No. 13-517

IN THE

# Supreme Court of the United States

GREGORY P. WARGER,

*Petitioner,*

v.

RANDY D. SHAUERS,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. As a nonprofit, voluntary professional bar association, NACDL represents 40,000 attorneys nationwide, made up of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the state supreme courts in cases raising issues of importance to criminal defendants and the defense bar.

In this case, NACDL has an interest in ensuring that the Federal Rules of Evidence are interpreted and applied in a manner consistent with a criminal defendant's constitutional right to a full and fair trial by an impartial jury. Although this case arises in the civil context, this Court's interpretation of Federal Rule of Evidence 606(b) will apply equally to criminal cases. It is thus imperative that the Court understand and account for the substantial criminal-law issues presented by this case.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or *amicus*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

## ARGUMENT

### I. RACIAL, ETHNIC, AND RELIGIOUS BIAS AMONG JURORS REMAINS A SERIOUS PROBLEM IN CRIMINAL CASES

"Let's be logical. He's black and he sees a seventeen year old white girl—I know the type." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (internal quotation marks omitted). "When Indians get alcohol, they get drunk, and . . . when they get drunk, they get violent." *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (internal quotation marks omitted). "[T]he defendants [were] guilty because they were of Arabic descent." *United States v. Shalhout*, 507 F. App'x 201, 203 (3d Cir. 2012) (internal quotation marks omitted). "I guess we're profiling but they cause all the trouble." *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009) (internal quotation marks omitted). "All the niggers should hang." *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) (internal quotation marks omitted).

Each of these statements was expressed by a juror during deliberations in a criminal case. Each of these biases escaped detection during voir dire and throughout an ostensibly constitutional trial. And each statement is abhorrent to our judicial system and envelops each trial in an impermeable cloud of doubt. The Court's interpretation of Rule 606(b) in this case will dictate the extent to which criminal defendants and civil litigants alike will be allowed to introduce such evidence of juror bias to challenge the fairness of their trials.

These are by no means isolated incidents. For example, a state court recently considered the effect of a juror's declaration that "race was an issue from the

inception of the trial." *Commonwealth v. Steele*, 961 A.2d 786, 792, 807 (Pa. 2008). A co-juror had "noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty" and should "fry, get the chair or be hung." *Id.* at 807–08 (internal quotation marks omitted).

In another recent case, one juror called another a "nigger lover," a fact the defendant sought to introduce after the verdict. *Williams v. Price*, 343 F.3d 223, 225–35 (3d Cir. 2003) (Alito, J.) (internal quotation marks omitted). The court of appeals "emphasize[d] that [it did] not hold that testimony of the type at issue is inadmissible under Rule 606(b)" but nonetheless felt constrained, under the high standards applicable to habeas actions, to "hold only that the exclusion of such testimony . . . does not contravene or represent an unreasonable application of clearly established federal law." *Id.* at 237.

Religious and ethnic biases, like racial bias, have similarly poisoned the fairness of trials. In one such case, jurors made comments during deliberations such as, "Well, the fellow we are trying is a Jew. I say, 'Let's hang him'"; "you know what the Rabbi came here for, he came to bless Mr. Heller"; and "[H]e is Jewish. We are just going to hang him." *United States v. Heller*, 785 F.2d 1524, 1525–26 (11th Cir. 1986). These examples demonstrate the continuing threat that "justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Ristaino v. Ross*, 424 U.S. 589, 596, n.8 (1976).

Voir dire is the primary method to ferret out impermissible biases and actual prejudice that could prevent parties from receiving a fair trial. But voir dire is an imperfect filter. Jurors are reluctant to reveal—

and are at times even eager to conceal—their conscious biases.

Because jurors harboring virulent racial and religious prejudices can and do slip through voir dire, a court's ability to protect the fairness of criminal proceedings can depend on evidence of statements made during jury deliberations. This case presents a critical opportunity to fortify—or an equally troubling occasion to erode—the Constitution's guarantee that criminal defendants will be tried based on their conduct, not their race or belief system. Protecting the fundamental rights of criminal defendants compels an interpretation of Rule 606(b) that permits a party to introduce evidence that a juror withheld or concealed critical information during voir dire that infected a trial with partiality or other improper influence.

## II. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES ADMITTING EVIDENCE UNDER RULE 606(b) THAT TENDS TO PROVE A LITIGANT DID NOT RECEIVE A FAIR TRIAL

Although the interpretation of Rule 606(b) arises here in the context of a civil case, the Court's resolution of the question presented will have equal effect on criminal proceedings. "In general, the rules of evidence are the same in civil and criminal cases." *Nudd v. Burrows*, 91 U.S. 426, 438 (1875); *accord Huddleston v. United States*, 485 U.S. 681, 685 (1988); *see also* Fed. R. Evid. 1101(b). This Court accordingly should account for constitutional arguments unique to the criminal context in interpreting Rule 606(b).

### A. Rule 606(b) Implicates Core Constitutional Concerns in the Criminal Context

The Fifth, Sixth, and Fourteenth Amendments guarantee, *inter alia*, the right to an impartial jury and the right to present a complete defense. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973). The Eighth Circuit's interpretation of Rule 606(b)—to bar the admission of juror statements made during deliberations even to show juror dishonesty at voir dire—implicates those rights and raises serious constitutional questions in criminal cases.

1. "One touchstone of a fair trial is an impartial trier—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough*, 464 U.S. at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The Sixth Amendment guarantees defendants the "right to be tried by a jury free from ethnic, racial, or political prejudice, . . . or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (internal citations omitted). Indeed, the presence of a partial juror "violates even the minimal standards of due process." *Irvin v. Down*, 366 U.S. 717, 722 (1961).

The Constitution guarantees the right to a jury "without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992); *see Ham*, 409 U.S. at 526. While this malady has manifested itself primarily in the criminal context, "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991).

The Eighth Circuit's interpretation of Rule 606(b) runs headlong into the right to a jury free of partiality. If a juror fails to acknowledge racial or other bias during voir dire, indications of that bias are likely to arise only in statements made during deliberations. Barring jurors from testifying about such statements would effectively foreclose a defendant's best chance to show that prejudice robbed him of a fair trial.

To determine whether the exclusion of juror testimony under Rule 606(b) violates a defendant's Sixth Amendment rights, this Court has assessed the purposes of the rule in relation to the constitutional rights at stake. *Tanner v. United States*, 483 U.S. 107, 119–27 (1987). Rule 606(b) works to ensure "finality" as well as "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople," which "would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 120–21. In *Tanner*, those purposes outweighed the threat of juror intoxication because other safeguards at trial—voir dire, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to report misconduct prior to the verdict, and the availability of alternative non-juror evidence to show misconduct—were adequate to protect the defendant's "Sixth Amendment interests in an unimpaired jury." *Id*. at 126–27.

An entirely different set of considerations is at play where, as here, partiality rather than impairment is involved. The "right to a speedy and public trial, by an *impartial* jury" is specifically guaranteed in the Sixth Amendment. U.S. Const. amend. VI (emphasis added). This constitutional right sustains the fairness of the

trial-by-jury process because the very "purpose of a jury is to guard against the . . . biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

The potential for partiality and the corresponding strength of the constitutional guarantee guarding against it are especially significant where racial bias is concerned:

> Eradication of the evil of state supported prejudice is at the heart of the Fourteenth Amendment. This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict. Racial prejudice undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression. This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.

27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure: Evidence* § 6074 (2d ed. 2007).

*Tanner*'s concern about jury harassment should not trump the need for jury impartiality, which is "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (internal quotation marks omitted). "[T]he seating of any juror who should have been dismissed for cause . . . require[s] reversal." *United States v. Martinez-Salazar,* 528 U.S. 304, 316 (2000). In other words, juror partiality—particularly where it involves racial bias—is a "structural defect" that irretrievably taints a trial, making the need for a complete inquiry into juror impartiality more compelling than with

respect to juror impairment. *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

Concern for "the community's trust in [the judicial] system," *Tanner*, 483 U.S. at 121, also compels a full and fair determination of whether a verdict was rendered based on bias rather than on the merits. "[T]he impartiality of the adjudicator goes to the very integrity of the legal system." *Gray*, 481 U.S. at 668. Precisely because racial, ethnic, and religious prejudice in a jury room "is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice," Rule 606(b) must allow courts to "correct any possible harmful effects" on criminal defendants. *Heller*, 785 F.2d at 1527.

Other "aspects of the trial process," *Tanner*, 483 U.S. at 127, do not adequately protect a defendant from a juror's deeply held biases or actual prejudices. "The judge will probably not be able to identify racist jurors based on trial conduct as easily as he could identify drunken jurors." *Benally*, 546 F.3d at 1240. Indeed, in *Tanner*, the government explicitly drew a distinction between juror incompetence and "juror partiality, which tends to express itself only during jury deliberations and, hence, outside the presence of the trial judge." Brief for the United States at 48, *Tanner*, 483 U.S. 107 (No. 86-177).

Voir dire, too, can be a "feeble protection" against partiality. *Benally*, 546 F.3d at 1240. "While individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias." *Villar*, 586 F.3d at 87. Moreover, "non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements

uttered during deliberations." *Id.* Finally, unlike the physical evidence available in *Tanner*, it is difficult to imagine what evidence would be available to show partiality if Rule 606(b) barred probative testimonial evidence.

Given the paramount importance of eliminating bias by juries and the inadequacy of other procedures to combat the issue, "if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury." *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983). Many courts have thus refused to apply Rule 606(b) "so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *Villar*, 586 F.3d at 87.

2. For similar reasons, Rule 606(b) also implicates the constitutional right to present a complete defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (internal citations omitted).

The right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). This right extends beyond the guilt or innocence phase of a trial. *See Green v.*

*Georgia*, 442 U.S. 95, 97 (1979). This Court has repeatedly confronted, and rejected, proposed applications of evidentiary rules that would violate a criminal defendant's right to present fundamental defenses. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Washington v. Texas*, 388 U.S. 14, 18 (1967).

Interpreting Rule 606(b) to preclude admission of evidence that a juror lied about his biases at voir dire would infringe a weighty interest. As discussed above, "[t]he right . . . to an impartial jury lies at the heart of due process," *Porter v. Illinois*, 479 U.S. 898, 900 (1986) (Marshall, J., dissenting from the denial of certiorari), and the right to object to jurors who "would be incapable of confronting and suppressing their racism" is paramount, *McCollum*, 505 U.S. at 58. If a party challenging the effectiveness of voir dire can "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," he is entitled to a new trial. *McDonough*, 464 U.S. at 556.

A defense would be inherently incomplete without the ability to introduce a juror's testimony that another juror revealed unlawful prejudice during deliberations. Again, "the bias of a juror will rarely be admitted by the juror himself," *id.* at 558 (Brennan, J., concurring), and physical evidence is not likely to be available to show bias. Juror testimony regarding deliberations is thus often "the only available evidence [] to establish racist juror misconduct" or other partiality. *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1596 (1988).

Interpreting Rule 606(b) to bar such evidence would be "disproportionate to the ends" the rule is "asserted

to promote." *Holmes*, 547 U.S. at 326. Safeguarding the freedom of deliberations in the jury room, *see Tanner*, 483 U.S. at 120–21, cannot "justify the limitation imposed" on a defendant's right to defend himself on the ground that his trial was fundamentally unfair. *Rock*, 483 U.S. at 56. Not only is the constitutional interest formidable, but the purpose of Rule 606(b) is weakened because the same evidence is admissible in other contexts. *See Washington*, 388 U.S. at 22. Specifically, juror testimony regarding dishonesty at voir dire is admissible in contempt proceedings against the dishonest juror. *See Clark v. United States*, 289 U.S. 1, 12–14 (1933). Admitting testimony of juror bias in order to prosecute a juror while excluding the same testimony where it may be necessary to protect a criminal defendant's constitutional rights would ascribe "absurdity [to] the rule," *Washington*, 388 U.S. at 22, with no attendant benefit to the jury's freedom of deliberation.

Moreover, it has never been the purpose of Rule 606(b) to bar juror testimony where doing so would violate fundamental rights. In establishing the rule, the advisory committee relied on this Court's decision in *McDonald v. Pless*, 238 U.S. 264 (1915), which "recognize[d] that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *Id.* at 268–69 (internal quotation marks omitted); *see* Fed. R. Evid. 606(b) advisory committee's note (1972). Interpreting Rule 606(b) to remove a criminal defendant's ability to prove that his trial was infected with unlawful bias would certainly "violat[e] the plainest principles of justice." *McDonald*, 238 U.S. at 269. Rules should not be applied "mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

### B. This Court Should Consider Criminal-Specific Constitutional Concerns In Construing Rule 606(b)

Under the Eighth Circuit's interpretation of Rule 606(b)—which would preclude juror testimony revealing bias or partiality concealed during voir dire—criminal defendants would likely be without recourse to defend their fundamental rights to an impartial jury and to a complete defense. That construction of Rule 606(b) presents an apparent conflict with the Rules Enabling Act, which requires that the Federal Rules of Evidence "not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2702(b). Those constitutional implications also require application of the constitutional avoidance canon. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). "When deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). "Indeed, one of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions." *Id*.

"[T]he elementary rule" of constitutional avoidance "is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (internal quotation marks omitted). "This canon is followed out of respect for Congress, which [this Court] assume[s] legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

Rule 606(b) can be reasonably interpreted to avoid the critical constitutional problems that would follow from excluding evidence of juror bias. Two reasonable interpretations are available that conform to the language and purpose of the rule while also ensuring that criminal defendants will maintain their rights to an impartial jury and to present a complete defense.

First, Rule 606(b) applies only to "an inquiry into the validity of a verdict." Fed. R. Evid. 606(b)(1). Where a party seeks to introduce juror testimony to show juror dishonesty during voir dire, however, "the focus of the motion is the legitimacy of pre-trial procedures, not the validity of the verdict." Wright & Gold, *supra*, § 6074. Indeed, introducing juror testimony showing that a juror failed to disclose bias during voir dire focuses even more broadly, challenging the constitutionality of the entire proceeding. The Court thus must be careful not to conflate the *purpose* of admitting evidence of juror bias (that is, to show a constitutional violation) with its possible remedial *effect* (a new trial). Accordingly, "[s]tatements which tend to show deceit during voir dire are not barred by" Rule 606(b) because they do not come within the coverage of the rule in the first instance. *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987).

Second, the exceptions in Rule 606(b) allow admission of statements showing "extraneous prejudicial information" and "outside influence." Fed. R. Evid. 606(b)(1)–(2). Interpreting Rule 606(b), this Court has explained that a "juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide." *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983) (per curiam). Because bias and other prejudices are "unrelated to any specific issue that a juror in a criminal case may

legitimately be called upon to determine," Rule 606(b)'s prohibition should not bar evidence of such bias. *Henley*, 238 F.3d at 1120. Viewed another way, because an individual harboring racial or other prejudicial biases should never have been on the jury, *see, e.g.*, *Ham*, 409 U.S. at 526–27, discussion of that individual's bias "would surely seem to be 'extraneous,' and possibly 'prejudicial' as well." *United States v. Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995).

Adopting either of these interpretations of Rule 606(b) to permit evidence of juror dishonesty during voir dire would be "consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system." *Henley*, 238 F.3d at 1120.

## CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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