**No.**

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**IN THE**
# Supreme Court of the United States

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**JONATHAN DAVIS,**

**PETITIONER,**

**v.**

**UNITED STATES OF AMERICA,**

**RESPONDENT.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Sixth Amendment guarantees the right to an impartial jury. Over 115 years ago, this Court recognized that "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias[.]" *Crawford v. United States*, 212 U.S. 183, 196 (1909). Today, jurors who are disqualified despite their own protestations of impartiality are said to be impliedly biased or biased as a matter of law.

This Court's decision in *Smith v. Phillips*, 455 U.S. 209 (1982) created widespread confusion about the modern viability of the implied bias doctrine and its relationship to the Sixth Amendment. This case presents the following questions:

I. Does the Constitution require selected jurors to be free from implied bias?

II. What standards should apply when assessing an implied bias claim?

III. Did the Eighth Circuit err in concluding that a juror was not impliedly biased when he had been the victim of a crime nearly identical to the crime alleged at trial?

## PARTIES TO THE PROCEEDINGS

All parties are named in the case caption.

## RELATED PROCEEDINGS

*United States v. Davis*, No. 23-3430 (8th Cir. Jan. 14, 2025)

*United States v. Davis*, No. 4:21-cr-00167-HEA (E.D. Mo. Oct. 19, 2023)

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## TABLE OF AUTHORITIES

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Jonathan Davis respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The panel opinion of the court of appeals is reported at 126 F.4th 610 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-14a. The Eighth Circuit's order denying rehearing and rehearing en banc is reprinted at Pet. App. 15a.

## JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

The Eighth Circuit had jurisdiction under 28 U.S.C. § 1291. It entered its opinion and judgment on January 14, 2025 and denied Petitioner's motion for rehearing and rehearing en banc on March 4, 2025. Therefore, this petition is timely under Sup. Ct. R. 13.1 and 13.3.

## RELEVANT PROVISIONS

The Sixth Amendment 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[.]" U.S. Const. amend. VI.

## INTRODUCTION

This case presents a set of exceptionally important questions regarding the scope of the Sixth Amendment and the standards used to address claims of implied juror bias. "Implied bias" is bias conclusively presumed as a matter of law; in other words, bias that is attributable to a prospective juror regardless of his or her actual partiality. It is a doctrine which stems from the common-sense notion that certain classes of jurors are highly unlikely to be impartial—close family members of the litigants, for example, or those with a pecuniary interest in the outcome in the case. Those jurors must be excused for cause, even if they claim to be impartial.

Despite the doctrine's common-sense utility, its impressive historical pedigree, and its clear prominence within this Court's jurisprudence, lower courts have expressed skepticism about the continued viability of implied bias challenges. There is a deeply entrenched circuit split regarding the appropriate standard of review for implied bias claims. And, when these claims *are* reviewed on the merits, circuit courts commonly assess whether the case involves a "extreme" situation, an improperly restrictive rule inconsistent with an original understanding of the Sixth Amendment.

This case presents a unique opportunity to address the disagreement over when it is appropriate to hold that a juror is impliedly biased. Petitioner Jonathan Davis was indicted for the armed robbery of a restaurant; over objection, a juror who had been the victim of a near-identical robbery was seated and allowed to take part in deliberations. On appeal, Mr. Davis argued that the District Court had violated his Sixth Amendment rights by declining to excuse the juror for cause. The Eighth Circuit affirmed the conviction, applying an abuse of

discretion standard and concluding that the circumstances were not extreme enough to warrant a new trial. A petition for rehearing and rehearing en banc was denied.

The Eighth Circuit's decision was wrong. To win a challenge for cause based on implied bias, litigants should not have to demonstrate that extreme circumstances are at play. The better test—the time-honored test—would require the trial court to determine whether the average person in the juror's position could be impartial. This determination should be reviewed de novo, a standard which recognizes that the heart of the issue involves a legal determination, not a factual one.

Clarification of the implied bias standard would benefit litigants in both criminal and civil cases. It would resolve deeply entrenched disagreements which have been brewing for several decades. And, most importantly, it would guard against the erosion of the Sixth Amendment.

## STATEMENT OF THE CASE

### I. Legal Background

The Sixth Amendment guarantees the right to an impartial jury. U.S. Const. amend. VI. Part of our Bill of Rights, this Amendment imats deeply rooted in historical tradition: at common law, jurors could be challenged *propter affectum*, because of partiality. *See* 3 Sir William Blackstone, *Commentaries on the Laws of England* 363 (1st ed. 1768) (hereinafter "Blackstone"). Challenges were framed as either "principal challenges" or challenges "to the favour." *Id.*; *accord* 4 Matthew Bacon, *A New Abridgment of the Law* 551-53 (4th ed. 1832). A principal challenge was particularly serious: if the allegations of partiality were true, the challenge "[could not] be overruled." Blackstone at 363. Principal challenges were appropriate, for example, in cases when a juror was "of kin to either party within the ninth

degree," or was a party's "master, servant, counsellor, steward or attorney," as well as when a juror had "an interest in the cause" or had "taken money for his verdict[.]" *Id.*

This common law heritage was embraced during the early Republic. Presiding over the treason trial of Aaron Burr, Chief Justice John Marshall—who was then riding circuit—emphasized that the jury "should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make[.]" *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

> All the provisions of the law are calculated to obtain this end. Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him . . . . The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.

*Id.* Chief Justice Marshall opined that all those who try the impartiality of a juror ought to "hear the statement made . . . and conscientiously determine, according to their best judgment, whether in general men under such circumstances ought to be considered as capable of hearing fairly, and of deciding impartially, on the testimon [sic] which may be offered to them[.]" *Id.* at 51.

In the early 1800s, reported decisions from state courts were in broad agreement with the Chief Justice. *See, e.g.*, *Ex parte Vermilyea*, 6 Cow. 555, 562-66 (N.Y. Sup. Ct. 1826) (citing to the Burr trial and reasoning that "It is a fallacy to suppose such a man stands impartial, merely because he has no malice or ill will against the defendant . . . . All experience goes to prove the infirmity of human nature is such, that we cannot at pleasure get rid of preconceived

opinions."); *see also Shoeffler v. State*, 3 Wis. 823, 827-28 (1854) ("As when the juror has formed and expressed a fixed and decided opinion in regard to the guilt or innocence of the accused; when he is near of kin to the prisoner, or if he be infamous . . . and in many other instances, the law raises such a presumption of bias, as absolutely to exclude the juror, leaving nothing to be determined by the court except merely the truth of the facts alleged."); *Commonwealth v. Lesher*, 17 Serg. & Rawle 155, 156 (Pa. 1827) ("The law, in every case, is scrupulous to prevent even the possibility of undue bias . . . . Any one, who, in any possible way, no matter how honestly, has been warped by any preconceived opinion which may affect his verdict . . . is excluded.").

In the mid-1800s, states began to codify the circumstances which created "implied bias" and led to juror disqualification as a matter of law. *See, e.g.*, *State v. Millain*, 3 Nev. 409, 426-30 (1867); *State v. Wilson*, 8 Iowa 407, 410 (1859); *People v. McCauley*, 1 Cal. 379, 384-85 (1851). A distinction was drawn between cases of "implied bias" and cases of "actual bias": the Supreme Court of Nevada, for example, noted that a challenge for implied bias was appropriate after "the existence of the facts is ascertained" and required a party to argue that "the judgment of the law disqualifies the juror[.]" *State v. Squaires*, 2 Nev. 226, 230 (1866). In contrast, a challenge for actual bias required a party to argue that "the existence of the state of mind on the part of the juror, in reference to the case . . . leads to the inference that he will not act with entire partiality in the trial." *Id*.; *accord Shoeffler*, 3 Wis. at 827-28.

This terms "actual" and "implied" bias are still used today. In 2012, the Third Circuit wrote:

> Actual bias, also known as bias in fact, is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." All members of the venire are subject to examination for actual bias, which may become apparent when a venireperson admits partiality or may be inferred

> from responses to voir dire questioning. District courts possess broad discretion in excusing prospective jurors for cause on the basis of actual bias.
>
> . . . .
>
> Implied bias, by contrast, is "bias conclusively presumed as [a] matter of law," or, put another way, "bias attributable in law to the prospective juror regardless of actual partiality." This doctrine is rooted in the recognition that certain narrowly-drawn classes of jurors are highly unlikely, on average, to be able to render impartial jury service despite their assurances to the contrary. For example, the victim of a crime might insist that she can serve as an impartial juror in her assailant's trial. But, understanding that the average person in her situation likely would harbor prejudice, consciously or unconsciously, the law imputes bias to her categorically and mandates her excusal for cause.

*United States v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012) (internal citations omitted).

This Court addressed implied bias for the first time in 1878. *See Reynolds v. United States*, 98 U.S. 145, 154-57 (1878). George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints, had been convicted of bigamy; at trial, he unsuccessfully challenged a juror who had read related newspaper coverage and "'believed' he had formed an opinion . . . which he did not think would influence his verdict on hearing the testimony." *Id.* at 156. The *Reynolds* Court opined that "[t]he reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality." *Id.* It cautioned that, to set aside the ruling of the trial court, "[i]t must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial." *Id.* In other words, "[t]he case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." *Id.*

Approximately thirty years later, the Court addressed juror bias in a different context: In *Crawford v. United States*, Petitioner William Gordon Crawford was prosecuted in the District of Columbia for conspiring to defraud the United States Postal Service. 212 U.S. 183,

189-92 (1909). At trial, he challenged a juror who worked as a Post Office clerk. *Id.* at 192-93. This time, the Court held that it was error to overrule the challenge. *Id.* at 192-97. It reasoned that there was a "general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side." *Id.* at 196.

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

*Id.*

After *Crawford*, the routine disqualification of government employees made it difficult to seat a jury in the District of Columbia; and so, in 1935, Congress passed a law permitting a large swath of government workers to sit for jury service. *See Wood v. United States*, 83 F.2d 587, 588-89 (D.C. Cir.), *rev'd,* 299 U.S. 123 (1936). Reviewing the constitutionality of the new statute, this Court reasoned that "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude . . . the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood*, 299 U.S. 123, 145-46 (1936). More specifically, the Court concluded that there was no settled common law rule with respect to the disqualification of governmental employees for implied bias; in addition, it reasoned that even if such a disqualification had existed, "Congress had power to remove it." *Id.* at 134-47.

*Wood* was reaffirmed in *Frazier v. United States*, 335 U.S. 497 (1948) and *Dennis v. United States*, 339 U.S. 162 (1950). The Court was particularly clear in *Dennis*: though defendants

tried before government employees could challenge a juror's actual bias, "[a] holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible." 339 U.S. at 171.[1]

A different issue involving juror employment was addressed in *Smith v. Phillips*, 455 U.S. 209 (1982). In that case, a sitting juror applied to work as an investigator for the prosecutor's office. *Id.* at 212. When defense counsel was notified, he moved to set aside the jury's guilty verdict. *Id.* at 213. That motion was denied following a post-trial hearing, and so the defendant argued, as part of federal habeas proceedings, that he had been denied due process of law. *Id.* at 213-14. Ultimately, the *Smith* Court found no Fourteenth Amendment violation: it reasoned that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias" and that the defendant had received all the process that was constitutionally required. *Id.* at 215-18.

Justice Marshall dissented; he would have held that the juror in question was impliedly biased. *Id.* at 224 (Marshall, J., dissenting, joined by Brennan and Stevens, JJ.). In response, Justice O'Connor wrote separately to express her view that *Smith* "[did] not foreclose the use of 'implied bias' in appropriate circumstances." *Id.* at 221 (O'Connor, J., concurring). "[I]n most instances," she wrote, "a postconviction hearing will be adequate to determine whether a juror is biased . . . . [However,] there are some extreme situations that would justify a finding of implied bias." *Id.* at 222.

> Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the

[1] *Dennis* produced two concurrences and two dissents. Notably, Justice Reed's concurrence emphasized that "Government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case." *Dennis*, 339 U.S. at 172-73 (Reed, J., concurring).

> state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.

*Id*.

"In the wake of *Smith,* some Courts of Appeals questioned whether the majority opinion quietly discarded the doctrine of implied bias." *Mitchell*, 690 F.3d at 144 (collecting cases). Contemporaneously-published scholarship expressed similar confusion. *See, e.g.*, Mary B. Bader, Note, *Constitutional Law – Juror Bias – Posttrial Hearing to Determine Actual Juror Bias Held Sufficient to Satisfy Due Process Rights* (Smith v. Phillips), 66 Marq. L. Rev. 400, 412 (1983) ("It is unclear whether the Court foreclosed the use of the implied bias test altogether or just refused to employ the test in this case"); Willie Dudley, Comment, *Constitutional Law - Due Process Safeguarding the Right to an Impartial Jury: The Adequacy of Post-Trial Hearings* Smith v. Phillips, 8 Nat. Black L. J. 338, 347 (1983) ("The extent to which federal courts can employ an implied bias rule is left unclear by the *Smith* opinion.").

The Court has never directly addressed the confusion stemming from *Smith.* Individual justices have written to express the view that bias can be implied. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57 (1984) (Blackmun, J., concurring, joined by Stevens and O'Connor, JJ.) *and id.* at 558 (Brennan, J., concurring, joined by Marshall, J.); *see also Rushen v. Spain*, 464 U.S. 114, 152 (1983) (per curiam) (Blackmun, J., dissenting). In addition, the Court has touched on the implied bias doctrine in cases involving the impact of extensive publicity, judicial partiality, and jury interference. But those cases grapple variously with the Sixth Amendment, Fifth and Fourteenth Amendments, and the Court's supervisory power; perhaps unsurprisingly, their lessons are far from clear.

***Publicity.*** Since its 1878 decision in *Reynolds*, the Court has addressed allegations of juror bias stemming from extensive publicity in *Skilling v. United States*, 561 U.S. 358 (2010);

*Mu'Min v. Virginia*, 500 U.S. 415 (1991); *Patton v. Yount*, 467 U.S. 1025 (1984); *Chandler v. Florida*, 449 U.S. 560 (1981); *Murphy v. Florida*, 421 U.S. 794 (1975); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam); *Rideau v. Louisiana,* 373 U.S. 723 (1963); and *Irvin v. Dowd*, 366 U.S. 717 (1961). Those cases "acknowledged that adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed[.]" *Mu'Min*, 500 U.S. at 429 (internal quotations omitted). In addition, they established that whether a court ought to apply a presumption of bias depends upon "the size and characteristics of the community," the inclusion of "blatantly prejudicial information" in the news coverage, the passage of time between the coverage and the trial, and the ultimate outcome of the case. *Skilling*, 561 U.S. at 382-83.

***Judicial Partiality.*** A similar rule applies in cases involving allegations of judicial bias. *See Rippo v. Baker*, 580 U.S. 285 (2017) (per curiam); *Williams v. Pennsylvania*, 579 U.S. 1 (2016); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927). "[T]he Due Process Clause may sometimes demand recusal even when a judge has no actual bias," and "[r]ecusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Rippo*, 580 U.S. at 287 (cleaned up). Ultimately, bias is evaluated by asking whether, "the average judge in [t]his position is likely to be neutral[.]" *Williams*, 579 U.S. at 8 (internal quotations omitted); *accord Tumey*, 273 U.S. at 532.

***Jury Interference.*** Yet another strand of case law is implicated when jurors are exposed to an outside intrusion. *See United States v. Olano*, 507 U.S. 725, 737-39 (1993) (holding that

the participation of alternate jurors in deliberations did not affect the respondents' substantial rights under Fed. R. Crim. P. 52(b) and exploring cases involving similar "intrusions"). In this context, there have been cases where prejudice is presumed. *See id.* at 739; *see also Parker v. Gladden*, 385 U.S. 363, 365-66 (1966) (per curiam) (concluding that constitutional error occurred after a bailiff made disparaging comments about the defendant during trial and reasoning that jury contact with this bailiff involved "such a probability that prejudice will result that it is deemed inherently lacking in due process"); *Turner v. Louisiana*, 379 U.S. 466, 471-74 (1965) (concluding that constitutional error occurred when two deputy sheriffs entrusted with chaperoning the jury were called as government witnesses and reasoning that "it would be blinking reality not to recognize the extreme prejudice inherent in [this situation]"); *Remmer v. United States*, 347 U.S. 227, 229 (1954) (reasoning that "[i]n a criminal case, any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court" and remanding the case for a hearing to "determine whether the incident complained of was harmful to the petitioner").

Outside of these three neat categories stands *Leonard v. United States*, 378 U.S. 544 (1964) (per curiam). Petitioner Andrew J. Leonard was convicted in separate trials for forging and uttering endorsements on government checks and for transportation of a forged instrument in interstate commerce. *Id.* at 544. "The jury in the case tried first—forging and uttering endorsements—announced its guilty verdict in open court in the presence of the jury panel from which the jurors who were to try the second case—transportation of a forged instrument—were selected." *Id.* Defense counsel immediately objected to selecting a jury from among this panel of contaminated jurors, but his objection was overruled. *Id.* Eventually,

however, the Solicitor General confessed error and the Court reversed the judgment of conviction. *Id.* at 544-45. Though the Court did not draw attention to what it was doing, it essentially "used implied bias to reverse a conviction." *Smith*, 455 U.S. at 223 (O'Connor, J., concurring).

Without clear guidance from this Court on when challenges for implied bias are viable, practice varies widely amongst the various courts of appeal. *See infra* at 16-19. The Eighth Circuit, where Petitioner filed his direct appeal, has not overturned a conviction for implied bias since *Smith v. Phillips* was decided in 1982.

## II. Factual and Procedural History

After being accused of robbing a Steak N' Shake restaurant in Berkeley, Missouri, Petitioner Jonathan Davis was convicted on one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and one count of brandishing a weapon in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). Pet. App. 1a. The robbery took place in 2021, when a man wearing a black sweatsuit and a face mask entered the restaurant around closing time and confronted the manager, Richard Payne, in the back office. *Id.* at 2a. The man held Payne at gun point, demanded money from the open safe, and left after taking the cash from the safe and registers. *Id.* Richard Payne was adamant that the robber was Jonathan Davis, a former employee who, according to Payne, often wore an identical outfit when he worked at the restaurant. *Id.*

Mr. Davis noticed an alibi defense. Dist. Ct. Dkt. 76.[2] During voir dire on the first day of trial, all prospective jurors were asked whether they had "ever been a victim of a crime." Pet. App. 16a. One venire member, Juror 40, disclosed that he had been the victim of a

[2] "Dist. Ct. Dkt." refers to the docket in *United States v. Davis*, No. 4:21-cr-00167-HEA (E.D. Mo.).

robbery in Cool Valley, Missouri in the mid-1970s. *Id.* He explained that armed robbers entered the grocery store where he worked around closing time, made Juror 40 and his coworkers lie on the ground, "put a gun to [Juror 40's] head," "escorted [everyone] back to the office and bathrooms," and "ended up robbing the safe." *Id.* at 16a-17a. The perpetrators were never caught. *Id.* at 17a.

When the District Court asked whether there was anything about the experience that might prevent him from being impartial, Juror 40 responded "Possibly. I don't know for sure. It depends on the situation." *Id.* The District Court rephrased the question, referencing the charges in Petitioner's indictment and asking whether there was anything that "would cause you to not be able to give both sides a fair trial[.]" *Id.* This time, Juror 40 answered "No, not now. It's been 50 years and I am okay now." *Id.*

At the close of voir dire, defense counsel moved to strike Juror 40 for cause. *Id.* at 3a. The motion was overruled and Juror 40 was seated as an alternate. *Id.* Two days later, when another juror called out sick, defense counsel objected that allowing Juror 40 to participate in deliberations would deprive Petitioner of his right to a fair trial. *Id.* at 20a. The District Court disagreed and stated the following:

> [T]he voir dire experience with [Juror 40] was full and complete and, yes, [Juror 40] did indicate, in response to the questions of whether anyone had been the victim of a crime, that he had been the victim of a robbery some years ago . . . further inquiry about the circumstances and how that might impact his ability to sit and serve as a juror disclosed that [Juror 40] was fully capable of setting that circumstance aside . . . . [A]s the Court observed [Juror 40] in his response to the question and his explanation as to how he would be able to base his decision on the evidence in the courtroom and not allow his past experience to

> interfere or in any way, shape or form guide him or impact his decision, it was quite clear that he is able to do that.

*Id.* at 20a-21a. Ultimately, the District Court concluded that Juror 40's credibility was "sound and solid." *Id.* at 21a.

Petitioner was convicted and sentenced to 125 months in federal prison. *Id.* at 1a-2a. On appeal, he argued that Juror 40 was impliedly biased and that it was structural error to allow him to participate in deliberations. Pet. C.A. Br., at 32-48 (8th Cir. Feb. 5, 2024). Noting that "assessing implied bias involves purely legal considerations," Petitioner requested de novo review. *Id.* at 33. And, noting that a finding of implied bias is based upon "an objective evaluation of the challenged juror's experiences and their relation to the case being tried," Petitioner asked the Court to assess specific similarities that would "inherently create in a juror a substantial emotional involvement, adversely affecting impartiality." *Id.* at 35 (quoting *United States v. Powell*, 226 F.3d 1181, 1188-89 (10th Cir. 2000)). He emphasized that the robberies took place at the same time of day in neighboring towns and involved a similar *modus operandi*: arriving as employees were closing up, placing a gun to the head of the real or perceived manager, and taking cash from the business' safe. *Id.* at 37-38. He asked the Court to consider that, "if the men who committed the [grocery store] robbery had been caught and federally indicted, they would have been charged with violating the Hobbs Act and 18 U.S.C. § 924(c)—just like Mr. Davis." *Id.* at 38. And, finally, he asked the Court to consider the following:

> First, the average person in [Juror 40]'s position would have instinctively sympathized with Richard Payne—the government's first witness and the only person who conclusively identified Mr. Davis as the perpetrator of the Steak N' Shake robbery. At trial, Mr. Payne testified in detail about being robbed: he talked about how the gun felt when it was pressed against his neck, what he wished he'd done differently during the robbery, and how, afterwards, he'd felt responsible for the other employees. Given this vivid testimony, there was an

> acute risk that a juror who personally identified with Mr. Payne could not have impartially evaluated evidence that Mr. Payne was mistaken about what he recalled on January 23, 2021—an issue central to Mr. Davis' defense.
>
> Second, [Juror 40] informed the District Court that the men who robbed him "got away with it." In this context, there was an acute risk that the average person in [Juror 40]'s position would have (consciously or unconsciously) viewed Mr. Davis as a "stand-in" for the men who were never caught or convicted.

*Id.* at 39-40 (internal citations omitted).

The Eighth Circuit reviewed the District Court's decision under an abuse of discretion standard, emphasizing that the trial judge was in "the best position to assess the demeanor and credibility of the prospective jurors." Pet. App. at 9a. The panel conceded—without significant elaboration—that there were "similarities between Juror No. 40's experience and the instant offense" and that "experiencing a crime is often a traumatic experience not easily forgotten." *Id.* at 12a. But it stated that "the question is whether an empaneled juror who was a victim in a similar crime nearly 50 years ago is an 'extreme situation[ ] where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.'" *Id.* (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)). And—again without elaboration—the panel concluded that this situation was not so extreme as to warrant a finding of implied bias. *Id.* The judgment of the District Court was affirmed. *Id.* at 14a.

Petitioner filed a motion for rehearing or rehearing en banc; that motion was denied on March 4, 2025. *Id.* at 15a.

## REASONS FOR GRANTING THE WRIT

This case is an ideal vehicle for resolving persistent confusion over the viability of the implied bias doctrine: it provides the Court with an opportunity to clarify the test for establishing implied bias at the trial court level as well as an opportunity to address the appropriate standard of review on appeal.

The questions presented are recurring and tremendously important. They implicate the right of litigants across the country, in both criminal and civil cases, to receive a fair trial before an impartial jury. Given how long these questions have been brewing in the lower courts, there is little chance that the law can be harmonized without this Court's intervention. A writ of certiorari should be granted to prevent the erosion of the Sixth, Fifth, and Fourteenth Amendments and to correct the ill-considered judgment of the Eighth Circuit.

### I. Confusion persists about the availability of implied bias challenges, the rule for assessing a challenge on the merits, and the standard of review applicable on appeal.

"Today . . . most Courts of Appeals endorse the view that the implied bias doctrine retains its vitality after *Smith.*" *Mitchell*, 690 F.3d at 144 (collecting cases). However, some continue to have their doubts. *See, e.g.*, *United States v. Bowman*, 106 F.4th 293, 304 n.11 (4th Cir. 2024) ("[T]he validity of even a narrow implied-bias doctrine is uncertain"); *English v. Berghuis*, 900 F.3d 804, 816 (6th Cir. 2018) ("[T]he continued vitality of the doctrine has been called into question by the Supreme Court." (internal quotations removed)). As a result, the courts of appeal are firmly split over whether implied bias is clearly established federal law. *Compare Hedlund v. Ryan*, 854 F.3d 557, 575 (9th Cir. 2017) ("There is no clearly established federal law regarding the issue of implied bias. The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias.") *with Conaway v. Polk*, 453 F.3d 567, 588 (4th Cir. 2006) ("[T]he implied bias principle constitutes clearly established federal law as

determined by the Supreme Court.") *and Brooks v. Dretke*, 444 F.3d 328, 329 (5th Cir. 2006) (same).[3] *See also Salgado v. Martinez*, No. 23-2032, 2023 WL 8539949, at *9 (10th Cir. Dec. 11, 2023) (unpublished) ("There appears to be no clearly established Supreme Court holdings against which to evaluate whether the state court reasonably handled a claim of implied juror bias based on similarities between the juror's life experiences and the accusations at issue in the case."); *Cutts v. Smith*, 630 F. App'x 505, 506 (6th Cir. 2015) (unpublished) ("[T]he implied bias doctrine is not clearly established.").

At this point, disagreement and confusion have persisted for decades; there is little chance that, if left to their own devices, the lower courts will converge on a consistent standard for evaluating claims of implied bias. Already, "the vitality of the implied bias doctrine . . . has been weakened." William P. Barnette, *Ma, Ma, Where's My Pa? On Your Jury, Ha, Ha, Ha!: A Constitutional Analysis of Implied Bias Challenges for Cause*, 84 U. Det. Mercy L. Rev. 451, 452 (2007) (hereinafter "Barnette"). That, in turn, has weakened the Sixth Amendment.

### A. There is a clear split over the standard of review on appeal.

At the circuit level, there is division regarding the standard of review applicable to implied bias claims. The First, Second, Fourth, Eighth, and Eleventh Circuits review for abuse of discretion. *See* Pet. App. at 9a-12a; *United States v. Mensah*, 110 F.4th 510, 524-27 (2d Cir. 2024); *United States v. Kuljko*, 1 F.4th 87, 92 (1st Cir. 2021); *United States v. Cannon*, 987 F.3d 924, 945 (11th Cir. 2021); *United States v. Umaña*, 750 F.3d 320, 341 (4th Cir. 2014). The

[3] On this issue, the Fifth Circuit's law is particularly convoluted. Following *Brooks*, the court of appeals repeatedly entertained arguments that the doctrine of implied bias is not clearly established. *See Buckner v. Davis*, 945 F.3d 906, 913 (5th Cir. 2019); *Uranga v. Davis*, 893 F.3d 282, 288 (5th Cir. 2018); *Morales v. Thaler*, 714 F.3d 295, 304 (5th Cir. 2013). Recently, the court rejected an implied bias claim in an unpublished opinion, concluding that it was "impossible" to point to a relevant holding from the Supreme Court endorsing the doctrine. *Granier v. Hooper*, No. 22-30240, 2023 WL 4554903, at *3 (5th Cir. July 17, 2023) (unpublished) (emphasis removed).

Ninth and Tenth Circuits review de novo. *See United States v. Kvashuk*, 29 F.4th 1077, 1092 (9th Cir. 2022); *Powell*, 226 F.3d at 1188.[4] The Third Circuit employs a mixed standard. *See Mitchell,* 690 F.3d at 148 ("We review for abuse of discretion the denial of a motion to strike a juror for cause. However, a district court by definition abuses its discretion when it makes an error of law, and implied bias is a question of law. We review questions of law de novo." (internal citations and quotations omitted)).

This split cannot be ignored on the grounds that it is purely academic. As discussed below, the appellate court's chosen standard of review can have a profound impact on the merits analysis for implied bias claims. *See infra* at 20-21. This Court's intervention is necessary to ensure that litigants across the country are held to a consistent standard and, in turn, are receiving equal justice.

### B. There is substantial disagreement over how to evaluate the merits of implied bias claims.

There is no uniform standard for reviewing a claim of implied bias on the merits; rather, "different courts have stated the test in different ways." Barnette at 458.

> For example, one formulation recognizes that an inference of bias exists where a juror has a "potential for substantial emotional involvement" that could "adversely affect[ ] impartiality." An alternative iteration examines whether the juror is "connected to the litigation at issue in such a way that is highly unlikely that he or she could act impartially during deliberations."

*Id.* (comparing *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) with *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992)). Most of these standards can be traced back to the "average man" test: this Court's assertion, in *Tumey v. Ohio,* that "[e]very procedure which would offer

[4] The Fifth Circuit has used a de novo standard in one unpublished opinion. *United States v. Abreu*, No. 21-60861, 2023 WL 234766, at *1 (5th Cir. Jan. 18, 2023) (unpublished). In addition, at least one state court of last resort—the Wyoming Supreme Court—has adopted a de novo standard when reviewing Sixth Amendment claims of implied bias. *See Smith v. State*, 2008 WY 98, ¶ 29, 190 P.3d 522, 531-32 (Wyo. 2008).

a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." 273 U.S. at 532. This test is consistent with how implied bias was understood at the time of the Founding. *See Burr*, 25 F. Cas. at 50 (reasoning that jurors are "incapacitate[d]" if "in general persons in a similar situation would feel prejudice").

Justice O'Connor's concurrence in *Smith v. Phillips* has also had an enormous influence on contemporary tests for implied bias. Her comment that there are some "extreme situations that would justify a finding of implied bias" has led many courts to hold that implied bias can *only* be found in extreme situations. *See Smith*, 455 U.S. at 222 (O'Connor, J., concurring); *and see, e.g.*, *United States v. Greer*, 285 F.3d 158, 172 (2d Cir. 2002) (affirming the district court's finding that a juror who had failed to disclose a "bribe attempt" related to the trial was not impliedly biased because the situation was "insufficiently 'drastic'"); *United States v. Tucker*, 243 F.3d 499, 509 (8th Cir. 2001) (holding that "[t]he idea of presumed bias is reserved for extreme cases"); *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1261 (10th Cir. 1999) (reasoning that "[t]he implied bias doctrine is not to be lightly invoked, but must be reserved for those extreme and exceptional circumstances that leave serious question[s about] whether the trial court subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice." (internal quotations omitted)), *abrogated on other grounds by United States v. Duncan*, 242 F.3d 940 (10th Cir. 2001). However, this line of case law is not consistent with an original understanding of the Sixth Amendment. *See infra* at 22. At the time of the Founding, challenges for implied bias were a common part of trial practice; they were not reserved for

extreme situations and did not require proof of "drastic" circumstances. Clarifying that point would ensure that the Sixth Amendment is not unduly restricted or undermined.

## II. The decision below was wrong.

### A. The Eighth Circuit applied an incorrect standard of review.

In this case, Petitioner explicitly urged the Eighth Circuit to adopt a de novo standard of review. *See* Pet. C.A. Br., at 32-34 (8th Cir. Feb. 5, 2024). The court of appeals did not do so; instead, it reviewed Petitioner's claim for abuse of discretion. Pet. App. at 9a.

The chosen standard of review colored the merits analysis. As discussed above, Petitioner emphasized that Juror 40 had been robbed under circumstances that "would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality." *See supra* at 14-15. He called attention to the robberies' geographical proximity, the fact that they involved a similar *modus operandi*, and the fact that they implicated identical provisions of the federal criminal code. *Id.* In addition, Petitioner noted that the men who victimized Juror 40 were never caught and that, during the robbery, Juror 40 had been placed in a similar position as the government's star witness. *Id.*

If the Eighth Circuit had been required to engage in de novo review, it would have had to weigh these factors and come to an independent conclusion about whether Juror 40 should have been disqualified. But, under abuse of discretion standard, the panel could defer to the trial court—which is exactly what occurred. Without engaging in any significant analysis, the panel simply concluded that "this case does not constitute an 'extreme situation' warranting

a finding of implied bias, and the district court did not abuse its discretion in empaneling Juror No. 40 over defendant's objection." Pet. App. at 12a.

An abuse of discretion standard is wholly inappropriate in this context. Assessing implied bias involves a two-step analysis: as in the reasonable suspicion or probable cause context, "[t]he first part of the analysis involves only a determination of historical facts, [and] the second is a mixed question of law and fact[.]" *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The second step requires the court to determine "whether the facts satisfy the relevant statutory or constitutional standard," and to decide "whether the rule of law as applied to the established facts is . . . violated." *Id.* at 696-97 (internal brackets omitted). For that reason, the ultimate question of whether a juror is impliedly biased "should be reviewed de novo." *Id.* at 691.

De novo review is more consistent with historical practice and the original understanding of the Sixth Amendment. When our Bill of Rights was adopted, an assessment of actual bias required judges and triers[5] to consider the litigant's challenge to the favour, to assess the prospective juror's demeanor and credibility, and to make a determination about whether his profession of impartiality could be believed. Judges were more limited when ruling on claims of implied bias or principal challenges: that type of objection left "nothing to the 'conscience or discretion[.]'" *Reynolds*, 98 U.S. at 156. The judge could be required to disqualify the prospective juror even if he would have been impartial.

In this case, there was no reason to defer to the District Court's assessment of Juror 40's demeanor and credibility. Petitioner consistently argued that Juror 40 was impliedly biased, that his demeanor and credibility were wholly irrelevant, and that he should have been

[5] "[I]n common law days . . . the triers consisted of the first two jurors sworn. Presumably, they were impartial and uncontrolled by the court." R. Justin Miller, *Jury Triers*, Minn. L. Rev. 353, 361 (1925).

disqualified as a matter of law. In rejecting those arguments, the Eighth Circuit applied the wrong standard of review and its error should be corrected.

### B. The Eighth Circuit placed undue emphasis on whether the case arose from extreme circumstances.

The court of appeals framed the merits question as "whether an empaneled juror who was a victim in a similar crime nearly 50 years ago is an extreme situation where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." Pet. App. at 12a (cleaned up). However, the panel's analysis did not explore whether the "average person" could remain impartial after hearing the evidence presented at trial; it immediately jumped to the conclusion that "this case does not constitute an 'extreme situation' warranting a finding of implied bias[.]" *Id.*

In the Founding era, implied bias was not a doctrine reserved for extreme cases. In fact, when the Sixth Amendment was adopted, our country's most populous city had just over 33,000 residents.[6] It would not have been uncommon for jurors summoned to the courthouse to find that they were a "distant relative of a party" and would be disqualified from service. *Burr*, 25 F. Cas. at 50. Nor would it be extraordinary for jurors to find that they were the "master, servant . . . [or] steward of one of the parties." Blackstone at 363. Such relationships were not exceptional; at the time of the Founding, they would have been utterly unremarkable. For that reason, cases which hold that findings of implied bias must be reserved for extreme situations are out of step with an original understanding of the Sixth Amendment.

[6] *See* U.S. Census Bureau, *Table 2. Population of the 24 Urban Places: 1790*, available at https://www2.census.gov/library/working-papers/1998/demo/pop-twps0027/tab02.txt (placing the population of New York City at 33,131).

If left undisturbed, the Eighth Circuit's decision will continue to weaken the doctrine of implied bias. The Court should intervene before that occurs.

## III. This issue is one of national importance, impacting criminal and civil litigation in both state and federal courts.

In 2023, the year that Petitioner was convicted, federal courts presided over 1,695 criminal jury trials. *See Table T-1*, United States Courts, Dec. 31, 2023, available at https://www.uscourts.gov/data-news/data-tables/2023/12/31/statistical-tables-federal-judiciary/t-1. Thousands more were conducted in state courts across the country.[7] And so—though much has been written about the rise of plea bargaining and the demise of the trial—the airing of issues before an impartial jury has remained the bedrock of our criminal legal system.

With that said, it is remarkable that there is still confusion regarding *any* aspect of the right to a fair trial by an impartial jury. Granting the petition for certiorari and clarifying the appropriate standard for juror selection would go a long way towards protecting a "basic requirement of due process" for criminal defendants. *Murchison*, 349 U.S. at 136.

Civil litigants would also benefit, for "[c]ivil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). In recent years, civil litigants have often appealed to raise issues of implied bias. *See, e.g.*, *Fylling v. Royal Caribbean Cruises, Ltd.*, 91 F.4th 1371, 1375-78 & n.3 (11th Cir. 2024) (arguing, on appeal from a negligence action, that the district court had failed to properly investigate a juror's comment that her niece worked for Royal Caribbean, a family connection which may have been grounds for an implied bias challenge);

[7] In Mr. Davis' home state of Missouri alone, 459 criminal jury trials were completed in fiscal year 2023. *See FY 2023 – Statewide Data on Jury Trials*, Missouri Courts, available at https://www.courts.mo.gov/file.jsp?id=38953.

*Zia Shadows, L.L.C. v. Las Cruces*, 829 F.3d 1232, 1243-47 (10th Cir. 2016) (arguing, on appeal from a zoning dispute, that the district court had erred in refusing to dismiss a juror who worked for the city of Las Cruces); *Manuel v. MDOW Ins. Co.,* 791 F.3d 838, 842-44 (8th Cir. 2015) (arguing, on appeal from an insurance claim, that one juror who was the cousin of a trial witnesses should have been disqualified for implied bias). In addition, academic commentators have stressed that, "[a]t the same time the implied bias doctrine has been weakened, its relevance to ensuring the selection of fair juries [in civil cases] has increased." Barnette at 453 (focusing on the application of the implied bias doctrine as class action lawsuits become broader in scope).

## IV. This case presents an excellent vehicle for resolving the ongoing confusion regarding the scope of the Sixth Amendment and the viability of the implied bias doctrine.

This Court's intervention can have an immediate and salutary impact. In fact, there is already a playbook on how to provide guidance for lower courts confused about juror bias: *United States v. Skilling*, decided unanimously by this Court in 2010.

*Skilling* harmonized decades of discordant case law and clearly identified the relevant factors for determining whether adverse publicity has created a presumption of bias. 561 U.S. at 382-83. The Court can make a similar move in this case, as the opinion below tees up clear and straightforward issues for the Court to address.

First, the panel concluded that Petitioner's claim of implied bias should be reviewed for abuse of discretion. Pet. App. at 9a-12a. However, Petitioner preserved an argument that de novo review should apply and his argument is supported by this Court's case law as well

as the law in the Ninth and Tenth Circuits. As a result, the Court could easily reach the issue, resolve the circuit split, and create a uniform national standard.

Petitioner additionally asks the Court to consider how implied bias challenges should be resolved on the merits. This case presents a particularly strong opportunity for addressing a notion that has become widespread in the lower courts: the idea that challenges for implied bias can only be granted in "extreme" cases. As discussed above, case law adopting this standard has unduly restricted the application of the implied bias doctrine and undermined Sixth Amendment as a whole. Because the opinion below leaned unusually heavily on the finding that there were no "extreme" circumstances, the Court has a clear path forward if it wishes to examine the propriety of this test.

Finally, Petitioner asks the Court to determine that the panel erred by concluding that Juror 40 was not impliedly biased despite the fact he had been the victim of crime "closely resembling the charged offense." Pet. App. at 11a. Clarifying the law as it applies to crime victims would be helpful: as the panel recognized, multiple circuits have found implied bias involving people "intimately familiar with the offense charged in the trial." Pet. App. at 11a (citing *United States v. Gonzalez*, 214 F.3d 1109, 1113-14 (9th Cir. 2000); *Hunley*, 975 F.2d at 320; *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991); *Dyer v. Calderon*, 151 F.3d 970, 982-84 (9th Cir. 1998)). However, this Court has never addressed how the implied bias doctrine relates to victims of crime, and lower courts could benefit from a *Skilling*-esque identification of the factors relevant to deciding these challenges.

The stakes are high—for litigants across the country and for the Petitioner personally. This is Mr. Davis' first criminal conviction. Dist. Ct. Dkt. 129 at 7. He is 25 years old, *id.* at 3, and is serving a 125-month sentence in federal prison. Pet. App. at 1a-2a. If he succeeds in

establishing implied bias, he should be automatically entitled to a retrial: The Eighth Circuit has held that "[t]he presence of a biased jury constitutes a fundamental, structural defect that affects the entire conduct of the trial," *United States v. Dale*, 614 F.3d 942, 960 (8th Cir. 2010), and that "[t]rying a defendant before a biased jury is akin to providing him no trial at all." *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992). And this Court has emphasized that, under the Sixth Amendment, criminal defendants are "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"). *Parker,* 385 U.S. at 366.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 2nd day of June, 2025,

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