No. 13-517

IN THE

Supreme Court of the United States

GREGORY P. WARGER,
Petitioner,
v.

RANDY D. SHAUERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

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INTEREST OF AMICI CURIAE

Amici are professors of law who have written extensively on the history of the jury, the Federal Rules of Evidence, and the right to an impartial jury. Amici accordingly have a scholarly interest in the historical background and proper resolution of the question presented here.[1]

[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici are:

- Neil Vidmar, Russell M. Robinson II Professor of Law, Duke Law School
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SUMMARY OF ARGUMENT

This case requires the Court to consider the intersection of two distinct practices: (1) the American tradition of allowing litigants to inquire into the biases of potential jurors through voir dire and giving litigants the right to seek relief when a juror fails to disclose a bias and is wrongly empaneled, and (2) the historical rule barring jurors from disclosing the contents of their deliberations in order to impeach their verdicts, which is now codified in Federal Rule of Evidence 606(b), but which at common law was known as the Mansfield Rule. A review of the history and purposes of these two practices reveals that the latter was never intended to trump or undermine the former.

Voir dire in its present American form was essentially unknown in England. While jurors in England could be challenged for cause, litigants were allowed to examine jurors about their biases only in limited circumstances. By contrast, America has developed a robust commitment to voir dire, which has proven to be essential to the American jury selection process. In at least some cases, it has been recognized as a constitutionally required element of the right to an impartial jury.

The Mansfield Rule, by contrast, was first articulated in England before the American tradition of voir dire had developed, by judges who accordingly could not have contemplated that the rule would extend to shielding evidence of juror dishonesty during voir dire. The

rule originally arose from the now discredited belief that witnesses should not be permitted to testify to their own turpitude. And although American courts adopted the Mansfield Rule in narrowed form to serve other goals, it has never been viewed as an absolute prohibition on juror testimony. To the contrary, this Court and others have consistently recognized that the rule's objectives—shielding the jury's deliberations from scrutiny and promoting finality of verdicts—must yield in appropriate cases to fundamental principles of fairness. Indeed, in the years leading up to the adoption of the Federal Rules of Evidence, a substantial body of caselaw held that the Mansfield Rule does not bar the admission of jurors' statements during deliberations to show dishonesty during voir dire.

In light of the distinct histories and policies underlying voir dire and the Mansfield Rule, this Court should construe Rule 606(b) not to preclude admission of juror testimony to prove that a juror lied during voir dire and thus should never have been empaneled in the first place. Absent a clear contrary indication, the rules of evidence should be presumed to have adopted the common-law understanding of the Mansfield Rule. And nothing in Rule 606(b)'s drafting history suggests that Congress intended to repudiate the long-standing recognition that testimony regarding dishonesty in voir dire falls outside the scope of the Mansfield Rule. Moreover, given the central role that voir dire plays in exposing juror bias—including insidious racial bias—a contrary interpretation would needlessly raise grave constitutional concerns. The core constitutional right to a fair and impartial jury militates against such a reading of Rule 606(b). Finally, the privilege accorded jury deliberations exists only because of safeguards such as voir dire that ensure an impartial jury; Rule 606(b)

should not be construed to undermine the basic guarantee of a fair and unbiased jury on which it rests.

ARGUMENT

I. VOIR DIRE IS A UNIQUELY AMERICAN INSTITUTION THAT HAS DEVELOPED INTO AN ESSENTIAL GUARANTOR OF THE RIGHT TO A FAIR TRIAL

Under the English common law, there was no equivalent to the current American practice of voir dire; the right to interrogate potential jurors was quite circumscribed. By contrast, American law has long recognized that litigants must have the right to question jurors, and obtain truthful answers, to ensure that prospective jurors are free of bias and otherwise able to fulfill their duties. Indeed, voir dire is a pillar of the American jury system and a fundamental safeguard of the right to a fair and impartial jury.

A. English Common Law Had No Equivalent To The American Voir Dire Process

Voir dire in its modern American form—the examination of jurors under oath to discover potential bases for challenge—was largely unknown in the English common law. That is not to say that juror challenges did not exist. Although such challenges were rarely exercised, the common law did permit litigants to challenge jurors for cause. Where English common law differed from the modern American system, however, is in the method by which litigants ascertained potential bases for challenge. Voir dire, the centerpiece of that process in the United States and a crucial guarantor of an impartial jury, did not exist in England in its modern American form, and questioning of prospective jurors played only a minimal role in English practice.

1. Common law challenges to jurors

At common law, the jurors in the *panel* (or "little pane," an "oblong piece of parchment" containing jurors' names)—were generally selected by the sheriff. 3 Blackstone, *Commentaries on the Laws of England* 353, 358-359 (Wendell ed. 1852); *see also* Hans & Vidmar, *The Evolution of the American Jury* 35 (1986). The sheriff returned the panel to the court "many weeks" prior to trial so that the litigants could familiarize themselves with the jurors and determine whether to challenge any jurors for cause. 3 Blackstone, *Commentaries* 355.

The common law contained a complex taxonomy of challenges for cause.[2] Challenges "to the array" alleged partiality on the part of the sheriff or other person that arrayed the panel. 3 Blackstone, *Commentaries* 359. Such a challenge was to all the persons on the panel and could result in quashing the entire array. *Id.*; Coke, *Commentary Upon Littleton* 156a (19th ed. 1853) (*Coke on Littleton*).[3] Challenges "to the polls," by contrast, were "exceptions to particular jurors." 3 Blackstone, *Commentaries* 359, 361.

One ground for challenge to the polls was "suspicion of bias or partiality." 3 Blackstone, *Commentaries* 363; *see also Coke on Littleton* 156b-158b. Such chal-

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[2] Peremptory challenges were also available, at least in criminal cases. *See Coke on Littleton* 156b.

[3] Such challenges were limited in cases against the Crown. Coke explained that "where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance [the sheriff] ought to favour the king more." *Coke on Littleton* 156a; *see also* Hans & Vidmar, *supra*, at 35.

lenges fell into two categories. "Principal" challenges could be raised when there were "*prima facie* evident marks of suspicion" that a juror might be biased, such as the juror's kinship with a party. 3 Blackstone, *Commentaries* 363. Challenges "to the favor," by contrast, could be raised "where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as [a juror's] acquaintance [with a party] and the like." *Id.*

2. Ascertaining bases for challenge

"[T]he common-law rule provided for no preliminary examination [of jurors] in advance of challenge[.]" Millar, *Civil Procedure of the Trial Court in Historical Perspective* 291 (2005). Instead, litigants had to rely on personal knowledge or independent investigation to ascertain potential grounds for challenging a juror, and were able to question jurors only *after* a challenge had been raised.[4]

"[B]y the policy of the ancient law, the jury was to come *de vicineto*, from the neighborhood of the vill or place where the cause of action was laid in the declaration[.]" 3 Blackstone, *Commentaries* 359. The rationale was that jurors from the neighborhood "were supposed to know beforehand the character of the parties and witnesses, and therefore … better knew what credit to give to the facts alleged in evidence." *Id.* By the same token, litigants knew, or could easily investigate, potential jurors' reputations. Making the panel available to the parties well in advance of trial was

[4] *Cf. id.* (noting rare cases to the contrary but explaining that "these instances involved departure from established rule," a "deviation … definitely discountenanced in the later practice").

therefore an essential element of the jury-selection process, ensuring that "the parties … have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause." *Id.* at 355.

Although the geographic restrictions of the "ancient law" loosened over time, 3 Blackstone, *Commentaries* 359-360, the method for challenging jurors did not:

> The theory today is the same as stated by Peake at the opening of the nineteenth century, in his work on Evidence: "The pannell," he says, "is made out and known to the parties long before the trial; they have an opportunity of inquiring as to the characters and course of life of the persons named in it; and if they find anything which destroys the competency of a juror, they may be prepared to prove it."

Millar, *supra*, at 292 (quoting Peake, *Law of Evidence* 141 (Am. ed. 1812)).

3. Examination of jurors

Under the English common law, examination of jurors under oath did not serve its modern American purpose of uncovering potential bases for challenge. Instead, it played a far more limited role in jury selection.

At common law, challenges alleging bias or partiality for reasons that were not grounds for a principal challenge were decided by "triors" appointed by the court. These triors heard evidence and decided "whether the juror be favorable or unfavorable." 3 Blackstone,

Commentaries 363.[5] As part of this process, the juror could in some circumstances "be examined on oath of *voir dire*, *veritatem dicere*." *Id.* at 364. Such examinations were rare, however, for three reasons.

First, as discussed above, examination of jurors was permitted only *after* a challenge, and such challenges were rarely made. Millar, *supra*, at 292. That continues to be the case today. "In the modern English practice challenges continue to be possible, but very seldom are interposed, and only in the rare event of a challenge can there be any … examination of the juror." *Id.*; *see also Swain* v. *Alabama*, 380 U.S. 202, 218-220 (1965) (noting that "in England … both peremptory challenge and challenge for cause have fallen into disuse"), *overruled on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986).

Second, even in the event of a challenge, examination of jurors did not always occur. Litigants had to rely on extrinsic evidence to ascertain any causes for challenge in the first place, and could rely on the same evidence to prove the cause. Moreover, as one annotation to Blackstone observed of English practice, "[c]hallenges are seldom tried; the officer of the court, upon the objection being intimated to him, refrains from calling the juror." 3 Blackstone, *Commentaries* 331 n.19.

Third, examination of jurors was permitted only as to "such causes of challenge as are not to [the juror's] dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disad-

[5] Once a sufficient number of jurors were seated, the jurors themselves became the triors. *Id.*; *see also* Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 Geo. L.J. 438, 443 (1927-1928) (describing procedure for deciding challenge).

vantage." 3 Blackstone, *Commentaries* 364; *Coke on Littleton* 158b ("If the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined upon his oath[.]").

The scope of this prohibition was surprisingly broad. Notably, the prohibition extended to whether a juror had expressed a prior opinion regarding a case. In Cook's case, for example, the defendant sought to question jurors as to whether "they had … said he was guilty, or would be hanged." *Anonymous*, 91 Eng. Rep. 141 (K.B. 1691). The court ruled that "[t]his is a good cause of challenge, but then the prisoner must prove it by witnesses, not out of the mouth of the juryman," as such a statement "would charge [the juror] with misdemeanor or misbehaviour." *Id.* The defendant could not inquire, the court explained, as to that which "would make a man discover that of himself which tends to shame, crime, infamy, or misdemeanor." *Id.*

Similarly, the defendant in *King* v. *Edmonds*, 106 Eng. Rep. 1009, 1016 (K.B. 1821), sought to challenge jurors "on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause." The defendant did not "offer to prove such an expression, by any extrinsic evidence, but … proposed to obtain the proof, by questions put to the jurymen themselves." *Id.* The court held that it was proper to "refuse[] to allow such questions to be answered," reasoning that "it is a very dishonourable thing for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation." *Id.* at 1017.

Accordingly, jurors were rarely questioned during the jury selection process. Such questioning occurred only in the unusual circumstance in which (1) a litigant

raised a challenge to a juror after ascertaining grounds for the challenge through personal knowledge or investigation; (2) the litigant sought to prove the grounds for the challenge through testimony from the juror; and (3) the cause of challenge did not tend to the juror's "dishonor or discredit."

B. America Developed A Robust Practice Of Voir Dire As An Essential Guarantor Of The Right To An Impartial Jury

Voir dire in its modern American form bears little resemblance to the English model described above and could hardly have been contemplated by the likes of Coke, Blackstone, and Mansfield. In America, voir dire has developed into a critical part of the jury-selection process and a key guarantor of the right to an impartial jury.

1. Development of the American model

The precise origins of the American practice of voir dire are unclear. But as early as the 1807 trial of Aaron Burr, "Chief Justice Marshall had no difficulty in allowing extensive examination of jurors as to their previous opinion of the guilt of the accused." Millar, *supra*, at 292-293. Such inquiry would have been prohibited under English practice because it entailed both (1) questioning jurors before any challenge had been raised and (2) questioning jurors about prior statements regarding the defendant's guilt.

Nonetheless, "it came to be accepted in most of the American jurisdictions … that a preliminary questioning of the jurors on the voir dire, for the purpose of ascertaining whether a challenge would be in order, was a definite right of the parties." Millar, *supra*, at 292. American practice also diverged in other significant ways from the British example. American voir dire al-

lows "a much wider field of inquiry than was permitted at common law." *Id.* "The voir dire in American trials tends to be extensive and probing, … and the process of selecting a jury protracted." *Swain*, 380 U.S. at 218-220. The prohibition on examining jurors as to causes that tend to their "dishonor and discredit" likewise fell by the wayside. *See* Millar, *supra*, at 292.

2. Practical motivations

The dramatic expansion of voir dire in American practice was rooted in part in the necessities of jury trials in a large and heterogeneous country. The English practice developed in a society in which jurors were likely to come from the same neighborhood as the litigants. Litigants could therefore rely on personal knowledge of potential jurors or their reputations as a basis for making challenges.

In modern times, however, litigants in U.S. courts are unlikely to have any personal knowledge of potential jurors or any practical ability to conduct meaningful investigation of jurors' backgrounds independent of voir dire. In *Frazier* v. *United States*, 335 U.S. 497, 503 (1948), for example, it appears that jurors were selected from a pool of over five hundred. It is hardly feasible—at least for litigants of average means—to conduct any meaningful investigation of such a large number of potential jurors. Moreover, courts have recognized that even if such inquiries were possible, they would be less desirable than the more transparent voir dire process. *See Kiernan* v. *Van Schaik*, 347 F.2d 775, 778-780 (3d Cir. 1965) ("The impartiality of jurors should be tested under the control of the court rather than by the unsupervised activity of investigators with all the undesirable possibilities of intimidation and jury tampering which such surveillance inevitably presents.").

3. Voir dire protects the right to an impartial jury and a fair trial

Even more significant than these practical considerations, however, has been the recognition that meaningful voir dire is essential to protecting the constitutional right to a fair trial.

"One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). Indeed, the Sixth Amendment expressly protects criminal defendants' right to a trial "by an impartial jury." U.S. Const. amend. VI. And although the Seventh Amendment, which guarantees the right to trial by jury for civil litigants in federal court, does not include similar language, this Court has recognized that "[t]he American tradition of trial by jury, considered in connection with *either criminal or civil proceedings*, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (emphasis added); *see also Kiernan*, 347 F.2d at 778 ("Amendment VII preserves 'the right of trial by jury' in civil cases, and although the impartiality of the jury is not expressly mentioned it is inherent in the right of trial by jury[.]"); *cf. McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 549 (1984) (relying on "right to an impartial jury").

"The right to an impartial jury is" also "guaranteed … by principles of due process." *Turner* v. *Murray*, 476 U.S. 28, 53 (1986); *see also In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial *in a fair tribunal* is a basic requirement of due process." (emphasis added)); *Kiernan*, 347 F.2d at 778 (impartial jury right is implicit in the Fifth Amendment's due process clause).

"*Voir dire* examination serves to protect [the impartial jury] right by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough*, 464 U.S. at 554; *see also Tanner* v. *United States*, 483 U.S. 107, 127 (1987) (describing voir dire as a "source[] of protection of petitioners' right to a competent jury").[6] "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981); *see also id.* at 188 ("Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."); Babcock, *Voir Dire: Preserving 'Its Wonderful Power,'* 27 Stan. L. Rev. 545, 549 (1975) ("[W]ithout a reasonable amount of information about the prospective jurors, the litigant cannot realize his right to 'select' the jury by challenges for cause and by peremptory strikes.").

Voir dire is particularly essential as a mechanism for revealing racial, religious, and like forms of prejudice. As this Court long ago recognized, voir dire is critical in ferreting out those especially insidious forms of prejudice: "[T]he juror best knows the condition of his

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[6] *See also United States* v. *Wood*, 299 U.S. 123, 133-134 (1936) (finding juror qualification statute did not violate Sixth Amendment right to impartial jury because "[a]ll persons otherwise qualified for jury service are subject to examination as to actual bias" and "[a]ll the resources of appropriate judicial inquiry remain available … to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror"); *Dennis* v. *United States*, 339 U.S. 162, 171-172 (1950) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.").

own mind" as to such biases, and thus "no satisfactory conclusion" about the juror's impartiality "can be arrived at, without resort to [the juror] himself." *Aldridge* v. *United States*, 283 U.S. 308, 313 n.3 (1931) (quoting *People* v. *Reyes*, 5 Cal. 347, 349 (1855)).[7] Racial prejudice, for example, is "a fact … of the most vital import to the defendant." *Id.* at 313 n.1. But that prejudice, "if existent, [is] locked up entirely within the breasts of the jurors," and can be determined "only … by interrogating the juror himself." *Id.* (*quoting Pinder* v. *State*, 8 So. 837, 838 (Fla. 1891)). Where voir dire shows that a juror "entertain[s] a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Id.* at 314.

This Court has accordingly held that the Constitution itself imposes "requirements with respect to questioning prospective jurors about racial or ethnic bias." *Rosales-Lopez*, 451 U.S. at 189-190. Specifically, a defendant has a constitutional right to "inquire into possible racial prejudice" when there are "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case." *Id.* at 190.[8]

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[7] *See also Miles* v. *United States*, 103 U.S. 304, 309-311 (1880) ("It is evident from the examination of the jurors on their voire dire, that they believed that polygamy was ordained of God, and that the practice of polygamy was obedience to the will of God.… It needs no argument to show that a jury composed of men entertaining such a belief could not have been free from bias or prejudice on the trial for bigamy, of a person who entertained the same belief, and whose offence consisted in the act of living in polygamy.").

[8] This Court has required additional protections in various circumstances. "[A] capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner* v.

Moreover, this Court has recognized that the importance of such inquiries outweighs any concern—which in part animated the English common-law restrictions on voir dire—about examining jurors in ways that could bring them into disrepute. As the Court explained in *Aldridge*:

> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

283 U.S. at 314-315.

Voir dire's role as the guarantor of an impartial jury is not confined to instances of racial bias or prejudice. In capital cases, for example, defendants are entitled to voir dire to identify "those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt." *Morgan* v. *Illinois*, 504 U.S.

Murray, 476 U.S. 28, 36-37 (1986). This Court also requires, as part of its "supervisory authority over the federal courts," that "questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated." *Rosales-Lopez*, 451 U.S. at 190. For example, "federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." *Id.* at 192.

719, 733 (1992). "Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause" in such circumstances, the defendant's right to an impartial jury "would be rendered … nugatory and meaningless." *Id.* at 733-734.

In sum, voir dire of a sort that would have been barred under the English common-law rule is now essential to the American jury selection process. Under the common-law rule, a litigant would have had to determine whether to challenge jurors for prejudice based entirely on extrinsic evidence, without the benefit of voir dire. And even after such a threshold challenge was made, voir dire could have been barred under the rule prohibiting inquiries that tend to the juror's "dishonor or discredit." In the modern American system, by contrast, voir dire regarding juror bias or prejudice is a matter of constitutional right in appropriate cases, *see Rosales-Lopez*, 451 U.S. at 189-190—a dramatic departure from the English common law.

II. THE MANSFIELD RULE WAS NOT DESIGNED TO SHIELD DISHONESTY DURING VOIR DIRE THAT WOULD UNDERMINE A LITIGANT'S RIGHT TO AN IMPARTIAL JURY

While voir dire in its present form is an American innovation, the common-law predecessor to Rule 606(b)—the Mansfield Rule—was imported from England and originated before the American practice of voir dire had taken its current form. As originally formulated, the Mansfield Rule thus did not contemplate the unique problems posed by juror dishonesty during voir dire, or the constitutional implications of precluding inquiry into such dishonesty. In any event, the Mansfield Rule has never been understood, either as it was first articulated in England or as it was later applied in the United States, as an absolute bar to the admission of

evidence regarding the content of jury deliberations. To the contrary, in the period leading up to the adoption of Rule 606(b), numerous American courts recognized that juror testimony establishing dishonesty in voir dire falls outside the ambit of the Mansfield Rule.

A. The Development Of The Mansfield Rule In England

The common-law restriction on testimony regarding the content of jury deliberations dates from 1785, when the Mansfield Rule was first announced. Before then, "the unquestioned practice had been to receive jurors' testimony … without scruple … [and] proof of [misconduct] was received equally from jurors and others without discrimination." 8A Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2352 n.2 (3d ed. 1961) (collecting a dozen pre-1785 cases in which juror affidavits were accepted); *see also McDonald* v. *Pless*, 238 U.S. 264 (1915) ("Prior to 1785 a juror's testimony was sometimes received, though always with great caution.").

The Mansfield Rule is generally traced to Lord Mansfield's seminal decision in *Vaise* v. *Delaval*, 99 Eng. Rep. 944 (K.B. 1785). In that case, two jurors submitted affidavits stating that the jury had decided the case by "tossing up," *i.e.*, by tossing a coin. Lord Mansfield rejected the testimony, concluding that jurors could not testify to their own misconduct. The Mansfield Rule was soon widely adopted in England, and it is still followed throughout the British Commonwealth. *See* Hunter, *Jury Deliberations and the Secrecy Rule: The Tail That Wags The Dog?*, 35 Sydney L. Rev. 809, 814-816 (2013).

As Lord Mansfield originally formulated it, the rule against considering juror testimony that the jury had decided the case through improper means was not related to protecting the integrity of jury verdicts or the secrecy of the jury. Instead, it was rooted in the principle that such testimony by a juror was unreliable because any witness who testifies to his own turpitude is inherently untrustworthy.[9] Indeed, Lord Mansfield suggested that a jury verdict *could* be challenged based on the content of the jurors' deliberations if the witness testifying that the case was decided by a coin toss was a passerby who saw the coin toss through a window, rather than a juror. *Vaise*, 99 Eng. Rep. at 944 ("The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a high misdemeanor[,] but in every such case the Court must derive their knowledge from some other source[,] such as from some person having seen the transaction through a window or by some such other means." (footnote omitted)); *see also* 27 Wright & Gold, *Federal Practice & Procedure* § 6074 (2d ed. 2007) ("Lord Mansfield's rule applied only to statements offered by the juror directly to the court; testimony from court officers or eavesdroppers as to what jurors said during deliberations was not excluded."). Thus, the Mansfield Rule as originally articulated was in no way designed to privilege the secrecy of jury deliberations over the basic guarantee of an impartial jury, but only to exclude a type of evidence that was then thought to be particularly unreliable.

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[9] Lord Mansfield advocated the position that witnesses cannot testify to their own turpitude in many other unrelated contexts, but in all other contexts it was ultimately "utterly repudiated, in both England and America." Wigmore, *supra*, § 2352.

Moreover, the Mansfield Rule was, of course, announced well before the American institution of voir dire had developed. Neither Lord Mansfield nor the many Commonwealth courts that followed his rule could have envisioned either voir dire in its modern American form or the importance of voir dire to fair trials in the modern American justice system. It is thus unsurprising that amici are aware of no English cases from this period applying (or declining to apply) the Mansfield Rule in evaluating the admissibility of testimony regarding a juror's false statements during voir dire. Nor does it appear that the major treatises of the time ever considered whether the Mansfield Rule would appropriately apply in such a scenario.

B. The Mansfield Rule In America

1. Initial adoption and limitations

In the first half of the nineteenth century, apparently on the strength of the prestige of Lord Mansfield, the rule barring jurors from testifying to their deliberations was widely adopted in America. *See* Wigmore, *supra*, § 2352 (attributing adoption of the Mansfield Rule to the "prestige of the Great Chief Justice" and stating that "its authority came to receive in the United States an adherence almost unquestioned").

Over the course of the second half of the nineteenth century and into the twentieth century, however, while there was significant variation among jurisdictions, American courts increasingly recognized that the Mansfield Rule was not absolute and would yield to fundamental principles of fairness. In *United States* v. *Reid*, 53 U.S. 361 (1851), for example, this Court confronted the Mansfield Rule for the first time. In that case, the defendant sought to introduce jurors' affida-

vits stating that they had seen newspaper articles discussing the case. The *Reid* Court ultimately sidestepped the question of the Mansfield Rule's application on the ground that the articles appeared not to have influenced the jury's verdict. But, while noting that jurors' testimony about their deliberations "ought always to be received with great caution," the Court noted that "cases might arise in which it would be impossible to refuse [to admit such testimony] without violating the plainest principles of justice." *Id.* at 366.

The Iowa Supreme Court recognized such a limitation on the Mansfield Rule in the 1866 case of *Wright* v. *I&M Telegraph*, 20 Iowa 195. The court held that juror testimony regarding aspects of jury deliberations that "essentially inhere" in the verdict—such as jurors' misunderstanding of evidence or use of questionable reasoning in reaching a verdict—could not be admitted as a basis for obtaining a new trial. *Id.* at 209-210. By contrast, testimony regarding aspects of deliberations that did not inhere in the verdict—such as the jury's use of an improper process, *e.g.*, a coin toss, to arrive at a verdict—could be admitted. *Id.* at 210. *Wright* accordingly permitted the admission of juror testimony that the case had been decided by a "quotient" verdict (*i.e.*, by averaging the award of damages preferred by each juror).

The Iowa court rejected the logic of *Vaise*, observing that "if, as is universally conceded, it is the *fact* of improper practice, which avoids the verdict, there is no reason why a court should close its ears to the evidence of it from one class of persons [*i.e.*, the jurors], while it will hear it from another class [*i.e.*, eavesdroppers], which stands in no more enviable light and is certainly no more entitled to credit." *Wright*, 20 Iowa at 212. And the court emphasized the importance of fairness to

the litigants, concluding that "there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced" by the jury misconduct. *Id.*

Other courts followed the Iowa rule or identified other exceptions to or limitations on the Mansfield Rule. By 1881, there were "several cases" that "held that the affidavits of jurors may be received" in some circumstances in support of a motion for a new trial. Rogers, *Impeachment of Verdicts for Misconduct* (1881).[10]

This Court later addressed the Mansfield Rule in a trio of cases, each of which reiterated the basic principle that the Mansfield Rule was not absolute, but could be trumped by considerations of fairness. In *Mattox* v. *United States*, 146 U.S. 140 (1892), the Court considered juror testimony that during deliberations in a murder trial, the jury had read a highly prejudicial newspaper article and had been told by the bailiff that the victim was the third person the defendant had killed. The Court concluded that a new trial was required, emphasizing that "public policy, which forbids the reception of the … statements of jurors to impeach their verdicts, may, in the interest of justice, create an exception to its own rule." *Id.* at 148.

In *Hyde* v. *United States*, 225 U.S. 347 (1912), the Court considered allegations that the jurors had reached a compromise verdict, trading acquittal of two defendants for conviction of two others. The Court cit-

[10] Faculty Scholarship Series, Paper 4049, http://digitalcommons.law.yale.edu/fss_papers/4049 (collecting cases).

ed *Wright* with approval, adopting the "inhere in the verdict" terminology announced in in that case. However, it applied that framework somewhat differently than the Iowa Supreme Court, concluding that the allegations of compromise, even if true, would merely establish facts that essentially inhere in the verdict, and thus could not form a basis for challenge. *Id.* at 383-384.

Finally, in *McDonald* v. *Pless*, 238 U.S. 264 (1915), the Court considered the same question presented in *Wright*—whether juror evidence of a quotient verdict should be admitted—and held that it should not. *Id.* at 267-268. The Court did not, however, disturb its holding in *Hyde* that the Mansfield Rule applies only to juror testimony regarding matters that inhere in the verdict. And the Court reiterated *Reid*'s admonition that the Mansfield Rule should not be applied inflexibly in a manner that infringed on basic principles of justice. *Id.* at 268-269.

2. The intersection between the Mansfield Rule and voir dire

In the first half of the twentieth century, courts began to grapple with the intersection between voir dire and the Mansfield Rule. When confronted with a conflict between the two, courts in many jurisdictions concluded that ensuring honesty in voir dire should trump the Mansfield Rule. As one commentator explained:

> Cases from several jurisdictions have taken the position that affidavits or testimony of jurors, even though disclosing matters occurring in the jury room, may be received in support of a motion or petition for a new trial, where offered, and operating, to show the existence of bias or

> prejudice of a juror, or a fact grounding a challenge of the juror for cause, concealed on his voir dire examination notwithstanding well-directed questions were put to him touching such matters.

Allen, *Admissibility, In Civil Case, Of Juror's Affidavit Or Testimony To Show Bias, Prejudice Or Disqualification Of A Juror Not Disclosed On Voir Dire Examination*, 48 A.L.R.2d 971 § 2 (1956).

Although the law on this question was by no means uniform, a substantial body of caselaw emerged from a wide variety of jurisdictions recognizing that the Mansfield Rule did not apply to cases in which evidence regarding a jury's deliberations was offered to establish that a juror had failed to disclose bias during voir dire. As one court articulated the rule, "Affidavits of jurors may be received as to … the deliberations of the jury which tend to prove the existence of prejudice in the mind of a juror, which would prevent his acting as an impartial juror, where the state of mind is charged to have been entertained and to have been intentionally concealed during his voir dire examination." *In re Mesner's Estate*, 176 P.2d 70, 76 (Cal. Ct. App. 1947); *see also Department of Public Works & Buildings* v. *Christensen*, 184 N.E. 2d. 884, 887 (Ill. 1962) ("Although [the Mansfield] doctrine is generally recognized, it is subject to an exception when it is charged that a juror has answered falsely on voir dire about a matter of potential bias or prejudice."); *State by Lord* v. *Hayden Miller Co.*, 116 N.W.2d 535, 539 (Minn. 1962) ("The privilege which protects the deliberations of the jury from exposure does not extend to statements of jurors who may have on voir dire concealed prejudice or bias which would have disqualified them[.]"); *McNally* v. *Walkowski*, 462 P.2d 1016, 1019 (Nev. 1969) ("[T]he jurors' affidavits

were admissible for the limited purpose of showing concealment of actual bias by several of the jurors on their voir dire examination."); *Allison* v. *Department of Labor & Indus.*, 401 P.2d 982, 984 (Wash. 1965); Russ, Recent Case, *Evidence—Affidavit Concerning Jurors' Unauthorized View Inadmissible As Ground For New Trial*, 15 Buff. L. Rev. 217, 220 & n.29 (1965) (collecting New York cases showing that "[j]urors' affidavits have also been accepted, in support of a motion for new trial, to disclose a juror's concealed prejudice on *voir dire*, on the ground that due to his partiality he was never eligible to become a member of the jury").[11]

To be sure, some cases held that juror affidavits disclosing the jury's deliberations could not be admitted even to show dishonesty during voir dire. *See, e.g.*, *Wilson* v. *Wiggins*, 94 P.2d 870, 871-872 (Ariz. 1939); *Hinkel* v. *Oregon Chair Co.*, 156 P. 438, 439 (Or. 1916); *see also* Allen, *supra*, § 2 (collecting cases). However, even many of the courts that were generally unwilling to accept such evidence recognized that concealed bias during voir dire threatens the fundamental right to a fair trial and requires special treatment. Thus, while Missouri, Arizona, and Kentucky courts refused to accept juror affidavits disclosing the contents of deliberations to show that

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[11] *See also United States ex rel. Owen* v. *McMann*, 435 F.2d 813, 819-821 (2d Cir. 1970) (considering juror testimony that disclosed content of deliberations where testimony established juror bias); *Orenberg* v. *Thecker*, 143 F.2d 375, 376-377 (D.C. Cir. 1944) (apparently assuming that evidence from jurors showing fraudulent juror statements during voir dire could be considered on motion for new trial, but finding no such evidence); *Alabama Fuel & Iron Co.* v. *Powaski*, 166 So. 782, 786-788 (Ala. 1936) (allowing admission of juror affidavits to establish misconduct on voir dire, but only if a prima facie case of misconduct was first established using evidence external to the jury).

other jurors had been dishonest in voir dire, all of them held that a juror's testimony regarding that juror's *own* concealed bias was admissible in support of a motion for a new trial. *See Woodworth* v. *Kansas City Pub. Serv. Co.*, 274 S.W.2d 264, 270-271 (Mo. 1955); *Board of Trustees of Eloy Elem. Sch. Dist.* v. *McEwen*, 430 P.2d 727, 731-734 (Ariz. Ct. App. 1967); *Drury* v. *Franke*, 57 S.W.2d 969, 984 (Ky. Ct. App. 1933).[12]

The position that the Mansfield Rule does not preclude evidence of a juror's dishonesty during voir dire was substantially buttressed by this Court's decision in *Clark* v. *United States*, 289 U.S. 1 (1933). There, the Court held that testimony regarding the content of deliberations is admissible in a subsequent proceeding against a juror for contempt resulting from dishonesty during voir dire, and that the general rule privileging the secrecy of jury deliberations had no application in such a case. The Court explained that "[i]f [a juror's] answers to the [voir dire] questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham." *Id.* at 11. That is, a juror who lied during

[12] These cases specifically recognized the importance of voir dire to ensuring an impartial trial. *See Kansas City Pub. Serv. Co.*, 274 S.W.2d at 270-271 ("It is the duty of a venireman on voir dire examination to fully, fairly and truthfully answer all questions, so that challenges may be intelligently exercised, and the venireman's intentional concealment of a material fact may require the granting of a new trial."); *Drury*, 57 S.W.2d at 984 (noting that a litigant may be "entitled to a new trial because a juror gave a false answer, or no answer, to a pertinent question addressed to him on the voir dire examination" and that "the right [to] challenge [a juror] includes the incidental right that the information elicited on the voir dire examination shall be true").

voir dire should never have been seated on the jury in the first place. Admitting evidence regarding the juror's misstatements thus did not improperly intrude into the jury's deliberations, but preserved the core guarantee of an impartial jury.

Although *Clark* arose in the context of contempt proceedings, its logic was clearly applicable to cases in which a litigant sought a new trial based on a juror's dishonesty during voir dire. Indeed, *Clark* itself noted that the rule that "the testimony of a juror is not admissible for the impeachment of his verdict" is "not without exception," and cited *Hyman* v. *Eames*, 41 F. 676 (D. Colo. 1890)—a case in which juror testimony regarding the content of deliberations was admitted to show that a juror had concealed bias during voir dire—as an example. *Clark*, 289 U.S. at 18. In *Hyman*, the court held that when "considering the competency of [a challenged juror] to sit as a juror … the testimony of his associates may be received." 41 F. at 677-678.

After *Clark*, several courts drew the obvious parallel and concluded that if juror testimony was admissible for purposes of punishing a dishonest juror, it should logically be admissible to remedy the consequences of the juror's dishonesty in a proceeding to determine whether a litigant should receive a new trial. *See* Pet. Br. 29 (collecting cases). The 1961 edition of Wigmore's treatise likewise endorsed the proposition that juror testimony should be admissible to establish dishonesty during voir dire. As Wigmore explained, "the privilege [against introduction of juror testimony] ceases where the inquiry concerns a crime *committed by the juror prior to the jury's retirement*, e.g., perjury in answering questions on the voir dire." Wigmore, *supra*, § 2354 (emphasis in original). Overall, the weight of authority was such that a commentator in 1958 concluded: "If a

juror's remarks during deliberations indicate that he has given false answers or has concealed relevant information on the voir dire, it is *settled* that the verdict may be impeached"—that is, that testimony regarding the jury's deliberations could be admitted in support of a motion for a new trial. Comment, *Impeachment of Jury Verdicts*, 25 U. Chi. L. Rev. 360, 367-368 n.53 (1958) (emphasis added).

III. Rule 606(b) Should Not Be Interpreted To Exclude Juror Testimony Regarding Dishonesty During Voir Dire

The history of, and policies underlying, the Mansfield Rule and the American practice of voir dire strongly support the conclusion that Rule 606(b) does not bar admission of juror testimony regarding the content of deliberations to show dishonesty during voir dire. As discussed above, the English common-law regime that created the Mansfield Rule did not accord voir dire the same central place as a guarantor of core constitutional rights that it occupies in this country; American courts have always recognized that fundamental principles of fairness trump the Mansfield Rule; and the rule was widely understood not to bar juror testimony showing dishonesty during voir dire. There is no indication whatever that the drafters of Rule 606(b) intended to depart from these principles, and Rule 606(b) should be construed to harmonize with, rather than to repudiate, long-settled common law.

Moreover, construing Rule 606(b) to bar admission of testimony relating to juror dishonesty during voir dire would trench upon the basic right to an impartial jury. Such a construction would thus raise grave constitutional concerns. It would also be at war with the premises on which Rule 606(b) is predicated. For these

reasons, too, the court of appeals' reading of Rule 606(b) should be rejected.

A. The History Of The Mansfield Rule Is Inconsistent With The Construction Of Rule 606(b) Adopted By The Court Of Appeals

As this Court recognized in *Tanner* v. *United States*, 483 U.S. 107 (1987), "Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." *Id.* at 121. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Therefore, unless the drafters clearly indicated a contrary intent, Rule 606(b) should be read to codify the Mansfield Rule as it was applied and understood at the time the Federal Rules of Evidence were adopted—that is, as not barring introduction of a juror's testimony regarding statements made during deliberations that show juror dishonesty during voir dire.

As petitioner ably demonstrates, neither the text nor the legislative history of Rule 606(b) reveals any such contrary intent. By its terms, the rule addresses only an "inquiry into the *validity of a verdict*," not an inquiry into the composition of the jury. Fed. R. Evid. 606(b) (emphasis added). As this Court recognized in *Clark*, a juror who lies during voir dire "is a juror in name only." 289 U.S. at 11. Accordingly, a challenge to the seating of that juror is not an inquiry into the validity of the jury's verdict. Indeed, Rule 606(b)'s legislative and drafting history reflect no consideration of juror dishonesty during voir dire. Nor is there any indication

that Congress intended to reject the substantial body of caselaw holding that juror testimony establishing that a juror was dishonest during voir dire does not fall within the scope of the Mansfield Rule. *See* Pet. Br. 30-35. Rule 606(b) should accordingly be interpreted to permit admission of evidence of juror dishonesty during voir dire.

B. Rule 606(b) Should Not Be Construed In A Way That Would Threaten The Constitutional Right To An Impartial Jury

Moreover, interpreting Rule 606(b) to preclude juror testimony regarding dishonesty during voir dire would conflict with the fundamental constitutional right to an impartial jury. Rule 606(b) need not, and should not, be so interpreted. Under the constitutional avoidance canon, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998). The canon "rest[s] on the reasonable presumption that Congress did not intend" an interpretation "which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005).

As discussed in Part I.B.3, *supra*, voir dire is a key safeguard of the right to an impartial jury—explicitly guaranteed in the Sixth Amendment and inherent in the Seventh Amendment and Due Process Clause—because it enables the litigants and the court to screen out biased jurors (including racially or religiously prejudiced jurors). When jurors intentionally conceal partiality or prejudice, the right to a fair trial that has always been understood as providing a limit on the Mansfield Rule is threatened. *See McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984)

("The necessity of truthful answers by prospective jurors if [voir dire] is to serve its purpose is obvious.").

Numerous commentators have recognized the potential constitutional concerns that would arise if defendants were denied a remedy for verdicts that are the product of biased jurors who would not have been empaneled had they responded honestly during voir dire. *See, e.g.*, Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 Baylor L. Rev. 872, 880-881 (2009); *Federal Practice & Procedure* § 6074 (noting that "there is a serious problem in using Rule 606(b) to exclude all testimony of jury bias. Democratic institutions like the jury can produce oppression when the majority uses its values to demean the rights of minorities."); Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 524 (1988) ("A disturbing context involving the issue of jury misconduct … occurs when a juror manifests racial bias during deliberations.").

In many cases, statements made during jury deliberations will be the only evidence of dishonesty during voir dire. As a result, prohibiting testimony about the content of deliberations will often leave litigants with no remedy for a trial by a jury that did not satisfy constitutional standards for impartiality. *See Perkins* v. *LeCureux*, 58 F.3d 214 (6th Cir. 1995) (Jones, J., concurring) ("The rule of juror incompetency cannot be applied in such a manner as to deny due process."); *cf. Clark*, 289 U.S. at 12-14 (juror privilege against testifying about deliberations does not apply where the juror was seated on false pretenses because maintaining the

privilege in those circumstances "is paying too high a price for the assurance to a juror of serenity of mind").

Of course, not every question asked during voir dire would uncover prejudice of the kind that amounts to a denial of the constitutional right to an impartial jury. But as this Court has observed, the constitutional avoidance canon is a tool for "choosing between competing plausible interpretations of a statutory text," not a "method of adjudicating constitutional questions by other means." *Clark*, 543 U.S. at 381. Thus, "[i]t is not at all unusual to" impose "a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Id.* at 380. As this Court has recognized, there is a significant set of cases in which barring a litigant from demonstrating that a juror lied during voir dire would amount to denial of the core right to a fair trial by an impartial jury. *See supra* Part I.B.3. Rule 606(b) should not be construed to permit that result.

C. Precluding Evidence Of Dishonesty In Voir Dire Would Undermine Rule 606(b)'s Premise

Finally, construing Rule 606(b) to preclude juror testimony about dishonesty in voir dire would undermine a basic premise of that rule.

It is only the existence of a robust voir dire process—the key safeguard of an impartial jury—that justifies deferring to the jury's verdict and generally barring inquiry into the jury's deliberative process. As this Court made clear in *Tanner*, "the protection of jury deliberations from intrusive inquiry" rests on the assumption that "[t]he suitability of an individual for the responsibility of jury service … is examined during *voir*

dire." 483 U.S. at 127; *see also, e.g.*, *United States* v. *Duzac*, 622 F.2d 911, 913 (5th Cir. 1980) (upholding the rule against admitting testimony that jurors' "personal prejudices were not put aside during deliberations" on the ground that "[t]he proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to attorneys.").

Voir dire's "protection of [the] right to a competent jury," *Tanner*, 483 U.S. at 127, is a predicate on which Rule 606(b) is premised and the rule can only be properly understood in that light. Rule 606(b) should not be construed in a manner that weakens the efficacy of the voir dire safeguard by denying litigants a remedy for dishonesty during voir dire, and thereby undercuts the rule's foundation.

CONCLUSION

The Eighth Circuit's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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