No. 21-1587

CAPITAL CASE

In the Supreme Court of the United States

TIM SHOOP, WARDEN,
Petitioner,

v.

JERONIQUE D. CUNNINGHAM,
Respondent.

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

BRIEF OF KENTUCKY, ALABAMA, ARIZONA, ARKANSAS, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The *amici* States ask this Court to shut the door that a divided Sixth Circuit panel opened for criminal defendants, years after their conviction, to harass jurors for any information that might delay or disrupt their conviction and sentence. Every State—like the federal judiciary—has adopted rules and prohibitions to prevent this kind of juror harassment from yielding fruit. The decision below threatens those rules. It encourages even more juror harassment than the States already experience because it opens the door for vague and inadmissible evidence to be used to further one fishing expedition after another, including an evidentiary hearing on collateral review. The *amici* States have significant interests in the finality of their judgments and the preservation of their jury systems. Providing incentives for bothering jurors in their homes years after a trial undermines those interests.

This is all the more true given that this case arrives here not in the ordinary course, but instead from a request for habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). As this Court has repeatedly explained, "Congress enacted AEDPA 'to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases,' and to advance 'the principles of comity, finality, and federalism.'" *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022) (citations omitted). The panel's decision undermines those goals, and the *amici* States

[1] *Amici* notified counsel for all parties of their intention to file this brief more than ten days prior to filing. S. Ct. R. 37.2(a), 37.4.

have a "significant interest" in ensuring that AEDPA is not eroded any further. *Id*. at 2044.

SUMMARY OF THE ARGUMENT

The decision below threatens to exacerbate a problem that States already face: harassment of jurors to undermine the finality of a conviction and sentence and call into question the integrity of the jury's deliberations.

For over two centuries, American courts have relied on the no-impeachment rule to prevent parties from undermining a verdict by relying on statements and evidence about what happened during the jury's secret deliberations. This rule serves several purposes. It discourages juror harassment because the fruits of such efforts are often inadmissible. It promotes finality and gives confidence to those who give up their time to serve on juries that their work is not going to be wasted or called into question. These are vital goals for maintaining a criminal-justice system that depends on citizens giving up their daily lives to serve on juries—juries that are asked to make fair and honest decisions about life and death.

Opening the door to juror harassment chills the very freedom of expression in the jury deliberation room that the system depends on. As this Court has long understood, unnecessary inquiry into jury deliberations will lead to the erosion of the jury system, and when that happens, "[i]t is not at all clear . . . that the jury system could survive." *Tanner v. United States*, 483 U.S. 107, 120 (1987). And the more that courts allow further investigations into juror deliberations—further harassment of the individuals about what

went on in the jury room—the more those investigations will grow.

This case illustrates that problem well: a single vague statement that the Ohio Court of Appeals, at the very least, reasonably determined gave no indication of juror bias made by a juror well after a trial has been used to justify more and more discovery, leading to the decision below in which the Sixth Circuit ordered a hearing based only on that vague evidence and other evidence that is inadmissible. That kind of escalating inquiry into the deliberations of the jury room is a tsunami waiting to happen.

All of this is made worse here in the context of habeas review. This Court has repeatedly recognized the important guardrails that underpin AEDPA, which require federal courts to respect the finality of state-court judgments. That means federal courts are prohibited from "needlessly prolong[ing]" a case and "frustrat[ing] the State's interest[] in finality." *Shoop v. Twyford*, 142 S. Ct. 2037, 2045 (2022) (citation omitted). Yet nothing could be more "needless[]" than allowing a federal court to hold an evidentiary hearing to explore the ramifications of inadmissible evidence or evidence that a state court has already correctly determined does not warrant a hearing. Such an exercise does nothing more than provide further incentive for criminal defendants to harass jurors after a conviction on the hope that a single, vague notation from an investigator purportedly based on an interview with a juror years before could turn into a full-blown evidentiary hearing under AEDPA and further delay the finality of the conviction.

The Court should summarily reverse.

ARGUMENT

The American criminal-justice system is built on juries. But that system is fragile. It depends on ordinary citizens giving up their daily lives to serve on a jury where they are required to make some of the most profound decisions anyone could make: guilty or not guilty; life or death.

Recognizing that "[t]he jury is a central foundation of our justice system and our democracy," *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017), this Court has long protected jurors from unnecessary and unwarranted intrusion into their lives and deliberations. Jurors give up their time to make incredibly difficult decisions. That becomes all the more trying when jurors could be summoned back into court after every trial to probe them about their deliberations and private lives. But that is exactly what the decision below invites. So that "the jury system c[an] survive," *Tanner*, 483 U.S. at 120, this Court should summarily reverse the judgment below.

I. The Court should summarily reverse the decision below to prevent the Sixth Circuit's decision from incentivizing even more juror harassment.

Protecting jurors from harassment after trial has long been part of maintaining an orderly criminal-justice system. Courts do so primarily through rules that prohibit any party from using evidence about the jury's deliberations to attack the underlying verdict

and by requiring a more robust showing of other forms of juror bias. Those rules have a long history.

A. Courts have long protected jurors from harassment by prohibiting evidence impeaching the jury's deliberations.

1. "By the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner*, 483 U.S. at 117. For good reason. If the rule were otherwise, there is no doubt that "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald v. Pless*, 238 U.S. 264, 267 (1915). And "what was intended to be a private deliberation" would be "the constant subject of public investigation," leading to only one result: "the destruction of all frankness and freedom of discussion and conference" during deliberations. *Id.* at 267–68.

Lord Mansfield recognized this problem more than two centuries ago. "Prior to 1785 a juror's testimony [about deliberations] was sometimes received, always with great caution." *Id.* at 268. But in a case in which a party alleged "that [the jury's] verdict had been made by lot," Lord Mansfield nevertheless "refused to receive the affidavit of jurors to prove" what happened in the deliberations. *Id.* His decision "soon came to be almost universally followed in England and in this country." *Id.* That's because a contrary rule "would open the door to the most pernicious arts and tamper-

ing with jurors." *Id.* As this Court put it over one hundred years ago, "no verdict would be safe" if the courts indiscriminately allowed post-trial evidence about juror deliberations. *Id.*

2. For federal courts, these values were eventually codified in Federal Rule of Evidence 606(b). "The values sought to be promoted by excluding" evidence that would call into question a verdict "include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." Fed. R. Evid. 606(b), advisory committee note. These "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner*, 483 U.S. at 127. And so under Rule 606(b), nearly all evidence related to the juror's deliberations is inadmissible to attack the validity of a verdict.

Rule 606, of course, does not prohibit all evidence about the jury's deliberations. One of the "plain[] principles of justice" that Rule 606(b) preserves is the longstanding belief that extraneous influences should be kept out of the jury room. *See McDonald*, 238 U.S. at 269. "Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." *Tanner*, 483 U.S. at 121. So while Rule 606(b) primarily serves to protect jurors, it does so by more or less codifying the common-law rule "requiring an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations" by, for example, causing juror bias. *Id.* at 120; *see also id.* at 117.

This Court's decisions reflect that important balance. In *Remmer v. United States*, 347 U.S. 227 (1954), for example, the government "confessed as error" warranting an evidentiary hearing the fact that a juror had been interviewed by an FBI agent in the middle of a trial after it was discovered that an unnamed individual had told the juror that he "could profit by bringing a verdict favorable to the" criminal defendant. 347 U.S. at 228–30. But *Remmer* is rare. In most cases, procedures such as *voir dire*, though "not infallible," are the "safeguards of juror impartiality." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

That's why the exceptions to Rule 606(b) arise only "'in the gravest and most important cases' where exclusion of juror affidavits might well violate 'the plainest principles of justice.'" *Pena-Rodriguez*, 137 S. Ct. at 864 (quoting *McDonald*, 238 U.S. at 269). "Public policy requires a finality to litigation." *Tanner*, 483 U.S. at 124 (quoting S. Rep. 93-1277 at 13–14 (1974)). "And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts." *Id.* (quotation omitted). These principles are critical for "protecting the jury system and the citizens who make it work." *Id.* at 125 (quotation omitted).

3. Nor are the federal courts the only ones to have adopted rules protecting juries. *See, e.g., Delaware v. Cabrera*, 984 A.2d 149, 150 (Del. Super. Ct. 2008) (outlining Delaware's juror protections); *Marshall v. Florida*, 976 So.2d 1071, 1079–81 (Fla. 2007) (examining Florida's juror-protection rules); *Colorado v. Harlan*, 109 P.3d 616, 636 (Colo. 2005) (outlining Colorado's juror protections); *Crider v. Oklahoma ex rel. Dist. Ct.*

of Okla. Cnty., 29 P.3d 577, 578–79 (Okla. 2001) (discussing juror protective orders); *Maine v. St. Pierre*, 693 A.2d 1137, 1139–40 (Me. 1997) (discussing Maine's juror-protection rules); *Massachusetts v. Luna*, 641 N.E.2d 1050, 1053 (Mass. 1994) ("We have allowed postverdict interviews only where there is evidence that the jury considered extraneous matters during their deliberations."); *Tennessee v. Thomas*, 813 S.W.2d 395, 396 (Tenn. 1991) (discussing rules for attorney-juror contact). This should not be surprising given that the majority of civil and criminal litigation occurs in state courts.

Some courts prohibit contact with jurors unless for "good cause." *See, e.g., Hall v. Idaho,* 253 P.3d 716, 722 (Idaho 2011) (examining the justifications for juror protection, including "protecting juror privacy and protecting the finality of verdicts"); *Illinois v. Williams*, 807 N.E.2d 448, 454–58 (Ill. 2004) (examining the reasons for juror protection); *New Jersey v. Harris*, 859 A.2d 364, 430–32 (N.J. 2004) (same); *Townsel v. Superior Ct.*, 979 P.2d 963, 970–71 (Cal. 1999) (noting the policy justifications for juror protection, including juror safety and respect for juror privacy); *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So.2d 407, 419 (Miss. 1993) (explaining the need to protect jurors from harassment); *Arizona v. Paxton*, 701 P.2d 1204, 1205 (Ariz. Ct. App. 1985) (listing Arizona's standards for jury misconduct); *Oregon v. Smith*, 458 P.2d 687, 693 (Or. 1969) ("No cause was alleged or shown why the jurors should be interviewed, except the conjecture that investigation might turn something up. . . . Fishing expeditions of this nature after trial by disappointed litigants seeking some presently unknown but

possible cause for a new trial are universally condemned.") (citations omitted)).

Other courts prohibit juror contact altogether unless something more is shown. *See, e.g., Strong v. Missouri*, 263 S.W.3d 636, 643 (Mo. 2008) (stating that a criminal defendant "has no inherent right to contact and interview jurors"); *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960) ("[R]ather than permit . . . the promiscuous interrogation of jurors by the defeated litigant . . . the better practice would be to bring the matter to the attention of the trial court. . . . [T]he trial court may then summon the juror before him and permit an examination in the presence of counsel . . . and the trial judge under proper safeguards.").

Various state and local rules codify protection for jurors. *See, e.g.,* Cal. Civ. Proc. Code §§ 192, 206, 237; Fla. R. Crim. P. 3.575; Rules Governing the Courts of the State of New Jersey R. 1:16-1; Tex. Code Crim. Proc. art. 35.29; Fayette Cnty. Cir. Ct. Local R. 32 (Kentucky); Cuyahoga Cnty. Local R. 22(E) (Ohio). Even state bar associations impose protection for jurors. *See, e.g.,* Fla. State Bar R. 4-3.5; Okla. Bar Ass'n Ethics Counsel, Ethics Op. No. 248 (1967).

And most relevant here, "[s]ome version of the no-impeachment rule is followed in every State and the District of Columbia." *Pena-Rodriguez*, 137 S. Ct. at 865.

B. Juror harassment is a serious problem that the States face in defending convictions after a verdict.

The potential for increased juror harassment is no hypothetical. The *amici* States know this problem all too well, as they defend against post-conviction attacks on the jury's integrity.

1. Consider just one recent example in Kentucky. Twenty years ago, a jury convicted Roger Epperson for robbery, burglary, and complicity to commit murder. *Epperson v. Kentucky*, 2017–SC–000044–MR, 2018 WL 3920226, at *1 (Ky. Aug. 16, 2018). "The victims were found dead in their home" more than thirty years ago. *Epperson v. Kentucky*, 197 S.W.3d 46, 51 (Ky. 2006). "The wife had two gunshot wounds in the back" and the husband, who "was also gagged," had "two gunshot wounds to the head." *Id.* Epperson was tried and convicted by a jury and sentenced to death. *Id.*

For their service, the jurors spent years after the trial experiencing harassment. "Epperson's post-conviction counsel . . . called these jurors, show[ed] up at their house to conduct interviews, and subpoenaed them into this court for further proceedings." *Epperson*, 2018 WL 3920226, at *2. The trial court concluded that the harassment was so extreme it would lead the jurors to say "whatever needed to be said just for Epperson's post-conviction attorneys and investigators to stop questioning them." *Id.*

The harassment is in and of itself a problem, but perhaps of even greater concern for the judiciary is the effect of that harassment on the ability to preserve a jury system that is built on citizens giving up their

time to make serious decisions of profound importance. In *Epperson*, those sometimes-intangible fears materialized: "One juror expressed his dissatisfaction with the court system as a whole, stated he lacked confidence that the difficult decision he faced will be honored, and swore he would never participate on another jury." *Id.* Nor is that surprising. "The constant disruption of fellow citizens' lives, who are ordered into court to perform their civic duty for a mere $12.50 per day, serves only to poison the confidence our society has in its participation in criminal justice matters." *Id.*

Epperson is not an isolated incident. *See, e.g., In re Charles Russell Rhines*, No. 19-6479, Opp. Br. 8–13 (2019) (outlining juror abuse that occurred in in South Dakota); *Meece v. Kentucky*, 06-CR-656, 5–12 (Ky. Cir. Ct., Warren Cnty. Apr. 5, 2018) (outlining how defense counsel showed up at night at jurors' homes and pressured jurors to sign statements that defense counsel wrote); *Prosecutors: Jurors Felt Harassed by Widmer Defense*, WLWT NEWS (Jun. 10, 2009), available at https://perma.cc/ZEA6-J2EL. Post-trial juror harassment is a real problem that Sates everywhere face.

2. The facts of this case exemplify the same problem. A jury convicted Cunningham of two counts of aggravated murder, six counts of attempted aggravated murder, and aggravated robbery, for which he received a death sentence. *Cunningham v. Shoop*, 23 F.4th 636, 644 (6th Cir. 2022).

After extracting all that they could from the people they had just robbed, Cunningham and his accomplice "started firing into . . . the group—'aiming toward like

the middle, at the ends and coming in . . . one from one side, one from the other.'" *Id.* The victims could hear the "'click, click, click' of empty weapons as [the accomplice] and Cunningham continued to pull the triggers, even after they were out of bullets." *Id.* "Every member of the group was shot." *Id.* The group included teenager Leneshia Williams, who was shot in the back of her head and died almost instantly. *Id.* Another teenager, Coron Liles, was shot in the mouth. *Id.* Another individual, Armetta Robinson, was shot in the back of the head and was comatose for 47 days. *Id.* Yet another individual, Tomeaka Grant, was shot in the head and arm and lost her left eye. *Id.* If that were not bad enough, three-year-old Jala Grant was shot twice in the head and died on the kitchen floor. *Id.* Jala's father, James Grant, heroically attempted to shield Jala from the bullets, but himself was shot five times. *Id.*

One of the jurors at Cunningham's trial was Nichole Mikesell. *Id.* For her service, Mikesell likewise had her post-trial life interrupted by an investigator searching for anything that might be used to undo Cunningham's conviction and sentence. "One weekend afternoon" well after the trial, while scouring for information to help his client, an investigator working on behalf of Cunningham "showed up uninvited at Mikesell's home while she was playing outside with her kids." *Id.* at 679 (Kethledge, J., dissenting) (emphasis added).

At some point during that conversation, Mikesell told the investigator that "some social workers worked with [the defendant] in the past and were afraid of him." *Id.* This vague statement—which Mikesell made

well after the trial—lacked any specifics that would indicate juror bias during the trial. And the Ohio Court of Appeals correctly held the same.

Yet that did not stop even more inquiry into the jury's deliberations. Even though the Ohio court rejected Cunningham's juror-bias claim on the merits, a federal district court allowed Cunningham to depose not only some of the social workers at Mikesell's place of business and the investigator but also some of the jurors that sat at Cunningham's trial. *Id*. at 646. That did not lead to any additional information about Mikesell's alleged bias from the social workers she worked with. But because the door to discovery was opened, it led to something else that Cunningham could try to hang his hat on: a statement from *another* juror claiming that during deliberations, Mikesell said something that suggested juror bias because she knew the families of the victims. And that led to more depositions and more inquiry into the private deliberations of the jury—which eventually led to the Sixth Circuit's decision below mandating that the district court hold an evidentiary hearing under 28 U.S.C. 2254(e).

As the petition explains, what's important here is that *none* of the evidence Cunningham relies on to support the second of his two juror-bias claims is admissible under Rule 606(b). Nor did the Sixth Circuit even disagree. And yet, that did not stop the escalating discovery into the private deliberations of the jury. In that same vein, the investigator's statement about the social-worker information does not come even close to the situation in *Remmer* that this Court felt warranted an evidentiary hearing on juror bias, some-

thing that the Ohio Court of Appeals explicitly recognized. *See Cunningham*, 23 F.4th at 645–46; *see also id*. at 679–82 (Kethledge, J., dissenting). What started as harassing a single juror during a family weekend uncovering a vague and uninformative statement has turned into an ever-increasing (and court-imposed) inquiry into what the jurors might have said to each other during deliberations, all in search of the kind of juror bias that traditional "safeguards of juror impartiality, such as *voir dire*" protect from. *Smith*, 455 U.S. at 217. Even though no one has specific or discoverable admissible evidence after years of trying, the harassment continues—further eroding any "confidence that the difficult decision [the jurors] faced will be honored." *Epperson*, 2018 WL 3920226, at *2.

This case demonstrates what this Court (and courts before it) have recognized as obvious: intrusion into the private lives of jurors and the deliberative process breeds juror harassment and undermines finality of criminal convictions. *Pena-Rodriguez*, 137 S. Ct. at 865. And the "[f]reedom of debate" within the jury room that is necessary for a robust criminal-justice system "might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark v. United States*, 289 U.S. 1, 469 (1933). At each step of this case, rather than prevent a fishing expedition into the private lives of jurors and their conversations during deliberations, the federal courts have encouraged it.

II. The problem of juror harassment takes on a heightened form when used to expand federal habeas review.

All of this is doubly problematic in the context of habeas. The "limits" this Court has recognized on the "'exercise of habeas jurisdiction' . . . reflect [its] enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (citations omitted). The importance of finality also underscores the no-impeachment rule, preventing juror harassment to undermine a system that depends on verdicts not being subject to endless second-guessing. *See* Fed. R. Evid. 606(b), advisory committee note.

This Court recently reiterated that principle of habeas review in the context of a federal court issuing a writ to order a prisoner transported for an unnecessary hearing. *Shoop*, 142 S. Ct. at 2044. "AEDPA . . . restricts the ability of a federal habeas court to develop and consider new evidence." *Id.* That's because "[a] federal court 'may *never* needlessly prolong a habeas case, particularly given the essential need to promote the finality of state convictions.'" *Id.* (citation omitted). As the Court put it: "Commanding a State to take [the risks associated with prisoner transport] so that a prisoner can search for *unusable evidence* would not be a 'necessary or appropriate' means of aiding a federal court's limited habeas review." *Id.* at 2045 (emphasis added). And so before ordering such extraordinary relief, federal courts "must" determine whether the "new evidence . . . could be legally considered in the prisoner's case." *Id.* at 2044.

The same principle applies here. After a years-long fishing expedition to uncover claims of juror bias—bothering jurors at their homes and deposing jurors during unnecessary discovery—Cunningham has failed to produce a single piece of usable evidence to support his claims. Nor can it be said that the Ohio Court of Appeals unreasonably determined that the only arguably usable evidence did not necessitate an evidentiary hearing when compared to the situation in *Remmer*. The panel majority's decision ordering "an evidentiary hearing to investigate Cunningham's two juror-bias claims" thus undermines not only the principles that have given rise to the no-impeachment rule and other forms of juror protection, but also the well-established rules governing every federal court's exercise of jurisdiction under AEDPA. The Court should grant certiorari and summarily reverse the decision below to prevent further deterioration of these important guardrails on a federal court's ability to second-guess a state-court conviction.

CONCLUSION

The Court should summarily reverse the judgment below.

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