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

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

Lisa Blue Baron
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street N.W.
Suite 200
Washington, DC 20001
(202) 965-3500
President

Jeffrey R. White
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street N.W.
Suite 520
Washington, DC 20001
(202) 944-2839
(202) 965-0920 (fax)
jeffrey.white@cclfirm.com
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice is a voluntary national bar association whose members primarily represent plaintiffs in personal injury actions, civil rights and employment rights cases, and business litigation. American Association for Justice members present their clients' cases before civil juries throughout the United States. The American Association for Justice is committed to the fundamental and constitutional right to trial by jury in civil cases.

The American Association for Justice is concerned that the broad new exception urged by Petitioner will undermine the jury right by destroying the confidentiality of deliberations, exposing jurors to pursuit and harassment long after they have completed their duties, and destroying the finality of litigation. These are precisely the reasons this Court and Congress have adhered to the general rule excluding such juror testimony. The American Association for Justice respectfully submits this brief as *amicus curiae* in support of the decision reached by the courts below.[1]

[1] Letters of consent by the parties to the filing of this *amicus curiae* brief have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

SUMMARY OF ARGUMENT

1. The Question Presented in this case asks this Court to expand the admissibility of juror testimony under Federal Rule of Evidence 606(b) to include juror statements during deliberations that would show the reason for her vote and the effect of her statements on other jurors. History, the text of Rule 606(b), and compelling public policy strongly counsel against such a drastic expansion of judicial inquiry into jury deliberations.

The confidentiality of jury deliberations goes to the heart of the jury's constitutional role in our justice system. Juror misconduct is an inherent feature of the jury system. However, throughout our history this Court has consistently refused to allow jurors to impeach their verdict using statements made during deliberations in support of parties seeking a new trial. Although impartiality of the jury is important, this Court has also recognized that the general rule of inadmissibility also preserves the right to trial by jury by (1) protecting the confidentiality of deliberations, (2) shielding jurors from harassment by disappointed litigants, and (3) providing finality to litigation. This Court has balanced these competing interests by permitting juror testimony only to show that the jury was exposed to extraneous prejudicial information or to improper outside influences.

This rule permits the jury to carry out its valuable function of bringing the general knowledge, experience and common sense of the ordinary American to the evidence. Indeed, social science confirms that juries could not function without viewing the evidence in light of their own knowledge and experience.

In enacting Federal Rule of Evidence 606(b), Congress codified this Court's longstanding precedents by prohibiting jurors from testifying during an inquiry into the validity of their verdict "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict . . ." Fed. R. Evid. 606(b)(1). That is precisely the juror testimony that Petitioner proposes to permit in this case. Significantly, Congress rejected a version of the Rule that would have permitted juror testimony concerning "objective juror misconduct." Congress plainly did not intend to make juror testimony admissible to show juror dishonesty on voir dire.

2. The fact that Petitioner seeks a new trial on the basis of a juror's purported dishonesty on voir dire does not render Rule 606(b) inapplicable. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), sets forth the substantive requirements for a new trial due to juror dishonesty. Such a motion calls for an inquiry into the validity of the verdict and whether juror dishonesty may be shown through juror testimony remains subject to Rule 606(b).

Nor are the jury room statements by the purportedly dishonest juror "extraneous prejudicial information" admissible under the Rule. "Improper" must not be conflated with "extraneous." To construe the Rule so broadly would allow the exception to swallow the general rule entirely.

Additionally, Petitioner does not demonstrate that juror honesty on voir dire is at all enhanced by rewarding the losing litigant with a new trial while

visiting no adverse consequence upon the dishonest juror.

Trial judges have other tools at their disposal to promote honesty and impartiality, including imposing penalties on jurors who give intentionally dishonest answers on voir dire, instructing jurors on the need for impartiality and adherence to instructions, and instructing jurors to notify the court of juror misconduct before a verdict is reached.

3. Petitioner's proposal to broadly permit jurors to testify concerning statements during deliberations would undermine the strong policy reasons identified by Congress and this Court as the basis for excluding such testimony.

Permitting jurors to testify against other jurors in hearings into juror dishonesty will chill the full and frank discussion in the jury room which is essential to a healthy jury system. The fact that jurors in a relative few cases have given statements to the press, generally to defend their verdicts, does not diminish the harmful effects of Petitioner's proposal. In addition, admissibility of juror statements would make jurors vulnerable to manipulation or corrupting influence of losing parties, and diminish the public's high regard for the jury system.

Permitting parties to obtain new trials on the basis of juror testimony concerning deliberations would also make jurors the targets of harassment by litigants on both sides seeking to impeach or defend the verdict. It is likely that court rules and ethical considerations that currently restrict contact with former jurors would be relaxed, increasing public dissatisfaction with jury service.

The proposed rule would undermine the finality of the litigation process by enmeshing courts in protracted efforts to overturn verdicts based on misconduct during deliberations.

The Seventh Amendment right to trial by jury may be eroded if not jealously guarded by this Court. The dramatic and unprecedented intrusion into the jury's deliberative process proposed by Petitioner represents a serious threat to that right. The fact that it is proposed in the name of impartiality does not lessen the harm to this fundamental right.

ARGUMENT

I. HISTORY, THE TEXT OF FEDERAL RULE OF EVIDENCE 606(B), AND COMPELLING PUBLIC POLICY COUNSEL AGAINST PETITIONER'S PROPOSAL TO EXPAND JUDICIAL INQUIRY INTO JURY DELIBERATIONS.

A. This Court Has Jealously Guarded the Jury Right by Crafting a Rule That Carefully Balances the Need to Protect the Jurors' Internal Motives and Decisionmaking With the Need to Provide a Fair and Impartial Jury.

1. Historically this Court has permitted juror testimony regarding deliberations only to show extraneous information or outside influence affecting the jury.

"The right of trial by jury in civil cases," then Justice William Rehnquist declared, "is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting). As Judge Arnold observed: "It is almost impossible to exaggerate the centrality of the institution of the jury . . . It is the single most important institution in the history of Anglo-American law." Morris S. Arnold, *The Civil Jury in Historical Perspective*, *in* The American Civil Jury 9, 10 (1987). Consequently, this Court has emphasized, the "right of jury trial in civil cases at common law . . . should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 753 (1943).

The Question Presented in this case goes to the very heart of the jury's constitutional role. Petitioner contends that drastic expansion of judicial inquiry into a jury's deliberations is essential to assuring the truthfulness of prospective jurors on voir dire, which, in turn, protects the civil litigant's right to an impartial jury. Pet'r's Br. 19.

However, as the history of the rule excluding juror testimony makes clear, impartiality—though vitally important—is not the only value at stake when such testimony is proffered to obtain a new trial. Throughout our history, there has been juror misconduct. "In a system without professional jurors, it is inevitable that some jurors will act

unprofessionally on occasion. Varieties of juror misconduct run the gamut of human weakness," and include "lying or otherwise misleading the court during voir dire." Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1469-70 (2006).

Yet throughout our history, courts have held that jurors may not be heard to impeach their verdict with testimony regarding misconduct in the jury room. This broad rule of exclusion may be traced to Lord Mansfield's decision in *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785), rejecting juror testimony that the jury reached its decision by casting lots. *See Williams v. Price*, 343 F.3d 223, 232 (3d Cir. 2003) (Alito, J.). Much more recently, this Court restated the principle that "[t]he jury's deliberations are secret and not subject to outside examination." *Yeager v. United States*, 557 U.S. 110, 122 (2009). The Court cited *Vaise*, as well as this Court's decision in *Packet Co. v. Sickles*, 5 Wall. 580 (1866), wherein the Court stated that the testimony of jurors as to "the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict" was "not competent or admissible evidence." *Id*. at 593.

The rationale for the rule in this country was not Lord Mansfield's but this Court's. The general rule excluding juror testimony is essential to preserving the right to trial by jury by (1) protecting the confidentiality of deliberations, (2) shielding jurors from harassment by disappointed litigants, and (3) providing finality to litigation. *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

This Court has consistently adhered to these policies and has fashioned exceptions in only two circumstances. The Court has permitted juror testimony to show that prejudicial information not in evidence was introduced during the deliberations. *See*, *e.g.*, *Mattox v. United States*, 146 U.S. 140, 151 (1892) (juror brought newspaper into jury room); *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851), *overruled on other grounds* (newspaper in jury room). The Court has also permitted inquiry into jurors' contacts with outsiders who might have influenced the verdict in the case. *See*, *e.g.*, *Smith v. Phillips*, 455 U.S. 209, 215 (1982) (juror in criminal trial had applied for a job at the District Attorney's office); *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (bailiff's comments to jurors about defendant); *Remmer v. United States*, 347 U.S. 227, 228-30 (1954) (bribe offered to juror); *Mattox*, 146 U.S. at 150 (bailiff's statement that the defendant was about to be tried for another murder). *See also Tanner v. United States*, 483 U.S. 107, 117 (1987) ("Exceptions to the common-law rule were recognized only in situations in which an 'extraneous influence,' was alleged to have affected the jury." (citation omitted)).

2. The secrecy of juror deliberations protects the jurors' essential function of bringing their own general knowledge and experience to bear on the evidence.

It is an advantage of our jury system that jurors chosen from the community can be expected to bring their generalized knowledge, life experiences, and "common sense" to bear on the factual questions they must decide. As this Court long ago stated:

> So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion.

Head v. Hargrave, 105 U.S. 45, 49 (1881).

That principle has remained an essential feature of the jury system. *See United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991) ("Inevitably, '[j]urors must rely on their past personal experiences when hearing a trial and deliberating on a verdict.'"(internal citation omitted)); *Compton v. United States*, 377 F.2d 408, 412 (8th Cir. 1967) ("[A] juror has not only a right but a duty to use his common sense and experience and draw all reasonable inferences from the physical facts.").

Indeed, the federal pattern jury instructions inform juries:

> You are to base your verdict only on the evidence received in the case. In your consideration of the evidence received, however, you are not limited to the bald statements of the witnesses or to the bald assertions in the exhibits. . . . You are permitted to draw from the facts which you find have been proved such reasonable inferences as you feel are justified *in the light of your experience and common sense*.

Grotemeyer v. Hickman, 393 F.3d 871, 879 (9th Cir. 2004) (emphasis added) (quoting 1A Kevin F. O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions* § 12.03 (5th ed. 2000)).

This principle also finds expression in capital criminal cases where jurors "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *Woodward v. Alabama*, --- U.S. ----, 134 S. Ct. 405 (2013).

Indeed, modern social science shows that juries cannot be expected to behave otherwise. Humans naturally interpret new facts and information by comparing them with prior knowledge and experience. *See, e.g.*, Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041, 1130 (1995) ("[J]urors have different experiences and perspectives that shape the way in which they view the world."); Valerie P. Hans & Neil Vidmar, *Judging the Jury* 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate."); David Kairys, *et al.*, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 782 n.44 (1977) ("No one is without attitudes and preferences concerning various social, political, economic, cultural and religious issues, and such attitudes and preferences affect one's judgment and perception regarding factual and legal questions and the credibility of witnesses.").

Post-trial interviews with jurors suggest that disagreement among jurors on the first ballot is the

rule rather than the exception, strongly suggesting that individual jurors view the same evidence through the prism of their own prior knowledge and experiences. Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 Buff. L. Rev. 717, 737 (2006). According to another researcher, "'50% of the jurors' time [is] spent discussing personal experiences.'" *Navarro-Garcia*, 926 F.2d at 821 (quoting Joan B. Kessler, *The Social Psychology of Jury Deliberations*, *in The Jury System in America* 69, 83 (Rita J. Simon ed. 1975).

Personal experiences, of course, can also give rise to personal misconceptions and biases. However, as Judge Learned Hand pragmatically observed, it would be impossible to eliminate the effects of such bias without eliminating the jury system itself:

> [I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. . . . Like much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it.

Jorgensen v. York Ice, 160 F.2d 432, 435 (2d Cir. 1947). This Court adopted the same pragmatic view in *Irvin v. Dowd*, 366 U.S. 717 (1961): "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Id.* at 723.

For that reason, federal courts have held that, "Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations." *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980). *See also Carson v. Polley*, 689 F.2d 562, 581 (5th Cir. 1982) ("possible subjective prejudices or improper motives of individual jurors" are beyond the scope of inquiry on a motion for a new trial for jury misconduct).

Thus, although courts have recognized the importance of impartiality of jurors, they also recognize that our system in which ordinary citizens are called upon to play a vital role in the administration of justice could not long exist if every verdict that was affected by a juror's personal views required retrial.

B. Rule 606(b) Strikes the Appropriate Balance by Excluding Testimony Regarding Jurors' Mental Processes in Proceedings Seeking to Overturn Their Verdict While Allowing Testimony That Reveals the Jury's Exposure to Extraneous Prejudicial Information and Improper Outside Influences.

In 1972, after 14 years of intensive study by judges, practicing attorneys, and academics, this Court promulgated a set of uniform rules of evidence for the federal courts. Proposed Rule 6-06 essentially codified this Court's longstanding precedents on the subject of the inadmissibility of juror testimony to impeach the jury's verdict. In 1975, Congress enacted the Federal Rules of Evidence into law. Rule 606(b) as

enacted by Congress was the rule this Court proposed: juror testimony concerning their deliberations is broadly prohibited except to determine "whether extraneous prejudicial information was improperly brought to the jury's attention" or to determine "whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). Congress intended no broader exception and no broader exception should be implied. Indeed, Congress specifically rejected an amended version of the rule that would have opened the door to the type of juror testimony Petitioner asks this Court to permit.

In 1972, the House rejected this Court's promulgated Rule 6-06 and adopted a version that was based on an earlier Advisory Committee proposal. That version was more permissive of juror testimony in one important respect. The House version maintained the well-settled prohibition of juror testimony concerning the mental processes of the jurors. But it would have allowed testimony not only concerning extraneous information or outside influences, but also "objective juror misconduct." H.R. Rep. No. 93-650, at 9-10 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7083. The Department of Justice voiced its opposition to that proposal. *See* Letter from Dep't of Justice to Advisory Comm., *at* 117 Cong. Rec. 33655 (1971) (arguing that "[s]trong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations").

The Senate Judiciary Committee sharply criticized the House expansion of the admissibility of juror testimony. "Although forbidding the impeachment of verdicts by inquiry into the jurors'

mental processes, it deletes from the Supreme Court version the proscription against testimony 'as to any matter or statement occurring during the course of the jury's deliberations.' This deletion would have the effect of opening verdicts up to challenge *on the basis of what happened during the jury's internal deliberations*, *for example, where a juror alleged that the jury refused to follow the trial judge's instructions* or that some of the jurors did not take part in deliberations." S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7060 (emphasis added).

The Conference Committee Report agreed with the Senate Committee criticism: "[T]he House bill allows a juror to testify about objective matters occurring during the jury's deliberation, *such as the misconduct of another juror* or the reaching of a quotient verdict." H.R. Conf. Rep. No. 93-1597, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7102. "The Conference Committee adopted, and Congress enacted, the Senate version." *Tanner*, 483 U.S. at 125. *See also* Advisory Comm. Note, Rule 606(b), "1974 Enactment." The Rule currently provides:

> **Rule 606: Juror's Competency As A Witness**
>
> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of

> anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> (B) an outside influence was improperly brought to bear on any juror; or
>
> (C) a mistake was made in entering the verdict on the verdict form.

As the Fifth Circuit observed, "the legislative history of the rule unmistakably points to the conclusion that Congress made a conscious decision to disallow juror testimony as to the jurors' mental processes or fidelity to the court's instructions." *Robles v Exxon*, 862 F.2d 1201, 1205 (5th Cir. 1989). Consequently, "Rule 606(b) represents a judgment that exposure of the deliberative process would cause an even greater injustice by removing protections vital to the effective functioning of the jury system, thereby infringing everyone's constitutional right to trial by jury." *Shillcutt v. Gagnon*, 602 F. Supp. 1280, 1281 (E.D. Wis. 1985), *aff'd*, 827 F.2d 1155 (7th Cir. 1987).

This Court should not engraft onto Rule 606(b) an exception that Congress itself has rejected.

II. THERE IS NO NEED TO DEVISE A SPECIAL EXCEPTION TO RULE 606(b) FOR *MCDONOUGH* NEW TRIAL MOTIONS BASED ON JUROR DISHONESTY DURING VOIR DIRE.

A. *McDonough* Provides Ground for a New Trial Based on Juror Dishonesty on Voir Dire, But the Admissibility of Juror Testimony to Establish Juror Dishonesty Remains Subject to Federal Rule of Evidence 606(b).

1. *McDonough* does not provide for the admissibility of juror testimony to establish dishonesty on voir dire, and so is subject to Rule 606(b).

Petitioner argues that juror testimony regarding the deliberations in this case should be admissible in support of his new trial motion based on *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). Pet'r's Br. 19. In *McDonough*, this Court held that a litigant may be entitled to a new trial by showing that a juror (1) gave intentionally false information on voir dire, (2) in response to a material question, and (3) that if the juror had given a truthful answer, the juror would have been dismissed for cause. *Id*. at 555.

McDonough states the grounds for a new trial based on juror dishonesty; it does not suggest that the losing litigant may rely on statements made during

deliberations to establish such dishonesty.[2] Petitioner contends that Rule 606(b) does not apply to *McDonough* motions for new trial because the juror affidavit is not offered for the purpose of impeaching the jury's verdict. Rather, Petitioner contends that he offered the affidavit of juror Titus simply to show that juror Whipple answered dishonestly during voir dire. Pet'r's Br. 21-22.

The crux of Petitioner's argument that Rule 606(b) does not govern *McDonough* inquiries is as follows:

> To be sure, the result of a successful *McDonough* claim is that the moving party is entitled to vacatur of the judgment and a new trial. But a new trial is simply a *remedy* for a *McDonough* error. . . . Put another way, the availability of a new-trial remedy once the inquiry has been completed hardly transforms the inquiry into juror dishonesty during voir dire into an inquiry into the validity of the verdict.

Pet'r's Br. 21-22.

Amicus respectfully submits that the inquiry Petitioner proposes—to show by juror Whipple's statements during deliberations that she voted for the defense based on her views derived from her daughter's accident rather than the evidence and

---

[2] In this case, for example, it is likely that Petitioner could have established that juror Whipple's daughter had been involved in a fatal auto accident through police reports or news accounts, which would not be barred by Rule 606(b).

persuaded other jurors to decide on that basis as well—is indeed an inquiry into the validity of the jury's verdict.

The Tenth Circuit has persuasively rejected the exact argument Petitioner raises here:

> Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.

United States v. Benally, 546 F.3d 1230, 1235 (10th Cir. 2008), *cert. denied*, 558 U.S. 1051 (2009). The Tenth Circuit adopted the position set forth in *Williams v. Price*, 343 F.3d 223, 235-37 (3d Cir. 2003) (Alito, J.), excluding such juror testimony, as the approach that "best comports with Rule 606(b)."546 F.3d at 1236.

Petitioner's lengthy discussion of *Clark v. United States*, 289 U.S. 1 (1933) does not alter this result. *See* Pet'r's Br. 25-30. In that case, this Court held that juror testimony tending to show that a juror lied on voir dire may be introduced at the dishonest juror's trial on charges of contempt. Because the court was not inquiring into the validity of the verdict in the underlying case, the rule precluding jurors from impeaching their verdict did not apply. Consequently, as the Tenth Circuit correctly stated,

> [I]f the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt

> of court, Rule 606(b) would not apply. However, it does not follow that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict.

Benally, 546 F.3d at 1235 (internal citation omitted).

Contrary to Petitioner's view, *see* Pet'r's Br. 30, the admissibility of such evidence when offered to impeach the jury's verdict is governed by Rule 606(b), not by *Clark*.

2. Testimony concerning a juror's statements during deliberations which may indicate dishonesty on voir dire and the effect on other jurors is not evidence of "extraneous prejudicial information."

Petitioner argues, alternatively, that this Court should hold "that evidence that tends to show juror dishonesty during voir dire . . . is admissible under Rule 606(b)(2)(a)," which allows juror testimony to show that "extraneous prejudicial information was improperly brought to the jury's attention." Pet'r's Br. 46. Petitioner contends that if Juror Whipple had revealed her daughter's accident and her views against awarding damages she would have been dismissed for cause and so the statement would never have been made during deliberations. On that basis, Petitioner contends, Juror Whipple's statements during deliberations must be deemed both extraneous and prejudicial. *Id*. at 46-47.

It is clear that Juror Titus' affidavit, even as construed by Petitioner, is proffered to show the reason why Juror Whipple voted for the defense, that this reason was based on her own personal experience, and that other jurors were persuaded to vote for the defense for the same reason. To argue that these motives, biases, and mental processes are "extraneous" would allow the exception to swallow up the general rule that "a juror may not testify about . . . the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict." Fed. R. Evid. 606(b)(1).

A juror's personal knowledge constitutes extraneous prejudicial information where the juror has personal knowledge regarding the parties or issues involved in the litigation. *Hard v. Burlington N. R.R.*, 812 F.2d 482, 486 (9th Cir. 1987). In that case, the court held that a juror who was a railroad worker gave extraneous information to the jury by describing Burlington's settlement practices. *Id.* at 485. *See also People v. Brown*, 399 N.E.2d 51, 52, 54 (N.Y. 1979) (finding misconduct where juror drove to crime site to test defense theory and shared results with other jurors).

In *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971), Judge Friendly provided a thorough discussion of when statements by jurors regarding their personal knowledge may invalidate a verdict:

> [T]he inquiry is not whether the jurors "became witnesses" in the sense that they discussed *any* matters not of record but whether they discussed specific extra-record facts relating to the

> defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby.

Id.at 818 n.5 (emphasis added).

As Justice O'Connor pointed out in *Tanner*, Rule 606(b) expressly categorizes the effect of anything upon the "mind or emotions" as internal mental processes, and not extraneous information or an outside influence. 483 U.S. at 138.

For that reason, courts have held that the personal views of jurors, even if improper, are not "extraneous prejudicial information" for purposes of Rule 606(b). Thus jurors' statements regarding their personal experiences with Native Americans and their preconception that all Native Americans got drunk and then violent were entirely improper and inappropriate but did not come within the exception for extraneous prejudicial information. *Benally*, 546 F.3d at 1238 ("improper" must not be conflated with "extraneous"). Similarly, a juror's statements during deliberations that men with power always make sexual advances and that she had been sexually harassed at her place of employment were not extraneous information or outside influences, but emotions that influenced the juror and part of her mental processes. Such statements communicating "a generalized prejudice," are not within the exceptions to Rule 606(b). *United States v. Barraza*, 655 F.3d 375, 380 (5th Cir. 2011). *See also Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (Juror's personal experience with training police dogs was not "extraneous prejudicial information," for purposes of impeaching verdict that officer's use of a police dog constituted excessive force); *Lopez v.*

Aramark Uniform & Career Apparel, Inc., 417 F. Supp. 2d 1062, 1072 (N.D. Iowa 2006) (Two jurors' prior personal experiences with sexual abuse did not constitute "extraneous prejudicial information," in deliberations sexual harassment suit against former employer); *Wilson v. Vermont Castings*, 977 F. Supp. 691, 695 (M.D. Pa. 1997), *aff'd*, 170 F.3d 391 (3d Cir. 1999) (In products liability action against manufacturer of woodburning stove, juror's statements during deliberation regarding how she routinely operated her stove were not extraneous information. "Jurors bring with them to deliberations their life experiences. When such information becomes part of the deliberative process, it becomes sacrosanct under Rule 606(b).").

B. There Are Other Means to Protect the Impartiality of Jurors Short of Ordering a New Trial for Dishonesty on Voir Dire.

Petitioner contends that it is necessary to admit juror testimony concerning deliberations for the purpose of demonstrating juror dishonesty on voir dire. If voir dire is to serve its purpose of safeguarding the litigant's constitutional right to an impartial jury, Petitioner argues, "it is obviously necessary that prospective jurors give truthful answers." Pet'r's Br. 18-19.

The importance of honesty is beyond dispute. It is not so clear that overturning the jury's verdict and requiring the parties to retry their case is the only means of promoting voir dire honesty.

Similarly the Brief for *Amici Curiae* Professors of Law in Support of Petitioners ("Professors' Amici

Br.") devotes considerable discussion of the right to an impartial jury and the role of voir dire in protecting that right. Professors' Amici Br. 10-16. The professors urge this Court to hold juror testimony concerning deliberations admissible, despite the plain text of Rule 606(b), stating that precluding such juror testimony would undermine the voir dire process. *Id* at 31.

Both Petitioner and supporting amici misstate the question before to this Court. The question is not whether juror testimony may be admissible to show juror dishonesty. Such testimony is clearly permissible at a proceeding to punish the dishonest juror. *Clark*, 289 U.S. at 17. The question before this Court is whether under Rule 606(b) a losing party may use such testimony to obtain a new trial.

It is not self-evident that ordering a new trial on the basis of a juror's report of what occurred during deliberations is the only way—or even an effective way—to foster honesty during voir dire. Under the expanded admissibility Petitioner advocates, the offending juror would suffer no consequence for dishonesty. Indeed, a juror who is unhappy with the result, or for any reason, would be empowered to undo the work of the majority. In addition, the losing litigant would profit by eliminating an adverse jury verdict. It requires little imagination to point out the obvious incentive for parties with a great deal at stake to game the system and seek out possibly dissatisfied jurors.

Additionally, courts have at their disposal a variety of tools designed to ensure impartial decisionmaking by jurors. One, of course, is to instruct the jury on the importance of resisting bias and deciding the matters before them solely on the

evidence. In addition, some courts instruct jurors to advise the court of conduct in the jury room that may violate the court's instructions. *See*, *e.g.*, Tex. R. Civ. P. 226a (requiring judges to instruct jurors to report acts of juror misconduct to judge). As Petitioner acknowledges, Rule 606(b) does not preclude a juror from disclosing to the judge prior to verdict misconduct by another juror during deliberations. Pet'r's Br. 41. The trial judge can then take appropriate action.[3]

As one district court has stated:

> In order to preserve the jury system, the technique proposed by the petitioner must be rejected in favor of systematic safeguards against prejudice such as voir dire, the juror's oath, and the court's instruction which directs the jury to consider only the evidence and to reject arguments based on prejudice. While not infallible, these checks minimize prejudice without undermining the integrity of the jury system.

Shillcutt, 602 F. Supp. at 1283.

In *McDonough* itself, this Court rejected the contention that a new trial be awarded to every losing

---

[3] For example in *United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012), *cert. denied*, --- U.S. ----, 134 S. Ct. 512 (2013), after the foreperson informed the trial judge that juror Johnson refused to follow the court's instructions during deliberations, the judge questioned the other jurors and concluded that Johnson was improperly bringing her personal feelings to the case. *Id*. at 123. The judge replaced Johnson with an alternate and the jury proceeded to return a verdict. *Id*.

litigant who can demonstrate that a juror answered dishonestly on voir dire:

> This Court has long held that "'[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." .Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing case load.

464 U.S. at 553 (internal citations omitted).

In sum, the fact that Petitioner's motion for a new trial is based on the type of juror dishonesty referred to in *McDonough* does not require the admissibility of juror testimony regarding deliberations. Rule 606(b) governs such new trial motions and the juror dishonesty in this case does not involve extraneous information or outside influence. Moreover, there are other less drastic tools available to courts to promote impartial decisionmaking by civil juries.[4]

---

[4] Petitioner also urges this Court to permit the inquiry into jury deliberations, despite the plain text of Rule 606(b) under the doctrine of "constitutional avoidance," contending that in criminal cases, "refusing to allow questioning about racial bias in certain circumstances" would "violate[] both the specific Sixth Amendment jury trial right and the broader constitutional right to due process." Pet'r's Br. 38.

III. STRONG POLICY REASONS COUNSEL AGAINST PERMITTING LITIGANTS TO INTRODUCE JUROR TESTIMONY NOT WITHIN THE NARROW EXCEPTIONS IN RULE 606(B).

In enacting Rule 606(b), Congress chose a lesser evil. As this Court observed, "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Tanner,* 483 U.S. at 120. Congress determined that the possible prejudice to a litigant due to juror misconduct was far outweighed by the greater danger to the administration of justice and to the institution of the jury. This Court enunciated those dangers in detail almost a century ago:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part

---

This is not the case for this Court to prescribe the application of Rule 606(b) in cases where a criminal defendant proffers juror testimony indicating that racial bias affected jury deliberations. In the appropriate case, this Court may hold that the Sixth Amendment and due process require that a criminal defendant be permitted to seek a new trial based on such evidence. Such a possibility does not require this Court's to hold in this case that Rule 606(b) must permit testimony regarding a juror's personal opinions unrelated to racial prejudice in a civil case. "There is thus no constitutional doubt triggered by" the interpretation of Rule 606(b) in this civil case according to its terms. *Dorsey v. United States*, --- U.S. ----, 132 S. Ct. 2321, 2344 (2012) (Scalia, J., dissenting).

> in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors 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. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald, 238 U.S. at 267-68.

Those policy reasons for the rule—confidentiality of deliberations, prevention of harassment of jurors, and the finality of verdicts—worthy objectives in themselves, are essential to preserving the constitutional right to trial by jury that the Founders so valued. *See United States v. Olano*, 507 U.S. 725, 737 (1993) (stating the "cardinal principle that the deliberations of the jury shall remain private and secret"); *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) ("The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system. . . . Indeed, courts and commentators alike recognize that the secrecy of deliberations is essential to the proper functioning of juries."); *Virts v. Bailey*, 968 F.2d 1213 (table), 1992 WL 173887, at *6 (4th Cir. 1992) (accepting juror affidavits in support of new trial motions would encourage post-verdict questioning of jurors, which "undermines the vital role the jury system plays in our

judicial framework."); *Wyrosdick v. Southern Ry. Co.*, 192 F. Supp. 810, 812 (E.D. Tenn. 1961) ("The importance of protecting the secrecy of the deliberations of the jury and of protecting the jurors from inquisitions after they have rendered their verdict is necessary to the preservation of a sound jury system.").

The policies enunciated in *McDonald* are the same policies Congress had in mind in enacting Rule 606(b). As noted earlier, the House had passed a version of Rule 606(b) that would have allowed testimony as to objective juror misconduct. Congress rejected the broader bill. The Senate Judiciary Committee explained:

> The [House version] would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.
>
> Public policy requires a finality to litigation. 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. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7060. Similarly, the Advisory Committee restated the same policy foundation for the Rule: "The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." Advisory Comm. Note, Rule 606(b), "1972 Proposed Rule." *See also Tanner*, 483 U.S. at 120-21.

Petitioner recognizes the importance of these objectives but denies that permitting jurors to testify at a hearing to overturn their verdict would contravene those policies. Pet'r's Br 40. Amicus submits instead that each of those policies would be undermined, threatening the vitality of the Seventh Amendment right to trial by jury.

A. Rule 606(b) Preserves the Confidentiality of Jury Deliberations.

This Court has made clear that, "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 would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-21. Justice Cardozo, speaking for a unanimous Court in *Clark v. United States*, 289 U.S. 1 (1933), stated, "Freedom of debate 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." *Id*. at 13.

Moreover, as one district court has warned, if the door to the jury room is opened, it shall be opened wide:

> Jurors would be inhibited during deliberations by the knowledge that their statements might be disclosed to the public by a fellow juror. The exposure of statements made during deliberations would be commonplace since, if courts were to recognize a party's right to prejudice-free deliberations, the law would also have to allow all parties an equal opportunity to vindicate the right. Restrictions on attorney-juror contact imposed by this and other district courts would presumably be improper.

Shillcutt, 602 F. Supp. at 1282.

Petitioner seeks to minimize the impact of his proposal to broaden the admissibility of jury deliberations, stating that jurors nowadays often speak to the press and therefore no longer have a reasonable expectation that their deliberations shall remain private. Pet'r's Br. 40-41 (citing Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L. Rev. 465 (1997)). That study, however, found quite the opposite. First, the author found that "a LEXIS search of major newspapers and magazines from 1980 to 1995 revealed numerous high-profile cases and yielded fifty-two articles in which jurors were interviewed after the verdict." *Id.* at 476. There were well over one million state and federal jury trials

during that period.[5] Fifty-two instances of juror statements to the press hardly supports Petitioner's claim that "jurors routinely grant interviews to journalists." Pet'r's Br. 40. Indeed, Professor Marder suggested that "the relatively small number of jurors who speak to the press may indicate that jurors are not under pressure to speak, and post-verdict interviews should not be a cause for concern." 2 Iowa L. Rev. at 476-77.[6]

More importantly, in the great majority of those 52 instances, the juror(s) spoke to the press not to undermine the jury's verdict, but to support the outcome and "set the record straight" in the face of public criticism. *Id*. at 477. In 95 percent of the press accounts, the jurors defended their verdict as based on the evidence and in obedience to the courts' instructions. *Id*. This is wholly unlike Petitioner's proposal that individual jurors be made the subject of a hearing and, in effect, be put on trial on charges of

---

[5] The number of jury trials during that period may be estimated from data in Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004). The number of civil jury trials during 1980 to 1995 in the courts of general jurisdiction of 21 states (and the District of Columbia) that contain 58 percent of the U.S. population totaled 375,731. *Id*. at 507, tbl.4. The total number of state court criminal jury trials during that period was 668,845. *Id*. at 512, tbl.7. In addition, the number of federal civil and criminal trials averaged roughly 8,000 per year. *Id*. at 461-62,tbl.1 (Civil jury trials) & 493-94 & tbl.24 (Criminal jury trials).

[6] The author's concern was not that many jurors are revealing secret deliberations, but rather that the "limited number of vocal jurors may be playing a disproportionately large role in shaping public perception of jury deliberations." *Id*. at 477.

lying to the court. Such a prospect would surely chill the "full and frank discussion in the jury room." *Tanner*, 483 U.S. at 120.

The confidentiality of jury deliberations serves not only to foster frank discussion inside the jury room, but also to safeguard "the community's trust in a system that relies on the decisions of laypeople for judicial process." *Id.* at 121.

As Dean Wigmore has pointed out, the juries have remained remarkably free from corruption due to their relative anonymity and transience. Jurors "are selected at the last moment from the multitude of citizens. They cannot be known beforehand, and they melt back into the multitude after each trial." John H. Wigmore, *To Ruin Jury Trial in the Federal Courts*, 19 Ill. L. Rev. 97, 98 (1924).

If, however, losing litigants become entitled to seek a new trial based on jurors' reports of statements made during deliberations, they will have a strong incentive to locate and persuade jurors to come forward to make such reports. The party opposing the motion will be equally incentivized to locate and persuade other jurors to support the opposing version of events. The result would not make juries more impartial, but make jurors more "accessible to the arts of corruption and chicanery." *Id*.

B. Rule 606(b) Protects Jurors From Harassment.

This Court has also taken seriously the prospect that, if Petitioner's proposal were adopted, jurors "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*, 238 U.S. at 267. Rule 606(b) was designed "to protect the jurors from being pestered by lawyers." *United States v. Schwartz*, 787 F.2d 257, 261-62 (7th Cir. 1986). *See also United States v. Narciso*, 446 F. Supp. 252, 324 (E.D. Mich. 1977) ("The courts have long been concerned that by inquiring into the merits of the jury's deliberations . . . would unduly harass jurors and create needless issues for post-trial litigation.")

The threat of harassment is serious enough that "local court rules frequently restrict losing litigants from gathering information concerning misconduct from jurors. Many local rules grant the trial court authority to require litigants to show 'good cause' before receiving permission to interview jurors. Other rules prohibit lawyers or parties from contacting jurors in a manner calculated to harass them or their families." Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 511 (1988) (and accompanying notes, collecting examples of local rules). Indeed, Petitioner himself takes note of the fact that many local court rules as well as ethical rules limit contact between a litigant or counsel and the formers jurors in a case. Pet'r's Br. 42-43.

Petitioner contends that permitting inquiry into what a juror said in deliberations to show that she lied on voir dire would not present any danger that jurors might be harassed by disappointed parties. Indeed, Petitioner offers the surprising speculation that, given the restrictions imposed by court rules and ethical considerations, "it is unlikely that parties or their counsel would seek to contact jurors at all." *Id.* at 44. Petitioner ignores the likelihood raised by one

district court that, if this Court should hold that juror testimony would be admissible in support of a motion for new trial, such restrictions "would presumably be improper." *Shillcutt*, 602 F. Supp. at 1282. In their absence, there can be little doubt that jurors will be approached, perhaps long after the case has ended, for their version of jury room discussions.

The prospect of dealing with importuning attorneys after jury service has ended can only increase public dissatisfaction with serving on juries. In addition, the task of policing out-of-court contacts between jurors and civil litigants or criminal defendants and their lawyers is formidable. Congress has already made the decision that any potential harm to those litigants is far outweighed by the threat to the jury system arising from such contacts.

C. Rule 606(b) Protects the Finality of Jury Verdicts.

This Court pointedly expressed concern that "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner*, 483 U.S. at 120. As Judge Leaned Hand explained, it would be impractical to hold "that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court." *Jorgensen*, 160 F.2d at 435. If such were the rule, he warned, federal judges "would become Penelopes, forever engaged in unravelling the webs they wove." *Id*.

Petitioner denies that permitting jurors to testify regarding the mental processes of jurors in

deliberations would not undermine the finality of the judicial process "in any meaningful sense." Pet'r's Br. 45. Oddly, Petitioner's only argument on this point is the speculation that, after receiving the juror's testimony and conducting a hearing, the court might conclude that the juror is not credible or that the movant has not met the substantive requirements for a new trial under *McDonough*. *Id*. 44-45.

The fact remains that this Court's concerns are well founded. Following every jury trial at least one civil litigant—and most criminal defendants—will have a strong incentive to move for a new trial based on what they might uncover by interviewing jurors, or at least stave off final judgment for a time. *See generally*, Annot., *Motion for New Trial as Suspension or Stay of Execution or Judgment*, 121 A.L.R. 686 (1939). Meanwhile, the district courts will be placed in the position of conducting a proceeding following nearly every jury verdict in which the jury itself may be placed on trial. The fact that the new trial motion may be denied in many cases does not cure the serious disruption of the process that this Court warned against in *Tanner,* 482 U.S. at 120-21. Such a disruption places an undue burden on the constitutional right to trial by jury.

Sadly, Americans' Seventh Amendment right to trial by jury in civil cases has suffered a "gradual process of judicial erosion." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339 (1979) (Rehnquist, J., dissenting). Broadening the admissibility of juror testimony regarding the subjective motives and mental processes of jurors in deliberations will contribute to that erosion.

If the Founders had desired impartiality above all else in triers of fact, they might have prescribed a class of professional jurors, trained to be wholly neutral arbitors and held to high ethical standards. In fact, our civil justice system has such a class of professional jurors in the nation's trial judges, who serve as the finders of fact in nonjury cases. Yet, the Founders insisted that this responsibility be given to ordinary citizens chosen from the community who might "reach a result that the judge either could not or would not reach." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671 (1973). To invade the confidentiality of jury deliberations in favor of a new trial inquiry on the ground that it offers "more accuracy or is fairer" would as then-Justice Rehnquist observed, "effectively permit judicial repeal of the Seventh Amendment." *Parklane Hosiery*, 439 U.S. at 346.

The fact that Petitioner advocates this unprecedented modification of the historic rule in the pursuit of greater impartiality of the jury does not change that fact. The loss is not diminished where it is well intentioned.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the judgment below.

Date: August 12, 2014 Respectfully submitted,

Jeffrey R. White
Counsel of Record
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
777 6th Street N.W.
Suite 520
Washington, DC 20001
(202) 944-2839
(202) 965-0920 (fax)
jeffrey.white@cclfirm.com

Attorney for Amicus Curiae