No. 14-615

In The Supreme Court of the United States

CAROLYN JONES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DEAN OF THE UNIVERSITY OF IOWA COLLEGE OF LAW, ET AL.,

Petitioners,

v.

TERESA R. WAGNER.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit correctly held that the trial court, after having declared a mistrial and discharged the jury, could not recall the jury from outside the courtroom to render a purported verdict, when the record is silent regarding the discharged jury's exposure to outside influences.

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STATEMENT

This case concerns whether a trial court can recall a jury to render a purported verdict after the jury has been discharged and left the courtroom following the declaration of a mistrial. The Eighth Circuit held that, because the record in this case left uncertain whether the discharged jury had been exposed to outside influences, the risk of such exposure precluded reconvening the jury. It thus remanded for a new trial.

1. On five separate occasions between 2006 and 2009, Respondent Teresa Wagner applied for a position as a legal analysis, writing, and research

instructor at the University of Iowa College of Law. Although the law school's faculty appointments committee, various faculty members, and students enthusiastically supported Wagner's candidacy, Wagner was passed over each time for less-qualified applicants. Alleging that Petitioner Carolyn Jones, dean of the law school, refused to hire her because Jones disagreed with Wagner's conservative views, Wagner filed a 42 U.S.C. § 1983 suit in federal court for political discrimination in violation of the First and Fourteenth Amendments. *See* Pet. App. 135-144.

The district court initially granted summary judgment in favor of Jones on, *inter alia*, qualified immunity grounds. The Eighth Circuit reversed and remanded. *See* Pet. App. 133-162. In finding that material disputes of fact precluded the entry of summary judgment, the Eighth Circuit explained that if Wagner made a *prima facie* showing of political discrimination, the "burden of persuasion" would shift to Jones to articulate a non-discriminatory justification for her actions. *Id.* at 150 (citation and quotation marks omitted). But unlike the familiar *McDonnell Douglas* burden-shifting regime applied in Title VII discrimination cases, the court emphasized, the burden would *not* shift back to Wagner to demonstrate that Jones's proffered justifications were pretextual. *Id.*

2. On remand, Wagner amended her complaint to add a request for prospective injunctive relief against Jones's successor as dean, Petitioner Gail B. Agrawal. Wagner's trial proceeded on two constitutional claims: political discrimination (Count 1) and equal protection (Count 2). Pet. App. 3.

Upon submitting the case to the jury, the district court instructed the members "to evaluate the issues and return a separate verdict on each count submitted for deliberations." Pet. App. 4 n.3. The district court judge then traveled back from Davenport to his chambers in Des Moines, Iowa, and, by consent of the parties, a magistrate judge presided over the deliberations. *Id.* at 3 & n.2.

On the morning of the third and final day of deliberations, the jury sent the magistrate judge a note inquiring, "What happens if we cannot come to an agreement?" Pet. App. 3. Two hours after being instructed to continue deliberating, the jury informed the magistrate judge that it was "unable to come to a unanimous verdict." *Id.* During the subsequent telephone conference with counsel and the magistrate judge, the district court observed that "we don't know if [the jury's note] pertains to one of the submitted counts or both of the submitted counts," but nonetheless "assum[ed]" that it "pertains to both counts that the jury has, the discrimination claim and the equal protection claim." *Id.* at 93. The magistrate judge then followed the court's instructions "to tell [the jury] to continue to deliberate[,] then after lunch *** give them [an] Allen charge." *Id.* at 98-101; *see also Allen v. United States*, 164 U.S. 492 (1896).

Shortly after 4:00 p.m., the jury foreperson sent a final note to the magistrate judge stating: "We are still unable to come to a unanimous verdict. I do not see us ever agreeing." Pet. App. 101-102; *see id.* at 4. After informing Wagner's counsel by telephone that a mistrial would be declared, *see* Pl.'s Objection to

Entry of J. on Count I, Ex. 1, ¶ 9, No. 3:09-cv-10 (S.D. Iowa) (ECF No. 126-2), the magistrate judge convened the jury in open court and confirmed that the note reflected each juror's individual view as to the state of deliberations, Pet. App. 4-5. The magistrate judge then "declared a mistrial, asked the jury to later complete and return a post-trial assessment, and thanked the jury for their service." *Id.* at 5. According to the clerk of court's minutes, the jury was discharged and exited the courtroom at 4:35 p.m. *Id.* at 5, 113.

The magistrate judge reconvened the jury at 4:37 p.m. to ask whether its inability to reach a unanimous verdict covered both Counts 1 and 2. Pet. App. 5. "From the time the magistrate judge discharged the jury and the members dispersed from the courtroom, until the time the magistrate judge reassembled them in the courtroom, [there is] no record of the jury members' location, supervision, contacts, communications or conduct, either as individuals or as a group." *Id.* at 5 n.5.

The foreperson explained that the jury had reached agreement as to the political discrimination claim (Count 1) in favor of Jones, but had deadlocked on the equal protection claim (Count 2). After polling the jury, the magistrate judge announced: "I am amending my Order only to the extent that the mistrial that I have ordered is as to *** Count 2 and not Count 1[.]" Pet. App. 108. The magistrate judge then directed the jury foreperson to sign an unsigned verdict form on Count 1. *Id.* Accordingly, judgment was entered on Count 1. *Id.* at 163.

3. Wagner sought a new trial on the ground that "once [the magistrate judge] declared a mistrial and excused the jury, 'he had no discretion to reconvene the jury to accept some alleged *** verdict in favor of defendant on Count I." Pet. App. 36 (citation and internal quotation marks omitted). The district court found the argument "unconvincing." *Id.* at 40. Despite not being present on the last day of deliberations, the court relied on personal knowledge "that the jury room is in a secure area of the courthouse" to find that the excused jurors "remained at all times in this secure area of the courthouse," "in the control of the Court," and "inaccessible to any outside influences." *Id.* at 43. It followed, in the court's view, that the "jury remain[ed] 'undischarged' and subject to recall" to deliver a verdict on Wagner's political discrimination claim. *Id.*

In a footnote, the district court set forth the magistrate judge's extra-record account of the proceedings, including the fact that the magistrate judge "walked to the jury room and *** f[ound] all twelve jurors still present." Pet. App. 42 n.16. The district court underscored, however, that it "d[id] not consider the information in th[e] footnote in any way in conducting its legal analysis and deciding the issues before it." *Id.*

The district court also granted Petitioners' motion for a directed verdict on the equal protection claim, thus supplanting the mistrial order as to Count 2. *See* Pet. App. 64-76. The court therefore "affirmed" the judgment entered in favor of Petitioners on Count 1 and directed entry of

judgment in favor of Petitioners on Count 2. *Id.* at 77-78.

4. The Eighth Circuit reversed the entry of judgment as to Count 1 and remanded for a new trial.[1] It held that "in a case such as the present one, where a court declares a mistrial and discharges the jury which then disperses from the confines of the courtroom, the jury can no longer render, reconsider, amend, or clarify a verdict on the mistried counts." Pet. App. 10.

In the Eighth Circuit's view, this holding better comports with "this age of instant individualized electronic communication and widespread personal control and management of pocket-sized wireless devices." Pet. App. 10. By contrast, the court continued, a more "amorphous rule that turns on whether jurors in fact became available for or were susceptible to outside influences or remained within total control of the court" left "much to chance depending upon the nature of the architectural design of a courthouse and the availability of non-court personnel wandering the spaces outside the courtroom and its jury facilities." *Id.* at 11-12. Worse still, the rule "become[s] unworkable when, as here, the record is silent as to juror security and conduct after discharge." *Id.* at 11. At bottom, the Eighth Circuit concluded, it made little sense to adopt a rule that "forced [courts] to speculate as to the undefined

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[1] Wagner abandoned her appeal as to the entry of a directed verdict on Count 2. Pet. App. 6 n.7.

limits of the so-called 'protective shield'" that insulates juries and their verdicts. *Id.* at 12.

Beyond the possibility of external influences, the Eighth Circuit feared that the act of recalling a jury after declaring a mistrial risked undermining the verdict. It explained that "once a court has declared a mistrial and discharged the jury from the courtroom, an attempt to reconvene the jurors, question them, and re-poll them on the mistried counts raises serious potential for confusion, unintended compulsion and, indeed, coercion." Pet. App. 12. Its ruling avoided "giv[ing] a vacillating juror an opportunity to reconsider" at a point when a discharged juror's "change of mind or claim that he was mistaken or unwilling in his assent to the verdict [would] come[] too late." *Id.* at 12-13 (citation and quotation marks omitted).

Applying its bright-line rule to the facts before it, the Eighth Circuit concluded that "the magistrate judge erred in recalling the jury to question and re-poll them as to the mistried, or not, counts." Pet. App. 13. Upon discharge, the Eighth Circuit explained, "the jury no longer operated under the admonition that it could not talk to others about the case outside of the deliberation room. And, once discharged and dispersed from the courtroom, we are left, as earlier noted, to speculate as to the jurors' conduct." *Id.* That made the magistrate judge's "inadvertent mistake in failing to clarify the jury verdict before the mistrial was declared *** beyond correction after the jury left the courtroom." *Id.* at 14.

Finally, having concluded that a new trial was necessary, the Eighth Circuit "question[ed]" whether the district court's jury instructions on the remaining First Amendment political discrimination claim "adequately embraced" its earlier guidance. Pet. App. 14. In particular, the Eighth Circuit "d[id] not think" that the district court's instructions "adequately address[ed]" the burden-shifting and related principles set forth in its previous decision. *Id.* at 15. Accordingly, the Eighth Circuit directed the district court to "revisit" those instructions on remand. *Id.*

5. The Eighth Circuit denied Petitioners' petition for rehearing, without noted dissent. Pet. App. 164.

REASONS FOR DENYING THE PETITION

Contending that the decision below conflicts with the decisions of several other courts of appeals, Petitioners urge this Court to hold that a discharged jury can be reconvened to render a verdict "if the jury has remained an undispersed unit within the court's control since discharge." Pet. ii. But the result in this case would be the same even under Petitioners' proposed rule. That is because the record in this case does *not* confirm that "the jury remained an undispersed unit within the court's control since discharge"; to the contrary, it is devoid of any indication of where the discharged jurors went or what they did after leaving the courtroom. None of the purportedly conflicting authorities addresses the scenario present here, where the district court reconvened a discharged jury from outside the courtroom—without record evidence that they

remained free from outside influence—for the purpose of accepting an alleged verdict on a mistried count.

The Eighth Circuit's decision on the record below, moreover, is both sensible and correct. Petitioners now claim for the first time that requiring a new trial in this case violates their Seventh Amendment right to a jury trial. Petitioners overlook not only the fact that they may try their case to a jury on remand, but also a century of precedent recognizing that the Seventh Amendment does not bar courts from granting new trials after a verdict has been rendered.

In any event, this case presents an exceptionally poor vehicle for resolution of the question presented. Petitioners all but ignore the fact that the jury verdict on Count 1 is vulnerable on an independent ground: the district court's improper instructions on the burden of persuasion for a First Amendment claim of political discrimination. Because the Eighth Circuit strongly suggested instructional error in its opinion, and elsewhere has made clear that such an error requires a new trial, the verdict will not stand even if the decision below as to the mistrial is reversed. For all these reasons, this Court's review is not warranted.

I. THE DECISION BELOW CREATES NO CIRCUIT CONFLICT

According to Petitioners (Pet. 13), "[t]he Eighth Circuit's decision conflicts with decisions from the First, Second, Third, Fourth, Sixth, and Seventh Circuit Courts, which hold that where the jury

remains within the control and confines of a secure federal courthouse it may be reconvened." That contention not only overstates the actual holdings of those cases, but it also ignores the lack of an adequate record here on the critical point of the discharged jurors' pre-recall conduct. Petitioners' insistence (Pet. 5) that the jury in this case stayed "within the secure area next to the courtroom and had not yet dispersed," and thus remained "inaccessible to the public, the press, and all other outside influences," is based on speculation rather than on record evidence. The decision thus creates no conflict with other decisions permitting a jury to be reconvened when the record demonstrates that they remained within the court's control, free from outside influence, in the courtroom or jury room.

A. None Of The Cited Cases Involves A Jury Recall After Mistrial Without A Clear Indication Of Court Control Over The Discharged Jury

None of the allegedly conflicting decisions on which Petitioners rely addresses the situation here. Although Petitioners use broader language to describe their holdings, the cases in which circuit courts permitted a discharged jury to reconvene were those in which the record demonstrated that the jury remained within the control of the court, either in the courtroom or the jury room. *See Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926) (jurors "remained in their seats"); *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012) (court "retained control of the jury at all times after it informed the jurors they were released"); *United States v. Rojas*, 617 F.3d

669, 673 (2d Cir. 2010) (jury "returned to the deliberation room to await the thanks of the court for its service" and court "recalled the jury, which had not yet left the jury room"); *United States v. Marinari*, 32 F.3d 1209, 1212 (7th Cir. 1994) ("The request was denied while the jurors remained in the jury room waiting to be escorted by the court security officers to the parking lot."); *see also* Pet. App. 8-9 (noting same circumstance in other courts of appeals decisions).

The jury remained subject to recall in those cases as long as the "jurors did not disperse and interact with any outside individuals, ideas, or coverage of the proceedings." *Figueroa*, 683 F.3d at 73; *see Summers*, 11 F.2d at 586 (requiring jury to remain "an undispersed unit, within the control of the court, with no opportunity to mingle with or discuss the case with others"). As discussed further below (pp. 14-16, *infra*), the record here did not allow the Eighth Circuit to conclude that those criteria were met with any degree of certainty.

Moreover, most of the cases cited in the Petition (at 13-14) do not concern a request for further action by a discharged jury following the declaration of a mistrial. *See Rojas*, 617 F.3d at 673, 676-679 (re-polling pursuant to Federal Rule of Criminal Procedure 31(d) of "discharged" jury to confirm that the deputy clerk misread the jury's verdict form); *Marinari*, 32 F.3d 1209 (confronting whether, for purposes of Federal of Criminal Procedure 31(d), a discharged jury had delivered a "recorded" verdict, such that it could no longer be polled); *Summers*, 11 F.2d at 585-587 (permitting further deliberation after

verdict set aside and jury was re-instructed in defendant's presence); *Rutledge v. Johnson*, 282 N.W.2d 111 (Iowa 1979) (construing Iowa Rule of Civil Procedure 203(c) governing sealed verdicts to permit a jury to reconvene to make ministerial verdict form corrections); *Oxford Junction Sav. Bank v. Cook*, 111 N.W. 805, 807-808 (Iowa 1907) (allowing trial court to ask jury to "complete its work by making calculation of the amount due defendant" after sealed verdict revealed).

Indeed, in two of the cases, the jury was never recalled at all. *See Ross v. Petro*, 515 F.3d 653, 658 (6th Cir. 2008) (double jeopardy motion filed in response to setting of new trial after court "found there to be 'corruption of a juror'" and "released the jurors," who "left the building" before court advised counsel of signed verdict forms in the jury room); *Putnam Res. v. Pateman*, 958 F.2d 448, 457 (1st Cir. 1992) (complaining party "did not request *** that the jury be reconvened").

Those distinctions further diminish the claim of any conflict, as the Eighth Circuit relied on the fact that the risk of improper influence on the verdict is particularly strong in the mistrial context. *See* Pet. App. 12-13 ("[O]nce a court has declared a mistrial and discharged the jury from the courtroom, an attempt to reconvene the jurors, question them, and re-poll them on the mistried counts raises serious potential for confusion, unintended compulsion and, indeed, coercion," and could "give a vacillating juror an opportunity to reconsider" at a point when a discharged juror's "change of mind or claim that he was mistaken or unwilling in his assent to the verdict

[would] come[] too late.") (citation and quotation marks omitted).

The lone court of appeals decision involving a jury recalled after a declared mistrial is not in tension—let alone outright conflict—with the decision below. In *Figueroa*, the Third Circuit held that it was not "plain error" for discharged jurors to return and render a verdict as to a bifurcated claim "that had not previously been presented to them" and of which they were "not even aware." 683 F.3d at 73-74 & n.4. Unlike in this case, the *Figueroa* jury (which was definitively found to have remained undispersed under the court's control, *see* p. 10, *supra*) was not recalled to undo a mistrial as to a separate count that had been subject to deliberation. Petitioners thus miss the mark in asserting (Pet. 15) that "[n]o facts distinguish the trial court's error in this matter from the type of errors that were corrected and affirmed in the above-cited federal cases."

B. The Unique Circumstances Below Do Not Implicate Any Alleged Conflict

Petitioners also overlook the narrow context of the decision below. On Petitioners' reading (Pet. 20), the Eighth Circuit's decision "requires the trial court to disregard a verdict *every time* a jury is dismissed and recalled," such that "if a trial judge merely utters, 'discharged,' the moment before a jury forewoman—still seated in the jury box—corrects him to present a properly completed verdict form, the trial court may not accept the verdict." But that argument skips over the Eighth Circuit's more limited description of its holding: "we hold, in a case

such as the present one, where a court *declares a mistrial* and discharges the jury *which then disperses from the confines of the courtroom*, the jury can no longer render, reconsider, amend, or clarify a verdict *on the mistried counts*." Pet. App. 10 (emphasis added). Accordingly, Petitioners' contention (Pet. 20) that the decision below will have a "substantial impact" is a gross overstatement.

That is particularly true in light of the fact that both courts below acknowledged the anemic factual record here as to the discharged jurors' activities before they were recalled. Given that record, Respondent Wagner would be entitled to a new trial even under Petitioners' proposed rule, which permits discretion to recall a jury only "if the jury has remained an undispersed unit within the court's control since discharge." Pet. ii. As the Eighth Circuit made clear, no such finding can be made on the record below.

The Eighth Circuit stated in no uncertain terms: "From the time the magistrate judge discharged the jury and the members dispersed from the courtroom, until the time the magistrate judge reassembled them in the courtroom, we have no record of the jury members' location, supervision, contacts, communications or conduct, either as individuals or as a group." Pet. App. 5 n.5; *see id.* at 11 ("[H]ere, the record is silent as to juror security and conduct after discharge[.]"); *id.* at 13 ("[W]e are left *** to speculate as to the jurors' conduct."). The district court similarly disclaimed any reliance on the magistrate judge's narrative account of dismissing and recalling the jury. *Id.* at 42 n.16 (stating that it "does not

consider the information in this footnote in any way in conducting its legal analysis and deciding the issues before it"); *see id.* at 13 n.11 ("Although the district court offered the magistrate judge's personal account of the time interval between discharge and reconvening the jury, as the district court recognized, this is not part of the record.").

To be sure, the district court remarked that "the jury room is in a secure area of the courthouse," Pet. App. 43, and that according to the clerk of court's notations, the jury was reconvened after a short period passed, *id.* at 35. But those facts fall short of establishing that "[w]hen the jurors exited the courtroom for the approximately two minutes after [the magistrate judge] polled them on the contents of their note, they remained *at all times* in this secure area of the courthouse *** and were inaccessible to any outside influences." *Id.* at 43 (emphasis added); *see also* Pet. 5 (adopting same view). Even if this Court were to credit the magistrate's outside-the-record statement that he "walked to the jury room and *** f[ound] all twelve jurors still present," Pet. App. 42 n.16, Petitioners' version of the facts would still require the further assumption that the jurors upon leaving the courtroom remained in the jury room or the secure area of the courthouse (however large or small it might be), or were otherwise not subject to outside influence for the duration. *See* p. 20, *infra* (discussing use of cell phones).

"It has long been the Court's considered practice not to decide abstract, hypothetical, or contingent questions." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (citation and internal quotation marks

omitted); *see Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (per curiam) (dismissing writ as improvidently granted where question presented "may be entirely hypothetical"). But that is precisely the situation here, where the record does not permit application of the legal rule that Petitioners advance. *See* Pet. App. 11 (noting that Petitioners' proposed rule "become[s] unworkable" in this case). As noted above, the question presented—which is predicated on the jury "remain[ing] an undispersed unit within the court's control since discharge," Pet. ii—assumes a premise unsupported by the Eighth Circuit's explicit description of the record below. And a remand "for additional factual findings" (Pet. 12) in this context, where the jurors are no longer available, is unworkable as a practical matter.

The absence of any conflicting decisions is unsurprising. As the facts here demonstrate, the declaration of a mistrial, which is not rectified before the jury files out of the courtroom and becomes unaccounted for, is unlikely to recur absent a unique confluence of events. *See, e.g.,* Pet. App. 3 & n.2 ("district court judge *** had returned to his chambers in Des Moines, Iowa," leaving "magistrate judge presiding over the deliberations" in Davenport); *id.* at 4 (magistrate judge convening jury to declare mistrial "without counsel present"). Such idiosyncrasies make this case an outlier unworthy of this Court's review.

II. THE DECISION BELOW IS CORRECT

The Eighth Circuit held that a rule precluding a district court from recalling a dismissed and dispersed jury following the declaration of a mistrial

was necessary because: (i) it is better suited to the "age of instant individualized electronic communication and widespread personal control and management of pocket-sized wireless devices"; (ii) an "amorphous rule" that "depend[s] on the nature of the architectural design of a courthouse and the availability of non-court personnel wandering the spaces outside the courtroom and its jury facilities" requires "speculation as to the undefined limits of the so-called 'protective shield'" insulating the jury from improper influence; and (iii) recalling jurors "raises serious potential for confusion, unintended compulsion and, indeed, coercion." Pet. App. 10-12. That reasoning sensibly accords with the long-held view, expressed by Justice Cardozo, that when a jury "has been discharged altogether and relieved, by the instructions of the judge, of any duty to return," it "has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret v. City of New York*, 169 N.E. 280, 280 (N.Y. 1929).

Even aside from the merits of any such "bright line" rule, the decision below is correct at least under the circumstances of this case. As discussed above (pp. 14-16, *supra*), the lack of any record indication that the jury remained under control of the court and free from outside contact or influence precludes a conclusion that the jury remained under the court's "protective shield."

Rather than confront the Eighth Circuit's analysis or the sparse record, Petitioners assert that the decision below is flawed for two other reasons—

neither of which were pressed or passed on below. *See National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). Even if Petitioners could properly raise them before this Court for the first time, Petitioners allege no circuit conflict on either meritless argument.

First, Petitioners assert (Pet. 15-18) a violation of their right to a jury trial under the Seventh Amendment to the U.S. Constitution. But that right is nowhere near as sweeping or inviolate as Petitioners claim. As an initial matter, if anything, it is *Respondent Wagner's* right to a jury trial that would be compromised if the supposed verdict from a discharged jury were deemed valid here—especially one obtained after the magistrate judge directed the recalled jury foreperson to sign an unsigned verdict form. *See* Pet. App. 108. Under the decision below, Petitioners retain their constitutional right to try their case to a jury on remand.

Setting aside that basic point, the Seventh Amendment preserves only "the right of trial by jury *** according to the rules of the common law." U.S. Const. amend. VII; *see Osborne v. Haley*, 549 U.S. 225, 252 (2007). As this Court has explained, a court's authority to "nonsuit[] the plaintiff where he had obtained a verdict, enter[] a verdict or judgment for one party where the jury had given a verdict to the other, or mak[e] other essential adjustments" was "well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as

preserved and protected by that amendment." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659-660 (1935); *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432-433 (1996) ("In keeping with the historic understanding, the Reexamination Clause does not inhibit the authority of trial judges to grant new trials 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.'") (footnote omitted) (quoting FED. R. CIV. P. 59(a)); *accord Blunt v. Little*, 3 F. Cas. 760, 761-762 (C.C.D. Mass. 1822) (No. 1,578) (Story, J.) ("[I]f it should clearly appear that the jury *** have acted from improper motives *** it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.").

It makes no difference that the Eighth Circuit, rather than the district court, ordered the new trial. *See* Pet. 17-18. Petitioners point to *Gasperini*, but that case proves the point. In *Gasperini*, this Court recognized that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive"—not "jury verdicts" writ large (Pet. 18)—"is a relatively late, and less secure, development." 518 U.S. at 434. But it ultimately held that "[n]othing in the Seventh Amendment *** precludes appellate review" in that circumstance. *Id.* at 436 (ellipsis in original) (citation and quotation marks omitted).

Second, Petitioners claim (Pet. 19) that the Eighth Circuit improperly "relied on incompetent evidence" outside of the record "instead of relying on the trial court judge's analysis and observations."

That factbound argument gets it backward. The anonymous juror letter mailed to Wagner's counsel regarding jury deliberations was "information in the record," Pet. App. 6 n.6, while the "magistrate judge's personal account" of the jurors' whereabouts and actions between the time they were excused and recalled was "not part of the record," *id.* at 13 n.11; *see also* pp. 5, 14-15, *supra*. At any rate, the Eighth Circuit made no mention of the letter in holding that its rule avoided the risk that a "vacillating" juror might "reconsider" his or her view upon being recalled. Pet. App. 12.

Petitioners' complaint (Pet. 19) that the Eighth Circuit "supported its new rule with speculation about jurors' mobile device use" is equally far afield. Recognizing the prevalence of cell phones—"which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy," *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)—cannot be labeled "speculation." The record, moreover, bore out the Eighth Circuit's concern. As Petitioners point out, "[j]urors were prohibited from using their cell phones *during the trial*," Pet. 19 (emphasis added)—a restriction that abated (at the latest) once the discharged jurors exited the courtroom.

III. A SEPARATE INSTRUCTIONAL ERROR PROVIDES AN INDEPENDENT BASIS FOR A NEW TRIAL

Even if this Court were to resolve the question presented in Petitioners' favor *and* apply it in their favor on the record below, that still almost certainly

would not avert a new trial. Contrary to Petitioners' suggestion, the jury's purported verdict on the political discrimination claim was not otherwise "valid," Pet. 17, and the declaration of the mistrial is not the "sole[]" reason that "[t]hey must now face retrial," *id.* at 20.

After concluding that the declaration of mistrial was "beyond correction," the Eighth Circuit "question[ed] whether the trial court's jury instructions adequately embraced [its] earlier guidance *** concerning First Amendment political discrimination claims." Pet. App. 14. The jury, the Eighth Circuit explained, was not properly instructed as to the "shifting burden of persuasion," which did "not require[] [Wagner] to produce any evidence of pretext to prevail." *Id.* at 15; *see* p. 2, *supra*. It therefore "direct[ed] the district court to revisit [its] instructions" on remand. Pet. App. 15.

That instructional error casts serious (if not fatal) doubt on the validity of the jury's verdict. Under Eighth Circuit precedent, where a "jury instruction [incorrectly] shift[s] the burden of persuasion on a central issue in the case, the error cannot be harmless." *Gross v. FBL Fin. Servs., Inc.*, 588 F.3d 614, 617 (8th Cir. 2009). That statement applies here with full force and all but ensures that the decision below granting the request for a new trial—if reversed by this Court—would stand on an alternative ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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