No. 14-615

In The Supreme Court of the United States

CAROLYN JONES, Dean of the University of Iowa College of Law (in her official and individual capacities), and GAIL B. AGRAWAL, Dean of the University of Iowa College of Law (in her official and individual capacities),

Petitioners,

v.

TERESA R. WAGNER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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I. Respondent mischaracterizes the juror letter as "record evidence" despite this Court's recent decision rendering such material inadmissible.

Respondent argues that the juror letter is "record evidence" and therefore was properly considered by the Eighth Circuit Court of Appeals. (Brief in Opp., p. 20). The fundamental flaw in Wagner's position is that the juror letter is inadmissible under this Court's recent holding in *Warger v. Shauer*, ___ U.S. ___, 135 S. Ct. 521 (2014) (affirming decision of the Eighth Circuit to exclude a juror's affidavit as inadmissible). The Eighth Circuit's clear reliance on the juror letter in its decision – for why else does the Court mention it twice in connection with its bright-line rule? – is untenable in light of this Court's ruling in *Warger*.

Respondent mischaracterizes the juror letter with the phrase, "record evidence," as appellate courts do not rely on inadmissible evidence. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) (evidence not in the record will not be considered). Here, the juror letter was merely attached as an exhibit to an affidavit. (App. 165-168). If this Court were to consider facts not in the record, those facts should be incontrovertible and should not relate to the facts of a particular case. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 56-57, n. 111 (1973). Under no circumstance was the Eighth Circuit's consideration of and reliance on the inadmissible juror letter proper.

II. Respondent mischaracterizes the Eighth Circuit's comments on a jury instruction on which argument was neither preserved nor presented below.

Respondent claims that "almost certainly" the Eighth Circuit provided separate grounds for a new trial based on jury instructions regarding the requisite elements of a political discrimination case. (Brief in Opp., pp. 20-21). With respect to the jury instructions, the Eighth Circuit stated:

> Finally, since we remand this case for retrial, we question whether the trial court's jury instructions adequately embraced our earlier guidance in adopting the First Circuit's test concerning First Amendment political discrimination claims. . . . Accordingly, upon remand, we direct the district court to revisit these instructions.

(App. 14-15). Undeniably, these statements are *dicta* and do not represent that the instructions, as a matter of law, were incorrect. Moreover, Respondent herself did not request such an instruction; nor did she make any objection that the instructions lacked such a statement. (*See* App. 63-64). Respondent failed to preserve this argument for appeal. *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 876 (8th Cir. 2012) ("An objection must be specific, precise enough to allow the district court to address any problems and avoid a retrial").

III. Respondent cannot deny the Eighth Circuit's departure from the rule in all other circuits examining this question.

Respondent argues only factual distinctions between the instant case and cases from all the federal circuits on the overarching issue: whether a bright-line rule should be imposed. (Brief in Opp., pp. 9-13). In doing so, Respondent misstates the facts presented in these cases and disregards the rule developed by them. (Brief in Opp., pp. 11-12). Contrary to Respondent's assertions, the federal cases are factually similar to the instant case in material respects.

The federal courts have consistently allowed the recall of juries to correct verdict error or to provide clarifying information. *See, e.g.*, *United States v. Figueroa*, 683 F.3d 69, 72 (3d Cir. 2012) (jury recalled to consider additional count); *United States v. Rojas*, 617 F.3d 669, 673 (2d Cir. 2010) (jury recalled to be polled after re-reading of verdict forms); *United States v. Marinari*, 32 F.3d 1209, 1215 (7th Cir. 1994) (jury may be recalled and polled). In *Figueroa*, the jury was recalled to consider one of several counts after the judge had declared a mistrial. 683 F.3d at 72. Juries have been recalled from areas of the courthouse beyond the courtroom. *Figueroa*, 683 F.3d at 72 (jurors were held by court employee outside courtroom); *Marinari*, 32 F.3d at 1215 (jurors were outside courtroom awaiting escort to their cars); *Rojas*, 617 F.3d at 678 (jurors were in jury room outside the courtroom). In some cases, the jury was absent from the courtroom for longer than the two-minute absence

in this trial. *Rojas*, 617 F.3d 678 n. 3 (jury absent for six minutes); *Figueroa* (jury absent long enough for judge to research legal issue).

The Eighth Circuit's ruling clearly departs from federal precedent. No prior case holds that a jury remaining inside a federal courthouse is beyond the control of the court. No prior case holds that a jury remaining inside a federal courthouse may not be recalled to correct verdict error. In no prior case did the Court of Appeals require a special evidentiary hearing to confirm the trial court's description of the jury's location after discharge. Most importantly, none of the federal courts that have considered this issue has imposed a bright-line rule prohibiting the recall of a jury after discharge.[1]

Respondent challenges Petitioner's reliance on federal cases that arise in the criminal context. Yet the rules in a criminal case where double jeopardy, imprisonment, loss of voting rights, and even loss of liberty are at stake; are more stringent than in civil cases, where the disputes are about money. If courts can reasonably apply the fact-specific approach in

[1] Respondent asserts without basis that this factual scenario, requiring a jury to be recalled after discharge, is unlikely to recur. The six United States Courts of Appeals decisions and numerous state court decisions on this very question show that the situation does recur: *Lahaina Fashions, Inc. v. Bank of Hawaii*, 319 P.3d 356, 358 (Haw. 2014), *cert. denied*, 134 S. Ct. 2826 (2014); *State v. Rodriguez*, 134 P.3d 737 (N.M. 2006); *State v. Green*, 995 S.W.2d 591 (Tenn. Ct. Crim. App. 1998); and *State v. Edwards*, 552 P.2d 1095 (Wash. 1976).

criminal cases, then it is reasonable to apply it in civil cases – this one. *See Head v. Her Majesty the Queen*, 2 S.C.R. 684 (1986) (criminal case clarifying lower tolerance for flexibility in amending verdicts after jury discharge in criminal cases than in civil cases).

IV. Respondent misconstrues the Seventh Amendment and Petitioner's argument that the Eighth Circuit ruling violates it.

Respondent notes that the Seventh Amendment's Reexamination Clause does not prevent new trials (Brief in Opp., pp. 18-19); which Petitioner does not dispute. Absent an error of law meriting a new trial, however, the Reexamination Clause prevents any subsequent ***court or jury*** from reexamining the facts that a jury already has considered and adjudicated.

This Court has held that the Seventh Amendment accords great deference to the district court. *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415 (1996). In that case, concerning whether a jury's verdict was excessive, the Court emphasized that it was important for the court of appeals to review only for an abuse of discretion, giving great deference to the trial court. *Id.* at 432-436. The Court stressed that the trial court is better positioned to evaluate the facts, whereas appellate courts only have the "cold paper record." *Id.* at 438. Quoting a lower court, the Court emphasized that it "must give the benefit of every doubt to the judgment of the trial judge." *Id.* at 438-439. While the instant case does not concern an

excessive verdict, as *Gasperini* did, the issue here is whether the jury's verdict on the sole surviving claim will be honored – both *Gasperini* and this case question whether the respective verdict is valid and should be upheld.

To preserve the values enshrined by the Reexamination Clause, an appellate court thus should reject the District Court's handling of the verdict in this case only if true legal error exists in the form of a clear abuse of discretion in receiving that verdict. The trial judge in this case made several findings of fact that the Eighth Circuit should have accepted under this standard, all supporting the conclusion that the jurors had been within the control of the court (the magistrate or the court security officer) and had not been subject to outside influences during the two minutes between their discharge and recall. The magistrate judge polled them as to their verdict on the claim in question, and subsequently asked the forewoman to sign the verdict form. (App. 106-108).

The Eighth Circuit in the ruling below articulated the appropriate standard, but it certainly did not give the district court judge "the benefit of every doubt." Instead, it directly rejected the judge's findings and speculated about the use of cell phones, ultimately relying on material improperly in the record and impermissible as evidence in support of a rule in tension with the holdings of all other federal circuits that have considered it. By doing so, the

Eighth Circuit deprived Petitioner Jones of her Seventh Amendment right to jury trial.

V. Respondent also ignores the tradition of common law – dating to Lord Mansfield – that favors honoring the verdict and recognizes the interests of judicial economy consistent with the Seventh Amendment's Reexamination Clause.

The tradition of common law from before the adoption of the Seventh Amendment to the present day supports Petitioners' position. With Lord Mansfield as one of the judges on appeal, a jury in England was presented with two issues in the case of *Cogan v. Ebden*, 1 Burr. 383 (1757). The foreman declared a verdict for the defendant on both questions. Eight members of the jury later told the court that, about an hour after the trial – and indeed, after the trial judge had gone home – they realized that the verdict was erroneous and that they had actually ruled for the plaintiff on one of the claims. Citing English precedent, the court concluded that it was proper to amend the verdict:

> . . . Lord Mansfield and [another justice] thought that, as it was a mere slip, there might be some method of rectifying the verdict according to the truth of the case; from the Judge's notes, if they were sufficiently particular; **without sending the issue to be tried over again, at a great expense**.

Id. at 384 (emphasis added).

Cogan accurately expresses a valid common law approach to the issue, thus encompassing the period of 1791 that is critical to the application of the Seventh Amendment. *See, e.g.*, *Dardarian v. Schneider*, 3 D.L.R. (2d) [Dominion Law Reports] 292 (Ontario High Court 1956) (citing Wigmore, John Henry, *Evidence in Trials at Common Law*, 3rd ed., vol. VIII, at § 2355; and correcting a verdict on recall of jury after discharge and retreat from the courtroom for approximately four minutes); *McCulloch v. Ottawa Transp. Comm'n*, 2 D.L.R. [Dominion Law Reports] 443 (Ontario Court of Appeal 1954) (citing Wigmore, *supra*, and correcting a verdict after jury discharge).

The court in *Cogan* recognized the expense a new trial imposes and considered judicial economy as a benefit of its decision. The interests of judicial economy are consistent with and supportive of the rationale underlying the Seventh Amendment's Reexamination Clause: the preservation of the factual determinations made by our juries. *See Gasoline Prods. Co. Inc. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931). Once a valid verdict has been rendered, the Seventh Amendment protects it from reexamination – by court or jury.

The Reexamination Clause protects facts tried by a jury from being reexamined "***in*** any Court of the United States," unless such reexamination would be permitted under the common law (emphasis added). The Clause's use of the word "in," rather than the word "by," indicates that it bars later reexamination by judges and juries alike. A key reason not to disrupt

the District Court's findings is to ensure that, absent an error of law meriting a new trial, no subsequent court or jury will be given an opportunity to reexamine the facts that this jury has already considered and adjudicated. Here, the Eighth Circuit could not find a clear abuse of discretion, and so this jury's work should be preserved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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