No. 21-_____

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

PETITION FOR WRIT OF CERTIORARI

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October 18, 2021

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QUESTION PRESENTED

In *Remmer v. United States*, 347 U.S. 227, 229 (1954), the Court held that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial" unless made through court-sanctioned channels. *Ibid.* In light of the proffered evidence of such a contact, the Court required a hearing to determine "what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Ibid.*

The issue in this case is whether *Remmer* will continue to serve as a bulwark for the Sixth Amendment rights of criminal defendants amidst today's plethora of digital communications and devices. In this direct appeal of a federal criminal conviction, the lower courts refused a *Remmer* hearing because the defendant had no direct evidence of a juror's extrajudicial social-media contacts with reporters writing about his high-profile trial. Instead, the defendant had offered substantial circumstantial evidence, including that the juror had shown intense pre-trial interest in Twitter activity that was highly critical of the defendant, had subscribed to the Twitter activity of two reporters who tweeted 73 times about the case during trial, and had accessed social media, including Twitter, multiple times during the six-day trial. This result was directly contrary to the Sixth Circuit's holding in *United States v. Harris*, 881 F.3d 945, 954 (6th Cir. 2018).

The question presented is:

Whether circumstantial evidence of extrajudicial social-media contact with a juror about the case can be enough to entitle a criminal defendant to a *Remmer* hearing?

LIST OF PARTIES

The names of all parties appear in the case caption on the cover page.

RELATED PROCEEDINGS

- *United States v. Loughry*, No. 19-4137, (4th Cir.), now-vacated panel opinion entered on December 21, 2020, and judgment on rehearing en banc entered May 20, 2021.

- *United States v. Loughry*, No. 2:18-00134, (S.D.W. Va.), final judgment entered Feb. 25, 2019.

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The en banc opinion of the Fourth Circuit Court of Appeals is reported at 996 F.3d 729 (4th Cir. 2021) and is reproduced in the Appendix starting at App. 1.

The panel opinion of the Fourth Circuit Court of Appeals is reported at 983 F.3d 698 (4th Cir. 2020) and is reproduced in the Appendix starting at App. 5.

The District Court's opinion was not published, but is reproduced in the Appendix starting at App. 39.

JURISDICTION

The Fourth Circuit's judgment was entered on May 20, 2021. By order entered July 19, 2021, this Court extended the deadline for filing petitions for writ of certiorari to 150 days from the date of judgment or order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

"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." U.S. Const. amend. VI.

INTRODUCTION

More than 67 years ago, this Court recognized the inherent danger that a juror's extrajudicial contact with a third party about the matter pending before the jury poses to the integrity of a criminal trial. *Remmer v. United States*, 347 U.S. 227, 229 (1954). *Any* extrajudicial "private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Ibid.* Accordingly, this Court required that a defendant with evidence of such contact be granted a hearing to determine "what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Ibid.*

The defendant in this case, Allen H. Loughry, II, is the former Chief Justice of the Supreme Court of Appeals of West Virginia, the state's highest court. Justice Loughry was convicted on wire and mail fraud counts after a media storm engulfed the West Virginia court and its justices. There is no dispute that one of the jurors who convicted Loughry was involved in the Twitter discourse about the case. In the months leading up to the trial, she "liked" and "retweeted" numerous tweets and a news article criticizing Loughry. During trial, she accessed Twitter multiple times and "followed" (*i.e.*, subscribed to) 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 Loughry was published to the jury) and commented on the strength of the evidence, tweeting on the last day of evidence: "There seems to be quite a bit of evidence against the Justice."

When he learned about all of this after trial, Loughry sought a *Remmer* hearing. The district court denied relief, as did a divided panel of the Fourth Circuit, on the ground that Loughry had not presented *direct* evidence that Juror A actually read any of the reporters' tweets that no one disputes appeared in her Twitter feed during trial. But that was why Loughry needed the *Remmer* hearing. It would have allowed him to learn what the *circumstantial* evidence strongly suggested but that he could not otherwise know given the nature of Twitter: whether Juror A had privately read the tweets about the trial and evidence. The Fourth Circuit took the case en banc in light of a contrary Sixth Circuit opinion that had granted a *Remmer* hearing on the basis of circumstantial evidence alone. After almost two hours of argument and with three recusals, the en banc court split evenly, affirming the district court with a one-line per curiam opinion.

Threats to fair criminal trials have evolved markedly in the digital age. When *Remmer* was decided, telephones were still rotary dial and the world was still four years from putting the first artificial satellite into orbit. It is now possible for a juror to receive, through a curated feed on a phone that fits in her pocket, extrajudicial information that falls squarely within *Remmer*'s concerns without leaving any publicly available evidence of the contact. Moreover, that information is more private, pervasive, and prejudicial than anything in traditional media.

The result is that, more than ever before, criminal defendants are facing extrajudicial influences while only able to provide *circumstantial* evidence of those influences as grounds for a *Remmer* hearing. Applied faithfully, *Remmer* is well suited for this challenge.

The opinion itself contemplates that a defendant might not have direct evidence of "what actually transpired." *Remmer*, 347 U.S. at 229. The Sixth Circuit recognized as much when it allowed a *Remmer* hearing based only on circumstantial evidence that a juror had obtained extrajudicial information about a defendant online. *United States v. Harris*, 881 F.3d 945, 954 (6th Cir. 2018). But in denying Loughry a hearing in the face of compelling circumstantial evidence of extrajudicial juror contact through social media, the en banc Fourth Circuit has neutered *Remmer* at exactly the moment it is most needed.

This Court should grant certiorari and affirm the continuing vitality of *Remmer* in today's digital world.

STATEMENT OF THE CASE

I. Factual Background

A. Twitter

Twitter is a social-media site, accessible on cell phones or computers, that allows users to post and interact with written messages known as "tweets." Tweets are typically short, as they are limited to 280 characters. *Campbell v. Reisch*, No. 2:18-cv-4129, 2019 WL 3856591, at *1 (W.D. Mo. Aug. 16, 2019), *rev'd on other grounds*, 986 F.3d 822 (8th Cir. 2021). But they may include pictures, videos, and links to other websites, such as news sites. As of 2019, Twitter had more than 320 million monthly active users.[1]

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[1] Hamza Shaban, *Twitter reveals its daily active user numbers for the first time*, WASH. POST (Feb. 7, 2019), https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/ (last visited Oct. 14, 2021).

Four components of Twitter are important to this case. *First*, tweets are presented in a "feed" or "timeline." A feed is a vertically configured interface that displays tweets according to a user's settings, which may organize tweets either chronologically or by a user's preferences as determined by Twitter's algorithm.[2] Thus, older tweets (which are not deleted unless and until the author chooses to do so) may be prominent in a user's feed despite the age of the tweets, and a user's feed may be hyper-focused on a small number of topics based on the algorithm.

Second, the tweets that appear in a particular user's feed originate with other users that the initial person "follows," which is a term of art roughly equivalent to subscribing, such that a user's timeline will include all tweets published by another user. *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1174 (9th Cir. 2017); *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959, 960 (N.D. Cal. 2016); see *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1106 (N.D. Cal. 2016) ("When one Twitter user 'follows' another Twitter user, the latter's posts appear in the former's default real-time feed of tweets.").

Third, after reading a tweet, a Twitter user has four options. The user may "like" it, "retweet" it, reply

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[2] Users may choose between "top tweets" or "latest tweets." Top tweets displays first the tweets that a user is "likely to care about most," as determined by a user's demonstrated interest. Latest tweets displays tweets in reverse chronological order. ABOUT YOUR HOME TIMELINE ON TWITTER, https://help.twitter.com/en/using-twitter/twitter-timeline (last visited Oct. 14, 2021).

to it, or simply continue scrolling.[3] *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (Mem.) (2021) (Thomas, J., concurring) (explaining retweeting and replying); *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 262 (5th Cir. 2019) (explaining liking). The first three options leave a public indication that a user has seen a tweet, while the fourth leaves no trace. In other words, a user must affirmatively choose to interact with a tweet to leave any public fingerprint.

Put another way, Twitter "can be accessed by phone virtually anywhere and for any length of time, and includes no visible record of whether a tweet has been seen or not." App. 36 (vacated) (Diaz, J., dissenting in part) (quotation and quotation marks omitted). Other social-media platforms, like Facebook or Instagram, share in this possibility of total secrecy.

Fourth, the vast majority of Twitter use is passive. Eighty percent of tweets are written by ten percent of users, while the remaining users typically read what others post on the platform.[4] And the median engagement rate for tweets is zero, meaning most tweets re-

[3] "Scrolling" refers to the action of moving and reading through one's feed, which is "a continuously-updating scroll of new tweets from other users." *Campbell v. Reisch*, 986 F.3d 822, 823 (8th Cir. 2021). Given the length of most tweets, a user can often read each one while continuously scrolling, without stopping on any particular tweet.

[4] Stefan Wojcik and Adam Hughes, *Sizing Up Twitter Users*, PEW RESEARCH CENTER (April 24, 2019), https://www.pewresearch.org/internet/2019/04/24/sizing-up-twitter-users/ (last visited Oct. 14, 2021).

ceive no likes, replies, or retweets, so there is no public indication that anyone saw them even though many might have.[5]

B. Events Before Trial

This case involves a controversy that quickly became one of West Virginia's top news stories of 2017.[6]

The furor began when Justice Loughry contacted the United States Attorney to report excessive spending on office renovations by employees of the West Virginia Supreme Court of Appeals. App. 40. These allegations became a top news story in the state. App. 40. Subsequent investigations targeted Loughry himself, and gave rise to a complaint from the West Virginia Judicial Investigation Commission in June 2018, a federal criminal indictment that same month, and an impeachment proceeding beginning in August. App. 40. The allegations underlying the impeachment and the indictment largely overlapped. App. 12. The impeachment proceeding in particular was extensively reported. Less than two months after the articles of impeachment were issued, Justice Loughry was on trial in federal court. App. 40.

Juror A served on the jury in Loughry's criminal case. App. 42. In the months leading up to trial, Juror A showed a special interest in negative coverage of

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[5] Average Twitter Engagement Rate, https://mention.com/en/reports/twitter/engagement/#2 (last visited Oct. 14, 2021). Mention.com is a service that enables companies to monitor social-media activities across platforms. Part of this includes gathering data on how to effectively use Twitter.

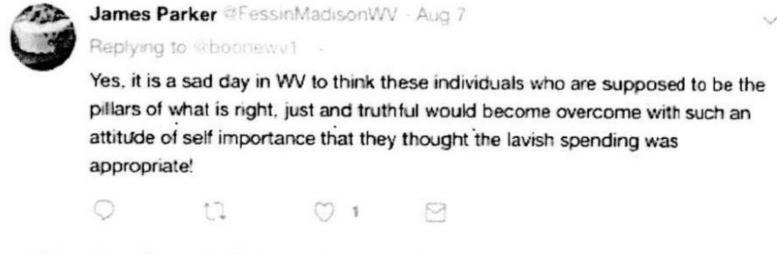
[6] Hoppy Kercheval, *My top ten West Virginia news stories of 2017*, METRONEWS (Dec. 29, 2017), http://wvmetronews.com/2017/12/29/my-top-ten-west-virginia-news-stories-of-2017-5-1/ (last visited Oct. 14, 2021).

Justice Loughry on social media. App. 45 to App. 48. On June 7th, she read, liked, and retweeted state legislator Mike Pushkin's tweet that was highly critical of Justice Loughry. App. 45. The tweet consisted of a quotation from a book Loughry had written on ethics: "When the soundness of the judiciary is questioned, coupled with the corrupt activities of the other branches of government, how is the public ever to have any faith in State government?" App. 45. This tweet also contained a link to a Charleston Gazette-Mail article containing allegations that Justice Loughry, among other things, had "clearly lied," violated the West Virginia Ethics Act, and misled the public. App. 45 to 46; J.A. I at 805–11.[7] The article also reported allegations that would be central in the federal indictment released two weeks later. App. 45 to 46; J.A. I at 805–11.

As the impeachment proceedings were beginning on June 26, Juror A liked two more tweets. App. 46. One, by a different state legislator, referred to the impeachment proceedings and exclaimed "[m]y goodness we've got issues to take care of!" App. 46. The other, again by Mike Pushkin, called on Loughry to resign and linked to an opinion piece that accused Loughry of lying and "stealing from the people of West Virginia." App. 46; J.A. II at 821.

When the articles of impeachment were adopted, Juror A liked another tweet critical of Justice Loughry:

[7] J.A. refers to the Joint Appendix in the U.S. Court of Appeals for the Fourth Circuit.



App. 47.

Like most on Twitter, Juror A was mostly a passive Twitter user, only affirmatively "liking," "re-tweeting," or replying to a small number of tweets. Yet, of the eleven posts that Juror A liked in the four months before trial, four related to Loughry. App. 48.

C. Events During Trial

The trial ran from October 2 to October 12, 2018. App. 40; App. 43. Juror A followed on Twitter two of the most prolific journalists reporting on the trial, Kennie Bass and Brad McElhinny. App. 48. These journalists tweeted a combined 73 times during trial, with Bass tweeting at least once a day. App. 34. The day before deliberations began, he tweeted: "There seems to be quite a bit of evidence against the justice." App. 34. Bass was no mere bystander either. He was mired in the trial itself based on allegations that Loughry had lied to him during an interview, an issue presented to the jury. J.A. I at 129–131.

It is beyond dispute that Juror A accessed Twitter during the trial period. Based on her public Twitter activity,[8] she was on Twitter at least once on October

[8] Juror A authored one tweet, retweeted another user's tweet, and liked a third tweet. App. 16.

3 and twice on October 6. App. 16. Bass and McElhinny tweeted about the case twelve times on the first of those two days. App. 34. It is unknown—and unknowable—whether Juror A visited Twitter on other days but left no trace. But it is also undisputed that she was on Facebook and Instagram—two other social-media platforms—on two other trial days. App. 33.

D. Events After Trial

After trial, an individual approached Justice Loughry's trial counsel and advised him to look at Juror A's Twitter account. App. 44. Counsel did so, and his investigation revealed that Juror A had engaged in pre-trial Twitter activity that was highly critical of Loughry and that Juror A had accessed social media, including Twitter, during trial. App. 45 to App. 48.

But Juror A did not stop there. Immediately after the verdict was returned, she contacted Bass's local television station to give a telephone interview. App. 47. The following day, she tweeted about her jury service. J.A. I at 274.

II. Proceedings Below

A. District Court Proceedings

After the six-day trial, Justice Loughry was convicted on seven counts of wire fraud for using a government credit card to make seven purchases of gasoline for his assigned government vehicle over two years totaling $341.14, one count of mail fraud for obtaining mileage reimbursement totaling $402.60 when he used a government vehicle, and two counts of making false statements to the Federal Bureau of Investigation about the use of state vehicles and his knowledge of a state-owned desk. App. 43; J.A. II at

997–1005. The jury acquitted on nine counts of wire fraud and one count of mail fraud. App. 43. The jury hung on one final count of wire fraud. App. 43.

After discovering Juror A's social-media activity, Loughry sought relief by moving for, among other things, a hearing on Juror A's social-media contacts during trial. App. 6; App. 50 to 58. The district court denied the motion despite acknowledging that Loughry had shown that Juror A had been on Twitter during the trial and followed reporters on Twitter who actively tweeted about the case during trial, and finding that Juror A had failed to answer at least two voir dire questions fully and honestly. App. 48; App. 54 to App. 55. Instead, the court faulted Loughry because there was only a "*possibility* that Juror A saw the reporters' tweets about the trial." App. 19. Loughry's second post-trial motion sought acquittal on three counts, and it was granted on one. App. 9.

B. Fourth Circuit Appeal

Justice Loughry appealed the denial of his motion for a hearing under *Remmer*, as well as for hearings on actual bias and juror dishonesty during the voir dire. App. 6. The panel unanimously affirmed the district court on the actual bias and juror dishonesty issues but split on the *Remmer* issue. App. 5 to App. 38.

The majority opinion reasoned that because Justice Loughry had not shown that Juror A had actually read specific tweets, he had not made a credible allegation sufficient to entitle him to a hearing. App. 16 (vacated). The majority faulted Loughry for showing only that Juror A "*could have seen* the reporter's tweet on October 9 or other tweets by the reporters."

App. 16; see also App. 19 (rejecting Loughry's evidence as showing only "the *possibility* that Juror A saw the reporters' tweets about the trial").

The dissent believed that Loughry had offered "the most he could possibly offer without the opportunity to conduct discovery or question Juror A," and therefore met the "minimal standard" required for a *Remmer* hearing. App. 32; App. 36 (Diaz, J., dissenting in part) (citing *Barnes v. Joyner*, 751 F.3d 229, 242, 244 (4th Cir. 2014)). The dissent disagreed with the majority's demand that Loughry "prove with certainty that Juror A saw the reporters' tweets." App. 37. In the dissent's view, the majority's inflexible rule asked too much: "it's impossible to obtain direct evidence of which tweets Juror A saw without a hearing." App. 36.

C. Fourth Circuit En Banc Review

Loughry sought and obtained rehearing en banc, focusing on whether *Remmer* requires direct evidence. App. 3 to 4. On the day of oral argument, three judges indicated their recusal, leaving twelve to consider the case. App. 71. After oral argument, the Fourth Circuit split evenly and therefore affirmed the district court by a published per curiam opinion that did not provide any reasoning. See App. 1 to 2.

REASONS FOR GRANTING THE PETITION

This petition presents the opportunity to address an evasive question of increasing importance, and over which the circuits are now divided: whether purely circumstantial evidence that a juror was exposed on social media to external information about a trial can be enough to entitle a criminal defendant to a hearing under *Remmer v. United States*.

For more than sixty years, *Remmer* has been a critical tool in protecting the Sixth Amendment right to trial by an impartial jury. See U.S. Const. amend. VI. Recognizing that a central component of this right is a jury free from external influence, this Court in 1954 established an entitlement to a hearing when a juror is exposed to extrajudicial information. *Remmer*, 347 U.S. at 230. This Court required that a defendant with evidence of such contact be granted a hearing to determine "what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Ibid.*

Reflecting the importance of *Remmer*, the courts of appeals have uniformly agreed that the evidentiary threshold for a hearing is low. The Fourth Circuit typically requires a hearing when a defendant makes a "credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury." *Barnes*, 751 F.3d at 242. The Sixth Circuit requires a "colorable claim of extraneous influence." *United States v. Davis*, 177 F.3d 552, 557 (6th Cir. 1999). The Tenth Circuit requires "genuine concerns" of improper jury contact. *Stouffer v. Trammell*, 738 F.3d 1205, 1214 (10th Cir. 2013).

But now—when technology has made *Remmer* more important than ever before—the circuits have diverged over whether a defendant must proffer direct evidence or may rely solely on circumstantial evidence to justify a hearing. The language of *Remmer* itself seems to contemplate that a defendant need not proffer *direct* evidence of an extrajudicial contact. And that is the path the Sixth Circuit has taken, requiring a district court to hold a hearing even where the defendant had only shown it "possible" that a juror was exposed to unauthorized communication.

Harris, 881 F.3d at 954. In the decisions below, however, the Fourth Circuit has taken exactly the opposite approach, refusing a hearing because Loughry had only shown "the *possibility* that Juror A saw the reporters' tweets about the trial." App. 19.

Certiorari is warranted for three reasons. *First*, the Court should resolve the conflict between the decision in the Fourth Circuit below and the Sixth Circuit's decision in *United States v. Harris*, 881 F.3d 945 (6th Cir. 2018), which granted a *Remmer* hearing based on circumstantial evidence that was far weaker than the evidence in this case. *Second*, this issue is of great and growing importance as juror influences continue to move online and become more private, pervasive, and prejudicial than ever before. *Third*, the Court is unlikely to see a better vehicle to address this question.

I. The Fourth Circuit's Decision Created a Circuit Split with the Sixth Circuit.

In conflict with the Sixth Circuit, the Fourth Circuit refused a *Remmer* hearing for a criminal defendant that proffered only circumstantial evidence of extrajudicial social-media contact, even though the evidence was both compelling and the best evidence available absent a hearing. This Court should grant certiorari to resolve those divergent approaches to *Remmer*, which have resulted in a criminal defendant, whose liberty was at stake, being denied a hearing in one circuit when he would have been granted a hearing in another.

A. The Sixth Circuit has held much weaker circumstantial evidence sufficient to entitle a defendant to a *Remmer* hearing.

In *United States v. Harris*, the Sixth Circuit held that the district court had abused its discretion by denying a *Remmer* hearing based on circumstantial evidence that a juror had obtained extrajudicial information about Harris online. 881 F.3d at 948. There was no direct evidence that the juror himself read this information. Instead, the Court concluded that the district court had "a duty to investigate" based solely on inference and possibility.

The circumstantial evidence before the district court was minimal. It showed that the juror's live-in girlfriend accessed Harris's LinkedIn profile at some point, though not necessarily during the trial. *Harris*, 881 F.3d at 952.[9] But there was no evidence that Harris's LinkedIn profile contained any information whatsoever about his criminal case. *Ibid.*[10] Nor was there evidence that the girlfriend had passed any information on to the juror, much less ever discussed the case. *Id.* at 954.

The Sixth Circuit filled in a set of cascading assumptions to reach the conclusion that a *Remmer*

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[9] This information was knowable because LinkedIn, unlike Twitter, allows users to see who has viewed their profile. ACCESS THE WHO VIEWED YOUR PROFILE FEATURE, https://www.linkedin.com/help/linkedin/answer/42 (last visited Oct. 14, 2021).

[10] It would be strange indeed if Harris's profile contained such information. LinkedIn is a professional networking site where people share their professional experience and qualifications. It is essentially an online resume. ABOUT LINKEDIN, https://about.linkedin.com/?trk=homepage-basic_directory_aboutUrl (last visited Oct. 14, 2021).

hearing was required. First, it assumed that the girlfriend, Goleno, had found Harris's LinkedIn profile by searching for Harris on Google. *Id.* at 953. Second, it reviewed the results of the Google search, which yielded results that were relevant to the case, and assumed the results would have been the same at the time the girlfriend Googled Harris's name. *Ibid.* In other words, the court assumed that because the girlfriend had viewed *one* website (LinkedIn), she must also have viewed a *different* website (Google), and it was *that* website that had information about the case on it. Third, the court assumed that the girlfriend communicated what she saw on Google, not LinkedIn, to the juror. *Id.* at 953–54. The Sixth Circuit summarized these assumptions as follows: "it is quite possible that Juror 12 told Goleno about the trial, leading her to Google Harris and [then] to potentially communicate her findings to her live-in boyfriend, Juror 12." *Id.*

These assumptions led the Sixth Circuit to conclude that Harris had presented enough information to obtain the modest relief of a *Remmer* hearing. He had "present[ed] a colorable claim of extraneous influence[] which necessitated investigation," even though he "did not establish that Juror 12 was exposed to unauthorized communication." *Id.* at 954.

B. The Fourth Circuit's refusal to require a hearing here creates a circuit split.

The Fourth Circuit refused Loughry a hearing, despite far more compelling circumstantial evidence than that in *Harris*.[11] It was undisputed that, of Juror

[11] The evidence presented to the district court is included in the appendix at App. 39 to 50. Some allegations, such as the

A's public Twitter activity leading up to trial, four of eleven tweets concerned Justice Loughry. App. 48. 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. 33 (Diaz, J., dissenting in part). And it was undisputed that Juror A followed two reporters on Twitter and that these reporters tweeted a combined total of 73 times during trial, including twelve times on October 3, a day on which Juror A was active on Twitter. App. 34 (Diaz, J., dissenting in part). Those tweets would have been present in her feed.

To borrow a phrase, Loughry showed that Juror A had the motive, means, and opportunity to view external information about the trial on Twitter. Her motive was her interest in Loughry as demonstrated by her Twitter activity leading up to trial. Her means of pursuing this motive was her Twitter account and her "following" of figures interested in this public issue—state legislators and two reporters. Her opportunity came when she accessed social media repeatedly during trial and when the two reporters she followed tweeted about the case a combined 73 times. As one dissenting judge observed, because of "the nature of the technology here . . . it's just impossible to [show] more than what [Loughry] did in this case." App. 82.

And yet, Loughry was refused a hearing when he undoubtedly would have received one under the Sixth Circuit's precedent in *Harris*. The panel majority below derided the circumstantial evidence as showing a mere "possibility that Juror A saw the reporters'

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fact that Juror A followed the two reporters at issue, were not contested by the government.

tweets about the trial." App. 19. But as the panel dissent noted, the Sixth Circuit required a hearing on precisely those terms: the "mere possibility of inappropriate communication with a juror [in *Harris*] was enough to warrant a *Remmer* hearing." App. 37 (Diaz, J., dissenting in part). And unlike in *Harris*, which featured cascading assumptions based on one piece of evidence, 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. The en banc Fourth Circuit had a chance to resolve this discrepancy but did not, leaving in place a result that is directly at odds with the Sixth Circuit.

At the en banc argument, several judges suggested that the district court's jury instructions on social media somehow make this case different. App. 109 to App. 112. They do not. There were instructions in *Harris*, too. And as the Sixth Circuit pointed out, the fact that "the district court admonished the jury not to discuss the case with others" does not rob a defendant of *Remmer*'s protection because "it is quite possible" that the juror ignored this admonishment. 881 F.3d at 953. District courts give instructions to avoid external contacts in every case. *Remmer* exists because these instructions are not always followed. It is an additional and independent protection of "the guarantee of an impartial jury that is vital to the fair administration of justice" 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); *Barnes*, 751 F.3d at 240 ("external influence af-

fecting a jury's deliberations violates a criminal defendant's [Sixth Amendment] right to an impartial jury.").

II. Review Is Needed to Ensure that *Remmer* Continues to Serve Its Critical Function in the Social-Media Age.

The importance of *Remmer* has only increased in the sixty years since this Court decided it. Extrajudicial information has become more pervasive and private in the digital age. It can reach into the jury room silently and without leaving any public trail. A juror can receive prejudicial contact without anyone, including a juror sitting in the next chair, being the wiser. And those communications can come from virtually anyone with a phone or computer, without regard to fact or fiction.

The en banc Fourth Circuit has neutered *Remmer* at exactly the moment it is most needed. Absent extremely unusual circumstances, the best a defendant can hope for these days is circumstantial evidence that a juror might have been prejudiced by extrajudicial contact, such as by being "exposed to tweets from reporters commenting about the trial." App. 35 (Diaz, J., dissenting in part). A *Remmer* hearing is often the only way for a defendant to determine "what actually transpired, or whether the incidents that may have occurred were harmful or harmless," and thereby ensure he has not been deprived of his Sixth Amendment right to a fair trial. *Remmer*, 347 U.S. at 230. This Court should grant certiorari to ensure that *Remmer* remains available to combat today's most common, and increasingly difficult to detect, forms of prejudicial extrajudicial contacts.

A. Social media has increased the risk of juror exposure to prejudicial external contacts while reducing the likelihood that these contacts are detected.

Social media has revolutionized how people access and consume media and commentary, as well as how that commentary is made. In 1955, the year after *Remmer* was decided, only 65% of American households had a television set. UNITED STATES DEPARTMENT OF COMMERCE & BUREAU OF THE CENSUS, Media Utilization — Telephone and Telegraph Systems, *in* STATISTICAL ABSTRACT OF THE UNITED STATES 555 (103d ed. 1982). Only 72% had a telephone. *Ibid.* Now, smart phones with internet connectivity and social-media applications are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). This technology was "nearly inconceivable just a few decades ago," to say nothing of almost 70 years ago, when *Remmer* was decided. *Ibid.*

In *Dietz v. Bouldin*, this Court noted the particular danger that modern technology poses to jury impartiality, explaining that "[i]t is a now-ingrained instinct to check our phones whenever possible." 136 S. Ct. at 1895. With the touch of a finger, a juror could "text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter." *Ibid.* That is why this Court recognized that cell phones pose an "extraordinarily high" risk of juror taint. *Id.* at 1890.

What is more, the nature and format of social media also make exposure more likely. The low bar to posting on social media permits people to comment

prolifically—accurately or inaccurately—about a high-publicity trial. The short length of tweets makes it difficult to avoid reading the whole thing before realizing its prejudicial content. And the fact that tweets are permanent, and can be retweeted, means they may appear and reappear in a Twitter feed even days after being first posted. In short, the chances of exposure to prejudicial contacts on social media "now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program." *United States v. Fumo*, 655 F.3d 288, 331 (3d Cir. 2011), *as amended* (Sept. 15, 2011) (Nygaard, J., concurring in part).

This extraordinarily high risk of exposure to extrajudicial information on social media is coupled with an extraordinarily high risk that such contacts go undetected. As explained *supra* in Section I.A, Twitter does not reveal whether a user has passively viewed a tweet or other content. A user leaves a public trace only when she affirmatively interacts with a tweet—by liking, retweeting, or replying to it. So short of having fortuitously looked over the user's shoulder the moment a tweet was on the user's screen, there is virtually no circumstance in which a defendant could ever "prove with certainty" that a particular juror passively viewed even the most prejudicial tweet. App. 37 (Diaz, J., dissenting in part). Scrolling through Twitter, reading email, checking the latest scores, and reading a weather forecast look identical to the passerby.

B. The result below fails to appreciate the effects of technological advancement and renders *Remmer* a nullity in the digital age.

"[A]pplying old doctrines to new digital platforms is rarely straightforward," and *Remmer* is no exception. *Knight First Amend. Inst.*, 141 S. Ct. at 1221 (Thomas, J., concurring). Below, the district court, the panel majority, and several judges during en banc oral argument clearly failed to understand Twitter. And as a result, they have effectively sidelined *Remmer* as a viable protector of the right to an impartial jury in today's smart-phone and social-media world.

The en banc proceedings, in particular, reveal a definite failure to understand key elements of Twitter. For example, one of the circuit judges was under the mistaken belief that, because the evidence showed that Juror A publicly interacted with Twitter eleven times over the summer, she must have visited Twitter only eleven times.[12] But the public trail reveals only what she did publicly. It says nothing about the frequency or regularity with which Juror A used Twitter passively. As noted above, the vast majority of Twitter use is passive, since eighty percent of tweets are written by only ten percent of users. What is important about the eleven times is that they reflect the instances in which Juror A showed sufficient interest to interact affirmatively and publicly with Twitter. And of those eleven times, *four* related to tweets about Loughry. App. 48.

[12] "[T]he summer Tweets were four Tweets over the period of four months, one a month. She went on Tweets [*sic*] only 11 times the entire summer; that's, like, two, three times a month." App. 86.

In addition, more than one judge expressed unawareness of (and even resistance to) what it means to "follow" in the Twitter context. App. 116 (evident "confusion as to what 'following' means"). "Follow" is a term of art. *Campbell*, 986 F.3d at 823; *Knight First Amend. Inst.*, 928 F.3d at 230–31; *Sierra Pac. Indus.*, 862 F.3d at 1174. When she "followed" the reporters, Juror A subscribed to those reporters' tweets and those tweets are actively pushed by Twitter into Juror's A personal feed, meaning that when she "used Twitter during the trial, the reporters' tweets were on her homepage, where she would have either read them or scrolled past them to read other tweets." App. 37 (Diaz, J., dissenting in part). Indeed, Twitter defines "following" as one user "subscribing" to another's tweets.[13] While some of the judges understood this, others did not and insisted that "follow" carried pre-Twitter connotations. App. 128-129 (term "follow" "also has a perfectly pre-Twitter meaning, which can be carried over to the Twitter universe"). Others still conflated "following" with other Twitter functions. App. 121 (defining "following" as operating like a hashtag, an entirely different function).

No wonder the Fourth Circuit wanted direct evidence. If all Twitter activity left a public record, then it would seem reasonable to demand that criminal defendants find such publicly available evidence before a hearing is granted. Likewise, "following" may not seem significant if it is understood, wrongly, as the equivalent of having a casual interest in a particular columnist or sportswriter in a newspaper.

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[13] FOLLOWING FAQS, https://help.twitter.com/en/using-twitter/following-faqs (last visited Oct. 14, 2021).

The fact is, however, that Twitter is both more private and more pervasive. Jurors can read their Twitter feeds with total anonymity. And when they "follow" someone, that does not simply mean they have an interest and *might* look up that individual's tweets, as someone might choose to flip to the "Dear Abby" column when reading the newspaper. Those tweets show up in the jurors' feeds automatically. Indeed, a feed is nothing more than a continuing compilation of the tweets by the users a person follows—and *only* those tweets. So the reality is that a juror who accesses Twitter is likely to be exposed to the tweets of those whom they follow, but if they do so passively, "there's never go[ing to] be any direct evidence of someone who simply looks at his or her feed during the course of a trial." App. 104. That is where *Remmer* comes in.

But the outcome below means that the evidence a defendant must present to obtain a *Remmer* hearing is, in cases involving passive exposure to social media, the very same evidence that the hearing is necessary to uncover. Needless to say, that is an impossible standard to meet. And it means that defendants will have no way to protect against a juror who surreptitiously accesses social media and is exposed to highly prejudicial material but leaves no public trace. This is true whether a juror is known to have been on Twitter once or constantly, or the juror is likely to have viewed innocuous or indisputably biased tweets, or the defendant faces one year or life in prison. The evidentiary difficulties posed by social media are neither limited to the facts of this case nor likely to abate in the foreseeable future.

To be clear, the circumstantial evidence must still be of sufficient quality and quantity to warrant a

hearing. Below, the panel majority expressed concern that a *Remmer* hearing would be available any time a juror "ha[s] a social media account." App. 16. But that would plainly be insufficient.

This matter, however, is a paradigmatic example of a case where the circumstantial evidence should have resulted in a hearing. 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). Loughry showed that Juror A had demonstrated interest in him on Twitter, accessed Twitter during trial, and followed reporters who tweeted prolifically and in prejudicial ways about the trial—everything but direct proof that Juror A had actually read the tweets before rendering the verdict. *Remmer* exists for these very circumstances, and this Court should grant certiorari to ensure the case's continuing vitality.

III. This Court Is Unlikely to See a Better Vehicle for This Issue.

This case presents a rare opportunity for this Court to address *Remmer* outside the habeas context, as it arises out of a direct appeal from a federal criminal trial. Review is therefore not constrained to whether the lower court decision was "contrary to, or involved in an unreasonable application of, clearly established Federal law" standard. 28 U.S.C. § 2254(d)(1). A similar opportunity is unlikely to arise again for some time.[14]

[14] Recent statistics show that only two percent of federal indictments go to trial. John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*,

As this Court well knows, the habeas standard of review can significantly handcuff appellate review of a legal issue. Consider the First Circuit's recent consideration of a *Remmer* question in *Bebo v. Medeiros*, 906 F.3d 129 (1st Cir. 2018). The defendant's attorney found a copy of a book titled "Guilty: Liberal 'Victims' and Their Assault on America" in the jury deliberation room. *Id.* at 132 (1st Cir. 2018). That book contained "a piece of paper containing the handwritten names of the petitioner's attorney, the prosecutor, and the trial justice" as well as a chapter discussing knife violence, "a passage disparaging defense attorneys," and a passage on "the trial of O.J. Simpson." *Id.* at 132–33. The First Circuit noted that any extraneous document's presence in the jury room is cause for concern, particularly when that document is "a book entitled Guilty, written by an author with a legal background" that "contains commentary about defense attorneys lying and murderers disclaiming responsibility for stabbings they committed, *using language similar to that attributed to the petitioner* by a witness at trial." *Id.* at 136 (emphasis added). The court expressly noted that, were the case presented on direct appeal, the court "might find that the book was 'extraneous' material" that required a *Remmer* hearing. *Ibid.* But, because the court could only address the issue "[i]n the narrowly circumscribed scope of habeas review," it could not grant relief. *Ibid.* There is no such obstacle to review here.

This case also presents an ideal set of facts to consider the question whether circumstantial evidence

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PEW RESEARCH CENTER (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ (last visited Oct. 14, 2021).

alone can ever justify a *Remmer* hearing. There is no direct evidence establishing external contact.[15] At the same time, it is difficult to imagine more compelling circumstantial evidence of potentially prejudicial social-media contact. If the circumstantial evidence here does not warrant a *Remmer* hearing, no circumstantial evidence ever will.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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[15] That is what differentiates this case from the *Remmer* issue in the conviction of drug cartel leader "El Chapo," pending in the Second Circuit. That case involves jurors who openly conducted their own internet research and reported the same to the media. *United States v. Guzman Loera*, No. 09-CR-0466 (BMC), 2019 WL 2869081, at *3 (E.D.N.Y. July 3, 2019), on appeal *sub nom. United States v. Beltran-Levya* (2d Cir. No. 19-2239). In other words, there was no question what those jurors saw.

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October 18, 2021