

IN THE SUPREME COURT OF THE UNITED STATES

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PATRICK EUGENE STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner is entitled to relief on his claim that the jury-selection plan used by the District of Kansas violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq., notwithstanding the court of appeals' determination that his claim was procedurally barred under the statute.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Allen, No. 16-cr-10141 (Feb. 4, 2019)

United States Court of Appeals (10th Cir.):

United States v. Stein, No. 19-3030 (Jan. 25, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

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No. 20-8458

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 985 F.3d 1254. The memoranda and orders of the district court (Pet. App. B1-B24, B25-B28) are not published in the Federal Supplement but are available at 2018 WL 453725 and 2018 WL 1071452.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2021. The petition for a writ of certiorari was filed on June 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of conspiring to use a weapon of mass destruction, in violation of 18 U.S.C. 2332a(a)(2), and conspiring to violate civil rights, in violation of 18 U.S.C. 241. Stein Amended Judgment 1. He was sentenced to 360 months of imprisonment, to be followed by ten years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1-A25.

1. The Jury Selection and Service Act of 1968 (Jury Act), 28 U.S.C. 1861 et seq., applies to the selection of grand and petit juries in federal courts. The Jury Act states that litigants in federal courts are entitled to juries "selected at random from a fair cross section of the community in the district or division wherein the court convenes" and that "all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose." 28 U.S.C. 1861. The statute forbids excluding any citizen from jury service "on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. 1862. And the statute requires each judicial district to promulgate a written jury-selection plan -- which must be preapproved by a reviewing panel of circuit and district judges -- that complies with legal

requirements. 28 U.S.C. 1863(a). Different judicial divisions within the same district may have different plans. Ibid.

The Jury Act also specifies the "exclusive means" for challenging a jury on the ground that it violates the Act's requirements. 28 U.S.C. 1867(e). As relevant here, a criminal defendant may move to stay the proceedings against him because of a "substantial failure to comply" with the statute's requirements for selecting petit juries. 28 U.S.C. 1867(a). The defendant must file the motion "before the voir dire examination begins, or within seven days after [he] discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." Ibid. The defendant also must attach "a sworn statement of facts which, if true, would constitute a substantial failure to comply with" the statute. 28 U.S.C. 1867(d).

2. The State of Kansas constitutes one federal judicial district, in which "[c]ourt shall be held at Kansas City, Lawrence, Leavenworth, Salina, Topeka, Hutchinson, Wichita, Dodge City, and Fort Scott." 28 U.S.C. 96. Consistent with the court locations designated by Congress, the District of Kansas's jury plan divides the district into six geographic divisions: "(1) Kansas City-Leavenworth; (2) Wichita-Hutchinson; (3) Topeka; (4) Dodge City; (5) Fort Scott; and (6) Salina." Pet. App. B2 (citation omitted). At the time relevant here, the jury plan provided that potential

petit jurors for a case would be drawn from the division where that case was being heard. Id. at B2-B3.

Only three of the six divisions -- Kansas City-Leavenworth, Wichita-Hutchinson, and Topeka -- have active federal courthouses. Pet. App. B3. Under the district's former plan, only citizens from those three divisions were ordinarily summoned for petit jury service. Ibid. On March 4, 2020, however, the Chief Judge for the District of Kansas amended the petit-jury selection process. See In re Administration of Jury Plan Pursuant to D. Kan. Rule 38.1, Administrative Order No. 2020-1. Now, "[o]n a quarterly basis at each courthouse," the jury coordinator draws petit-jury pools from both Kansas City-Leavenworth and Fort Scott for cases in Kansas City-Leavenworth; from both Wichita-Hutchinson and Dodge City for cases in Wichita-Hutchinson; and from both Topeka and Salina for cases in Topeka. Ibid. The plan also authorizes the court to "creat[e] [a] petit jury panel from a single division or from a combination of any of the six divisions, where a trial is held in a location other than Kansas City, Wichita, or Topeka or to address other practicalities as may \* \* \* exist." Ibid.

3. In 2016, petitioner and his co-conspirators plotted to attack Muslims in Garden City, Kansas, by planning to bomb an apartment complex and mosque where Somali Muslims lived and prayed. Pet. App. A3. The co-conspirators planned to detonate a bomb during prayer time to maximize casualties. 6 C.A. ROA 2919. The

co-conspirators “pursued various strategies for obtaining explosives to carry out the attacks, including manufacturing their own explosives and meeting with an FBI undercover employee \* \* \* posing as an arms dealer.” Pet. App. A3.

A grand jury indicted petitioner and the other conspirators for conspiring to use a weapon of mass destruction, in violation of 18 U.S.C. 2332a(a)(2), and conspiring to violate civil rights, in violation of 18 U.S.C. 241. Pet. App. A4. The case was heard in the Wichita-Hutchinson division, under the District of Kansas’s former jury plan. Id. at A6. The petit-jury pool was accordingly drawn only from that division. Ibid. The pool did not include potential jurors from the Dodge City division, where the events giving rise to the case occurred. Id. at A4, A6.

The district court confirmed the geographic scope of petit-juror selection at a status conference on November 16, 2017. Pet. App. A7. In particular, in response to the defendants’ concerns about prejudicial media coverage in southwest Kansas, the court reassured counsel that, “[f]or our jury trials, we tend not to pull that far.” D. Ct. Doc. 558, at 31 (Nov. 16, 2017). The jury coordinator, who was present at the conference, “confirmed that petit jury pools were drawn only from the Wichita/Hutchinson division.” Pet. App. A7.

Although the Jury Act gives a criminal defendant seven days to challenge jury-selection procedures after he discovers or could



have discovered the grounds for asserting that those procedures violate the Act, 28 U.S.C. 1867(a), petitioner took more than three weeks to move for an order to issue summonses to prospective jurors from both the Wichita-Hutchinson and the Dodge City divisions, see Pet. App. A7. Further, although the Jury Act requires a sworn statement of facts to be attached to the motion, 28 U.S.C. 1867(d), petitioner did not attach any such statement, see Pet. App. A7.

The district court denied the motion. Pet. App. B1-B24. The court determined, as relevant here, that the district's method of petit-juror selection did not violate petitioner's own statutory rights and that petitioner lacked third-party standing to invoke the statutory rights of the excluded jurors. Id. at B4-B23.

Six days later, petitioner moved to dismiss the indictment or stay the proceedings for a substantial failure to comply with the Jury Act; this time, he and his co-defendants attached a sworn statement of facts. Pet. App. A7. The district court denied the second motion on the same basis as the first. Id. at B25-B28.

Petitioner was convicted on both counts of the indictment. Pet. App. A5. The district court sentenced him to 360 months of imprisonment. Ibid.

4. The court of appeals affirmed. Pet. App. A1-A25.

As relevant here, the court of appeals rejected petitioner's contention that he was entitled to relief under the Jury Act. Pet. App. A6-A10. The court first determined that petitioner's Jury

Act motions had failed to comply with the procedures that the Act specifies as the "exclusive means" for a criminal defendant to challenge a jury under the Act. 28 U.S.C. 1867(e); see Pet. App. A7-A8. The court found that petitioner was "on notice \* \* \* as early as the November 16, 2017 status conference \* \* \* that petit jury pools were drawn only from the Wichita/Hutchinson division" and, thus, "had seven days from this time (i.e., through November 23, 2017) to file a compliant motion challenging this practice." Pet. App. A7. The court observed, however, that petitioner's first motion was filed only on December 8, 2017 and that his second motion was filed only on January 23, 2018 -- both after the statutory deadline had expired. Ibid. The court further observed that petitioner's first motion lacked the sworn statement of facts required by the statute. Ibid.

The court of appeals then determined, in the alternative, that petitioner's Jury Act challenge failed on the merits. Pet. App. A8-A10. The court observed that the Jury Act provides a remedy only for a "substantial failure to comply with the statute." Id. at A8 (citation omitted); see 28 U.S.C. 1867(a). The court explained that, under its precedents, "[a] failure is considered 'substantial' when it 'frustrates one of the three principles underlying the Act': (1) the random selection of jurors, (2) culling of the jury from a fair cross-section of the community, and (3) determination of disqualifications, exemptions, and

exclusions based on objective criteria.” Pet. App. A8 (quoting United States v. Kamahale, 748 F.3d 984, 1022 (10th Cir. 2014)). The court concluded that any “technical deviation from the provisions of the Jury Act” in this case did not frustrate those principles and thus did not amount to a “substantial failure to comply” with the statute. Id. at A9.

#### ARGUMENT

Petitioner contends (Pet. 12-19) that (1) his challenge to the District of Kansas’s jury selection plan was procedurally proper and (2) the plan substantially violated the terms of the Jury Act. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. In addition, the District of Kansas has modified its jury plan, thus resolving the issue that petitioner has raised. The petition for a writ of certiorari should be denied.\*

1. Under the Jury Act, a criminal defendant who wishes to raise a statutory challenge to the method of selecting the jury must do so “before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier.” 28 U.S.C. 1867(a). The defendant also must file “a

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\* Petitioner’s co-defendant has also filed a petition for a writ of certiorari. See Wright v. United States, No. 21-5039 (filed June 24, 2021).

sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of" the statute. 28 U.S.C. 1867(d). The Act specifies that a challenge in accordance with those procedures is "the exclusive means" by which a defendant may raise a Jury Act challenge to his jury. 28 U.S.C. 1867(e).

The court of appeals correctly determined that petitioner failed to comply with those procedural requirements. Pet. App. A7-A8. The court found that petitioner was "on notice of the jury selection plan as early as the November 16, 2017 status conference," when "the jury coordinator confirmed that petit jury pools were drawn only from the Wichita/Hutchinson division." Id. at A7. As the court of appeals explained, petitioner was therefore required to file any motion raising a Jury Act challenge no later than "seven days from this time" -- that is, no later than "November 23, 2017." Ibid. Petitioner, however, filed his first Jury Act motion on December 8, 2017, and his second motion on January 23, 2018. Ibid. The first motion also lacked the required statement of facts. Ibid. Petitioner's Jury Act challenge accordingly is procedurally barred. Ibid.

Petitioner contends (Pet. 13-14) that he was put on notice of the grounds of his Jury Act challenge only after the district court denied his first motion, and that his second motion, filed six days later, was accordingly timely. The court of appeals, however,

rejected that contention, finding that petitioner was “on notice of the jury selection plan as early as the November 16, 2017 status conference.” Pet. App. A7; see id. at A8 (“[petitioner] had enough to go on after being informed of the practice at the November 16 hearing”). That finding was correct. The text of the Jury Act provides no basis for exempting a motion like the first one that petitioner filed -- asserting that the Jury Act requires a change in the planned method of jury selection -- from its strict procedural requirements. And allowing such an exemption would render the Act’s procedural requirements largely inapplicable, effectively permitting challenges at any time and without the required statement, frustrating the Act’s design to resolve jury-selection challenges as early as possible. In any event, petitioner’s disagreement with the court of appeals’ fact-bound decision would not warrant this Court’s review. See Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); United States v. Johnston, 268 U.S. 220, 227 (1925) (“We do not grant a certiorari to review evidence and discuss specific facts.”).

2. The court of appeals also correctly determined in the alternative that petitioner’s Jury Act claim failed on the merits. Pet. App. A8-A10. A court may award relief under the Jury Act only for a “substantial failure to comply” with the statute’s

provisions. 28 U.S.C. 1867(d) (emphasis added). The court below explained that a failure is "substantial" when it frustrates one of the "principles underlying the Act," which include the "random selection of jurors," the selection of jurors "from a fair cross-section of the community," and the "determination of disqualifications, exemptions, and exclusions based on objective criteria." Pet. App. A8 (citation omitted).

The court of appeals correctly rejected petitioner's contention that the District of Kansas's previous jury plan violated the principle of random selection. Pet. App. A9. As the court observed, the plan "did not prevent the random selection of jurors." Ibid. The court also correctly rejected petitioner's contention that the plan violated the principle that exclusions from jury service should rest on objective criteria. Ibid. "The objectivity principle prohibits selection based on subjective 'criteria,'" such as "'good character, approved integrity, sound judgment and fair education.'" United States v. Carmichael, 560 F.3d 1270, 1277-1278 (11th Cir. 2009) (citation omitted), cert. denied, 558 U.S. 1128 (2010). The jury-selection plan here did not rely on any such criteria. And petitioner did not contend that the jury plan violated the remaining criterion, selection of jurors from a fair cross-section of the community. See Pet. App. A8-A9.

Contrary to petitioner's contention (Pet. 14-15), the court of appeals did not err by considering the principles underlying the Jury Act when gauging the substantiality of the violation. Other courts of appeals have used the same framework to determine whether a failure to comply with the Act is substantial. See United States v. Candelaria-Silva, 166 F.3d 19, 33 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); United States v. Calabrese, 942 F.2d 218, 227 (3d Cir. 1991); United States v. Schmidt, 711 F.2d 595, 600 (5th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); United States v. Allen, 160 F.3d 1096, 1102 (6th Cir. 1998), cert. denied, 526 U.S. 1044 (1999); United States v. Davis, 854 F.3d 1276, 1296 (11th Cir.), cert. denied, 138 S. Ct. 379 (2017). Petitioner identifies no court of appeals that has adopted a different framework; nor does he offer an alternative approach of his own.

Petitioner also errs in suggesting (Pet. 17-18) that the decision below is at odds with this Court's decision in Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). In Thiel, which was decided before the enactment of the Jury Act, this Court exercised its supervisory power to overturn a district court's practice of "deliberately and intentionally exclud[ing] from the jury lists all persons who work for a daily wage," explaining that such a practice improperly "discriminate[d] against persons of low economic and social status." Id. at 221, 223-224. The Jury Act

would prohibit a similar practice today; it explicitly prohibits discrimination on account of "economic status." 28 U.S.C. 1862. The jury plan at issue here, however, did not discriminate on the basis of economic status or any other characteristic discussed in Thiel or expressly protected by the Jury Act.

In all events, because the court of appeals rested its judgment on two alternative grounds, petitioner must establish that the court erred on both grounds in order to obtain reversal. See United States v. Title Insurance & Trust Co., 265 U.S. 472, 486 (1924). Petitioner has not shown that the court erred on either the procedural issue or the merits, let alone on both.

3. Petitioner does not contend that either the court of appeals' procedural determination or its merits determination conflicts with the decision of any other court of appeals. Petitioner instead argues (Pet. 18-19) that this case involves "an issue of national importance" because many citizens of Kansas "are excluded from jury service" under the District of Kansas's jury plan. The district court, however, has already resolved that concern by modifying its jury plan. See In re Administration of Jury Plan Pursuant to D. Kan. Rule 38.1, Administrative Order No. 2020-1 (Mar. 4, 2020). Under the revised plan, the jury coordinator calls potential petit jurors from both Kansas City-Leavenworth and Fort Scott for cases in Kansas City-Leavenworth; from both Wichita-Hutchinson and Dodge City for cases in Wichita-



Hutchinson; and from both Topeka and Salina for cases in Topeka. Ibid. As a result, citizens from all six divisions now have the opportunity to be considered for service on petit juries in the district. And while petitioner speculates (Pet. 18-19) that “[s]imilar phenomena” to that challenged here “occur in states across the country,” he neither provides any concrete examples nor cites any evidence to support his assertion.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2021