interfered with his ability to be impartial, as he indicated on his questionnaire, and Juror 17 responded: "I would like to think I could be impartial, but from the reaction I got from reading the statement about the case, I was trying to be honest about the reaction I felt[.]" (3-ER-460) Juror 17 then said: "[M]y initial reaction was, well, then why are we here, in a way. My first reaction, was well this doesn't, why are we here, if he was caught, and busted and things[.]" (3-ER-462) Counsel asked if Juror 17 meant why was the defendant not pleading guilty, and he answered, "Yeah. Like, why is there a trial, honestly." (3-ER-462)

Juror 17 then discussed his experience with friends who had been victims of sexual assault, one of whom was a close male friend who had been abused in Catholic school. (3-ER-462-63) Juror 17 "guess[ed]" those experiences "probably" would "weigh heavily" on him. (3-ER-464)

Unprompted, Juror 17 then mentioned how his mother would "pull [him] away from the pervert in church" and how he and his wife were fearful of strangers lurking on the internet because they had "two small children." (3-ER-462-63) Although Juror 17 understood this trial was not about them, he "[could]n't imagine things like that wouldn't be on [his] mind somewhat" or "how heavy it would weigh on [his] mind or not." (3-ER-464-65)

Counsel then asked Juror 17 if he were in Mr. Pinedo's position, how he would feel listening to his comments, and Juror 17 said, "I don't think I would be stoked, but, I would let him know that as a citizen of this country, I would do my best to try to be as impartial as I can be." (3-ER-465)

The defense moved to excuse Juror 17 for cause. (App. 19a) The court said, "I recall in the end, he said he could." (App. 19a) Counsel reminded the court that Juror 17 said he "would do [his] best." (App. 19a) The court responded, "Exactly. Next[,]" thus denying the defense's for-cause challenge. (App. 19a) Juror 17 was ultimately seated on the jury. (4-ER-635)

Prospective juror #30 ("Juror 30"), a 52-year-old mother of two teenagers, similarly had very strong, negative feelings about the subject matter of this case. On her questionnaire, she wrote that "[a]dult[s] should not be engage[d] in coping strategies such as fantasy with minors." (SER-24) (emphasis in original) She agreed with three of the generic fairness-related questions at the end of the form, but checked "yes" on the question asking if

there was anything she wanted to bring to the court's attention that may affect her ability to be fair and impartial. (SER-29-30)

During oral *voir dire*, defense counsel questioned Juror 30 about her feelings about sexual fantasies involving minors. Juror 30 said: "I don't think adults should be, but— *** Well, a child is so innocent, why would you want to think about kids—innocent kids like that? *** I have two teenagers. *** I have nieces and nephews, they are teenagers. I do not want people to see them and fantasize about that." (3-ER-521) Counsel asked Juror 30 whether she could keep an open mind, or whether the subject matter was "too strong" for her to put aside her feelings, and Juror 30 answered, "Honestly, I think it's too strong for me. *** I will try to, but I don't know." (3-ER-520-22) Counsel tried to clarify Juror 30's feelings about the case, asking "[s]o, it sounds like even though you want to be, you don't think you could be; is that right, could be fair?" (3-ER-523) Juror 30 answered: "I don't know what to say *** Probably I wouldn't be a good juror." (3-ER-523)

The court then attempted to rehabilitate Juror 30. The court said, "Well, let me ask you, you don't think you could be fair, is it a possibility you could be fair?" and Juror 30 answered, "I will try my best." (3-ER-523)

The government also attempted to rehabilitate Juror 30, but by that point, she was so flustered and felt "pressure[ed]," and she concluded by saying: "Well, I will try my best." (3-ER-524)

The defense moved to excuse Juror 30 for cause. (App. 20a) The government countered that, in her questionnaire, Juror 30 said she could be fair and impartial, and the government "[thought] there were a handful of leading questions both ways and she would respond accordingly[.]" (App. 21a) The government argued that there was no reason to believe Juror 30 "stepped off of [her] position" in the questionnaire. (App. 21a) The court agreed with the government and denied the for-cause challenge. (App. 21a) Juror 30 was seated on Mr. Pinedo's jury. (4-ER-635)

Following trial, the jury found Mr. Pinedo guilty. (App. 2a) The court sentenced Mr. Pinedo to ten years in prison and five years of supervised release. (App. 2a)

B. Direct Appeal Proceedings

On appeal, Mr. Pinedo argued, *inter alia*, that the district court abused its discretion in declining to excuse Jurors 17 and 30 for cause. (App. 2a) The majority found the district court did not abuse its discretion in empaneling either juror. (App. 4a, 7a) Regarding Juror 17, the majority noted that he "answered three times that he would be impartial"—referring to the checkmarks on the generic fairness-related questions on the questionnaire. (App. 4a) The majority mentioned just two of Juror 17's statements during oral *voir dire* and found that "I would like to think I could" and "I would do my best to *try* to be *as impartial as I can be*" "clear[ed] the threshold set by

our precedent." (App. 4a) (emphasis added) The Ninth Circuit precedent the majority cited, however, held that "I'll try," "I might," "I would want to," and "I would try to be fair," were *not* sufficient to meet the demands of the Sixth Amendment and required reversal. (App. 4a)

Regarding Juror 30, the majority acknowledged she "made equivocal statements during voir dire"—though it mentioned only a couple of statements. (App. 4a) The majority nevertheless relied on Juror 30's "three" "unequivocal commitment[s] to be impartial . . . in her juror questionnaire"—again, referring to the checkmarks. (App. 5a) The majority did not believe her expressions of bias or equivocal statements during oral *voir dire* wavered from those checkmarks. (App. 5a) The majority instead considered Juror 30's problematic statements to be mere responses to "tough questions." (App. 5a)

Judge Bennett authored a lengthy dissent. He believed the court made a clearly erroneous factual finding "in its statement of why it was rejecting the challenge to Juror 30." (App. 11a) Judge Bennett acknowledged Juror 30's questionnaire responses, as well has her multiple expressions of bias during oral *voir dire*. (App. 14a) Then, Judge Bennett discussed the court's failed attempt to rehabilitate Juror 30—on the one hand, recognizing she "*[did]n't think [she] could be fair*," and on the other asking if there was "*a possibility* [she] could be fair." (App. 15a) (emphasis added by Judge Bennett) "Juror 30 responded, 'I will try my best,'" which Judge Bennett determined was

insufficient under the Ninth Circuit's precedent. (App. 15a & n.3-4) The district court's finding that Juror 30 never wavered from her written responses, therefore, was a clear factual error. (App. 16a-17a) Even though Judge Bennett believed "[t]he evidence against [Mr. Pinedo] was overwhelming," he would have reversed and remanded for a new trial, because the Constitution does not tolerate even one biased juror to be empaneled, "[r]egardless of the crime charged and the evidence against him[.]" (App. 17a)

Mr. Pinedo filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied. (App. 22a) Judge Bennett would have granted the petition for panel rehearing and rehearing en banc. (App. 22a)

Mr. Pinedo now petitions this Court for a writ of certiorari to address important questions regarding the fundamental right to an impartial jury.

V. REASONS FOR GRANTING THE WRIT

A. This Court Should Decide Exceedingly Important Questions Regarding the Fundamental Right to a Trial by an Impartial Jury.

The Sixth Amendment protects the defendant's right to an impartial jury. U.S. Const. amend. VI; *Skilling v. United States*, 561 U.S. 358, 377–78 (2010). This right is one of the bedrock principles of the American criminal justice system. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) (right to trial by impartial jury "is fundamental to the American scheme of

justice") (internal quotation omitted); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); *Connors v. United States*, 158 U.S. 408, 413 (1895) (same). The presence of even one biased juror on a jury violates the Sixth Amendment, requiring reversal and remand for a new trial. *See Parker v. Gladden*, 385 U.S. 363, 365 (1966) (per curiam) (defendants are "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"); *Rose v. Clark*, 478 U.S. 570, 577–78 (1986) (noting that juror-bias issues are not subject to harmless-error analysis).

"*Voir dire* examination serves to protect [the right to an impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). Many district courts use written questionnaires that prospective jurors fill out before oral *voir dire* to serve as an initial screening of the venire members and a basis for court- and attorney-led questioning during oral *voir dire*. *See, e.g.*, *United States v. Tsarnaev*, 595 U.S. 302, 308–09 (2022); *Skilling*, 561 U.S. at 370–75. Oral *voir dire* is critical because a "juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221–22 (1982)

(O'Connor, J., concurring). *Voir dire* examination, therefore, is essential to uncovering a prospective juror's bias. If a biased prospective juror does not unequivocally commit to laying aside their bias and deciding the case based solely on the evidence at trial, they must be excused. *See Irvin*, 366 U.S. at 723 ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").

The circumstances of this case present exceedingly important questions regarding the Sixth Amendment right to an impartial jury that can arise in any criminal jury trial in this country. Here, prospective jurors filled out a 69-question pre-oral *voir dire* written questionnaire. (App. 3a) The last four questions were generic fairness-related questions that asked about the juror's commitment to impartiality. (SER-13-14, 29-30) Jurors 17 and 30 placed marks next to "Yes" or "No" on those generic questions indicating, generally, that they believed they could be fair and impartial. (SER 13–14, 29–30)

Subsequent questioning during oral *voir dire* revealed, however, that Jurors 17 and 30 harbored actual biases not only toward the subject matter of the case, but also Mr. Pinedo's anticipated defense. (*See generally* 3-ER-457–66, 518–24) After these biases were uncovered, neither Juror 17 nor Juror 30 gave an unequivocal commitment to set aside their biases and remain fair and impartial. At best, the prospective jurors gave aspirational statements indicating they would try to be as fair as they could be, and at worst,

questioned why there was even a trial or admitted they probably would not be a good juror. (3-ER-460–62, 464–65, 523) Tellingly, both the district court and the majority of the Ninth Circuit panel relied on the jurors' checkmarks next to the generic fairness-related questions on the written questionnaire to find they unequivocally committed to remain fair and impartial, ignoring their later-revealed biases and failures to provide subsequent unequivocal commitments to remain impartial. (App. 4a–5a, 19a–21a)

In light of these circumstances, this Court should grant the writ to decide the important questions presented in this case. First, given the district court's and the Ninth Circuit's heavy reliance on the pre-bias written questionnaires to excuse later expressions of bias, this Court should decide whether prospective jurors who express actual biases must make a *subsequent* unequivocal commitment to remain fair and impartial to satisfy the demands of the Sixth Amendment. *See, Skilling*, 561 U.S. at 459 n.22 (Sotomayor, J., concurring in part and dissenting in part) (concluding lack of "yes" checkmarks on a question about preconceived opinions about the defendant was "of minimal significance," where possible sources of bias arose *after* questionnaires were submitted); *see also Greenwood*, 464 U.S. at 554 (noting purpose of *voir dire* examination is to expose prospective jurors' known and unknown biases). Without such a requirement, there can be no assurance that the high demands of the Sixth Amendment are met.

Otherwise, we would allow jurors to be empaneled based on their noble aspirations to be fair and impartial, before they may even be aware of the feelings, beliefs, or experiences that could affect their ability to be impartial.

Second, the Court should decide whether the Ninth Circuit majority's almost-exclusive reliance on mere checkmarks on a written questionnaire—to the exclusion of later expressions of bias and failure to follow up with commitments to set aside those specific biases and remain fair and impartial—conflicts with this Court's precedent requiring lower courts to consider the record as a whole rather than select portions of it. *See Skilling* 561 U.S. at 399. Otherwise, like here, there is a risk that courts will cherry-pick portions of the record to justify the seating of a biased juror.

Finally, this Court should provide guidance to lower courts about whether aspirational statements, such as "I'll try to be fair," or "I'd like to be fair," satisfy the Sixth Amendment's requirement that a prospective juror's commitment to fairness and impartiality be unequivocal.

Without this Court's intervention, the Ninth Circuit majority's decision in this case—though unpublished—sets forth a blueprint that the government and courts are free to follow and can eviscerate the right to an impartial jury. Indeed, so long as a prospective juror checks "yes" next to a generic fairness-related question on a written questionnaire, subsequent expressions of bias do not matter. This Court should grant the writ.

B. This Case Presents a Perfect Vehicle to Address the Question Presented.

This case presents an excellent opportunity for this Court to decide important questions about the Sixth Amendment right to an impartial jury. The questions are squarely presented and the record is sufficiently developed for the Court to clarify the relevant legal principles. Crucially, because this juror-bias issue is not subject to harmless-error analysis, *see Rose*, 478 U.S. at 577–78, the Court need not concern itself with the trial evidence and can focus exclusively on the legal issues presented. *See also Irvin*, 366 U.S. at 722 (jurors must commit to being impartial and deciding cases based on the evidence, "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies").

VI. CONCLUSION

For the foregoing reasons, Mr. Pinedo respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: January 27, 2025

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