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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, Brief of Law Professors as Amici Curiae in Support of Respondent, Gregory P. Warger, v. Randy D. Shauers

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Docket No. 13-517 in the Supreme Court of the United States

No. 13-517

IN THE

Supreme Court of the United States

GREGORY P. WARGER,

Petitioner,

v.

RANDY D. SHAUERS,

Respondent.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici are a group of distinguished law professors who have worked on evidence and criminal law issues for many years. *Amici* were involved in the drafting process for Fed. R. Evid. 606(b) and have likewise researched and written on issues of juror bias, jury service, and voir dire. They have an academic interest in the issues presented and the correct resolution of this case.

The brief is joined by the following professors:

Susan Crump, Professor of Law, South Texas College of Law.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioner's blanket letter of consent to the filing of amicus briefs has been filed with the Clerk's office. Respondent's consent to the filing of this brief is being filed with the Clerk's office together with the brief.

SUMMARY OF ARGUMENT

Petitioner asks this Court to interpret Fed. R. Evid. 606(b) as permitting statements made by jurors during deliberations to be admitted to support a motion for a new trial. The practical consequences of petitioner's rule would be significant and problematic, not only fundamentally altering the purpose and practice of voir dire, but also providing a new, fact-driven, basis for post-trial motions. These expanded proceedings would place substantial additional burdens of courts, lawyers and jurors alike. In light of existing mechanisms to ensure juror honesty and impartiality, petitioner's rule would disrupt a well-functioning system for little to no benefit.

1. Petitioner incorrectly argues that his rule would further the purposes of voir dire. Quite to the contrary, his rule would transform voir dire from an opportunity to discover juror bias into a strategic mechanism for setting up post-trial challenges based on juror dishonesty. Lawyers would be incentivized to ask broad and vague questions at voir dire – much like the questions at issue in this case – which maximize the likelihood that personal experiences or opinions shared during deliberations could later be characterized as inconsistent with the juror's response at voir dire. This would be the case notwithstanding that these sorts of questions are the *least* effective at uncovering juror bias. Furthermore, the possibility that voir dire questions would later form the basis for admitting statements made during deliberation would undoubtedly make voir dire a more contentious stage of the trial. This would both increase the number of

motions and appeals related to voir dire, and also make the already lengthy process of empanelling a jury even more time-consuming.

2. Petitioner's rule would also have the effect of introducing post-verdict, fact-bound allegations of juror dishonesty during voir dire into virtually every jury trial. Lawyers are under ethical obligations to diligently represent their clients, and once a jury trial has been lost, the opportunity to seek a new trial based on an allegedly dishonest statement will obligate lawyers to seek any and all information available to them about what was said during deliberations. Indeed, a failure to adequately pursue these claims could leave lawyers subject to disciplinary proceedings or charges of malpractice. Petitioner's capacious definition of "dishonesty" would only compound this problem, in that a juror's inevitable reliance on his own life experience during deliberations (which historically has been perceived as a *benefit* of the jury system) could be used as proof that the juror is irrevocably biased. Moreover, the potential for myriad interpretations (or misinterpretations) of what is said during deliberations would provide a fertile ground for new trial motions, greatly reducing the finality that a jury verdict is meant to provide.

3. Finally, Petitioner's rule would further erode public participation in the jury system while providing little additional assurance of jury impartiality. Evasion of jury service, whether through reliance on statutory excuses or failure to respond to summonses, is already a widespread problem. This problem produces sparse jury venires, thereby undermining efforts to ensure an

aspect of jury impartiality that Petitioner entirely ignores: the impartiality secured by juror selection from a broad, representative cross-section of the community. By extending jurors' involvement in a case beyond the delivery of a verdict, and by motivating attorneys to pry into jurors' personal understandings and experiences as discussed during deliberations, Petitioner's rule would enlarge existing deterrents to participation in the jury system, and for little to no benefit. Adequate deterrents and remedies to juror dishonesty during voir dire already exist, as such dishonesty may still provide grounds for a new trial (only supported by evidence not concerning deliberations), and may subject jurors to criminal sanctions. Accordingly, there is no cause for the adoption of Petitioner's burdensome rule.

ARGUMENT

I. Petitioner's Rule Would Transform Voir Dire From An Opportunity To Discover Juror Bias Into A Strategic Mechanism For Setting Up Post-Trial Motions Based On Juror Dishonesty.

Petitioner asks this Court to adopt a rule that would allow parties to pursue a post-trial motion for a new trial based on statements made during deliberations. The thrust of Petitioner's argument is that such a rule is necessary to carry out the purpose of voir dire, which "safeguards the constitutional right to trial by impartial jury." Pet'r Br. at 38. Far from being an essential component of that safeguard, however, Petitioner's rule would greatly undermine the legitimacy and the

efficacy of the voir dire process. It would also make voir dear a more contentious and laborious process.

A. Petitioner's Rule Would Incentivize Lawyers To Ask Broad Questions To Set Up Future Claims Of Juror Dishonesty, Even Though Such Questions Are The Least Effective At Uncovering Juror Bias.

This Court has consistently recognized that voir dire is intended to serve two purposes. First, it provides counsel and the court with a means of discovering actual or implied bias, such that jurors can be removed for cause. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994); *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). A juror is biased and thus removable for cause if his "views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 433 (1985)) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Second, voir dire provides counsel with the information necessary to exercise peremptory challenges. *J.E.B.*, 511 U.S. at 143; *Mu'Min*, 500 U.S. at 431. While Petitioner argues that permitting post-trial juror dishonesty claims based on statements made during deliberation would further the discovery of bias, in actual fact, it would shift the sorts of questions asked in voir dire towards those that are *least* effective in uncovering juror bias.

Under Petitioner's rule, lawyers will recognize that asking broad and vague questions at voir dire presents a significant opportunity to game the trial process. As the Tenth Circuit observed in rejecting the rule Petitioner advances, "[a] broad question during voir

dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict." *United States v. Benally*, 546 F.3d 1230, 1236 (10th Cir. 2008). Lawyers would thus have the incentive to preload voir dire with broad questions, which maximize the likelihood that personal experience or opinion shared during deliberations could be characterized as inconsistent with the juror's response at voir dire. The broad questions Petitioner relies on in this case – "Is there anyone who feels they would not be a proper juror to hear this case?", "Is there any reason why you cannot remain fair and impartial?" and "Is there anyone who would not be able to render a verdict based solely on the law?" – provide excellent examples of the utility that broad questions would have. One could characterize virtually any statement of personal experience or opinion as being inconsistent with a lack of response to these questions. Any juror who, during deliberation, begins a sentence with "I knew a person who . . .", "From my personal experience . . .", or "I refuse to believe . . ." would provide fodder for a lawyer's post-trial motion that the juror misrepresented his impartiality.

Broad questions of this nature do little to further the purpose of voir dire. It is well established that such questions are the *least* effective at uncovering juror bias because they rarely elicit a meaningful response. *See United States v. Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972) (holding that a "broad" and "general" voir dire question about exposure to pretrial publicity was "not adequate to bring out responses" from jurors and

"should not be relied on"); *United States v. Lewin*, 467 F.2d 1132, 1138 (7th Cir. 1972) ("[A] general question is inadequate to call to the attention of the veniremen those important matters that might lead them to recognize or to display their disqualifying attributes."); *Kuzniak v. Taylor Supply Co.*, 471 F.2d 702, 703 (6th Cir. 1972) (holding that "general questioning of the jurors as to whether they knew of any reason why they could not give the plaintiffs a fair trial" did not present sufficient opportunity for plaintiffs to uncover juror bias); *see also* Karen R. Roberts, *Voir Dire: How to Ask Questions that Matter and Get Answers that Count*, Winter 2006 ATLA-CLE-199 (suggesting that broad questions are less likely than case-specific questions to uncover juror bias). Under Petitioner's rule, however, a juror's lack of appreciation for the question at the time of voir dire actually plays into the lawyer's hands. The lawyer seeks not to elicit a meaningful response at voir dire, but to have the prospective juror provide an incomplete response, which can later be used to challenge the juror's honesty.

That lawyers will be in a position to get the better of jurors at voir dire and subsequently engineer disputes as to their honesty should go without saying. As this Court has cautioned:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and

> experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently.

Patton v. Yount, 467 U.S. 1025, 1039 (1984). Furthermore, as Professor Babcock observed in her leading article on the significance of voir dire, lawyers are already well versed in taking advantage of jurors' inclinations at voir dire:

> Experienced litigators know, and empirical studies have substantiated, that it is part of the psychology of the venire for some people to decide that they want to be on the jury. To that end, such people will evade or misconstrue, unconsciously or deliberately, general voir dire questions in order to avoid answering and possibly being struck.

Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 547 (1975) (footnote omitted); *see also* Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. C. L. R. 503, 510-11 (1965) (describing several examples in which jurors do not respond to voir dire questions because, for instance, they are "too nervous"). Lawyers will no doubt be able to shape broad questions that elicit an incomplete response at voir dire, but lay the groundwork for a post-trial challenge based on dishonesty.

This risk is particularly acute in federal courts, where parties submit voir dire questions to a judge, who then conducts most of the inquiry. *See* Nancy Gertner & Judith H. Mizner, *The Law of Juries* § 3:21, at 101 (7th ed. 2013); Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, Nat'l Center for St. Cts., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, 27-28 (Apr. 2007). Empirical research demonstrates that jurors are even more likely to give incomplete answers when questioned by a judge than by a lawyer, due, at least in part, to intimidation as a result of the judge's position as an authority figure. *See* Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 Law & Hum. Behav. 131 (1987); Gertner & Mizner, *supra*, at 102 ("[L]awyer voir dire promotes more candid exchanges than does judge voir dire."). Judges themselves are in a poor position to distinguish between those questions that are a legitimate attempt to uncover bias and those that a lawyer has designed to set up a post-trial challenge both because judges typically "know little about a case" at the time of voir dire and because judges, as a general matter, are not experts in distinguishing between questions that will lead to "distorted" answers and those that will not. Gertner & Mizner, *supra*, §§ 3:19, 3:21, at 97, 102.

B. Petitioner's Rule Would Make Voir Dire A More Contentious And Lengthy Process.

Because lawyers for both parties will recognize the opportunity to set up post-trial challenges, Petitioner's rule would also make voir dire itself a more contentious exercise. Faced with the risk of having responses at

voir dire used as the premise for undoing an entire trial, parties will no doubt strenuously contest the questions advanced by their opponents. Again, trial judges will generally be ill-equipped to resolve such disputes given the "limited information" that they have at the time of voir dire. Gertner & Mizner, *supra*, § 3:21, at 102. The trial judge's decision to reject certain questions, however, will no doubt become the subject of post-trial motions and appeals, on the basis that the rejected question would have provided a basis for challenging the juror for dishonesty given statements made during deliberation. None of these disputes, of course, would have anything to do with actually uncovering juror bias. Indeed, they would only distract from that pursuit.

And that distraction would come with a cost. The efforts of lawyers to elicit as many responses (or nonresponses) as possible that could later be used to challenge a juror's honesty, combined with the disputes that arise therefrom, would lengthen a voir dire process that, in most courts, is already long enough. This Court has previously recognized the importance of limiting voir dire to a reasonable length of time, cautioning that an excessively long voir dire "in and of itself undermines public confidence in the courts and the legal profession." *Press-Enter. Co. v. Super Ct. of Cal.*, 464 U.S. 501, 510 n.9 (1984). Even without the added disturbance that would follow from Petitioner's rule, voir dire in both civil and criminal cases can last weeks or months. *See* Margaret B. Kovera, Jason J. Dickinson & Brian L. Cutler, *Voir Dire and Jury Selection*, *in Handbook of Psychology*, Forensic Psychology 161

(2003); *see also* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 157 n.13 (1989) (referring to a study finding that in twenty percent of New York cases, voir dire took longer than the trial itself); *Press-Enterprise*, 464 U.S. at 510 n.9 (acknowledging counsel's statement that "it is not unknown in California courts for jury selection to extend six months"). The Court should not accept Petitioner's rule, which, in addition to being counterproductive to the goals of voir dire, would make the lengthy process of empanelling a jury even longer.

II. Petitioner's Rule Would Result In Post-Verdict Juror Dishonesty Challenges In Virtually Every Case, Leading To Interminable Inquiries Into Juror's Mental States And Disrupting The Finality Of Jury Verdicts.

Petitioner, evidently aware of the dramatic consequences that his rule could have on the thousands of jury trials that take place each year in federal courts,[2] claims his rule would neither lead to jurors being "harassed and beset by the defeated party" post trial, Pet'r Br. 42 (quoting *McDonald v. Pless*, 238 U.S. 264, 267 (1915)), nor detract from the finality of jury

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[2] During the year ending on September 30, 2013, there were 4,517 jury trials in the United States District Courts. United States Courts, *Judicial Business 2013*, at Table T-1, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/T01Sep13.pdf.

verdicts, *see* Pet'r Br. 44. Despite Petitioner's claims to the contrary, the two practical problems he highlights are necessary consequences of the rule he propounds. Lawyers' duties to their clients would require that they vigorously pursue the possibility of post-trial juror dishonesty claims in every case, and in so doing lawyers would engage in the wide-ranging investigation into jury room proceedings that Rule 606(b) is designed to prevent. Moreover, the availability of this new, fact-driven, attack on a verdict would open up an entirely new avenue for post-trial proceedings, diluting the finality that jury verdicts are intended to provide.

A. Lawyers Are Under An Ethical Obligation To Represent Their Clients Vigorously And Would Thus Be Required To Pursue Juror Dishonesty Claims After Any Unfavorable Verdict.

Under ABA Model Rules of Prof'l Conduct R 1.3, a lawyer is required to act with "reasonable diligence and promptness in representing a client." As explained in greater detail in the comments to the model rule, reasonable diligence requires a lawyer to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." ABA Model Rules of Prof'l Conduct R. 1.3 cmt. 1; *see also* Pa. Prof'l Conduct R. 1.3 cmt. 1 ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."); Tex. Disciplinary Rules Prof'l

Conduct R. 1.01 cmt. 6 ("[A] lawyer should act . . . with zeal in advocacy on the client's behalf.").

This Court has likewise long recognized that fundamental to the role of an attorney is "'fearless, vigorous and effective' advocacy, no matter how unpopular the cause in which it is employed." *Offutt v. United States*, 348 U.S. 11, 13 (1954) (quoting *Sacher v. United States*, 343 U.S. 1, 13-14 (1952)).

Naturally, the vigorous representation of a client has its limits, and lawyers are not permitted to pursue knowingly frivolous or vexatious motions or appeals. *See, e.g.*, Fed R. Civ. P. 11(b); *Polk Cnty v. Dodson*, 454 U.S. 312, 323 (1981) ("[T]he canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer – whether privately retained or publicly appointed – not to clog the courts with frivolous motions or appeals."). Nevertheless, so long as a viable avenue for overturning an unfavorable verdict exists, lawyers are bound to vigorously pursue that avenue to the best of their abilities.

Indeed, a failure to vigorously advocate on the part of a client does not merely violate a lawyer's ethical obligations, but leaves him open to a variety of adverse consequences as well. For example, a failure to raise potentially viable post-trial motions can result in an adverse proceedings before bar disciplinary committees and sanctions ranging from censure to disbarment. *See In re Parker*, No. 14-032-096998, Subcommittee Determination (Va. St. Bar 3d Dist. Subcomm. Mar. 27, 2014), *available at* http://www.vsb.org/docs/Parker-051614.pdf (publicly admonishing attorney for, inter alia, failing to file post-trial motion to modify client's

sentence, which he had been retained to author and submit); *In re Yunker*, 25 DB Rptr. 50, 52 (Or. Discipl. Bd. 2011), *available at* http://www.osbar.org/_docs/dbreport/dbr25.pdf (publicly reprimanding an attorney for, inter alia, failing to file a motion to set aside the administrative dismissal of a case in which he was attempting to collect an arbitration award). Likewise, the failure to raise a meritorious post-trial motion has been deemed to be professional malpractice in some instances, leaving a lawyer open not only to the opprobrium of a malpractice finding, but also to the financial consequences of a damages judgment. *See Davis v. Brown*, 23 F. App'x 504, 506 (6th Cir. 2001) (upholding $10,000 punitive damages award against attorney who committed legal malpractice by failing to file a motion requested by his client); *see also Logan v. Winstead*, 23 S.W.3d 297, 299 n.4 (Tenn. 2000) (noting that failure to file proper motions, such as a motion to suppress evidence or a motion to confront a confidential informant, constitutes legal malpractice).

In light of these requirements of diligent advocacy, were FRE 606(b) read to allow the use of statements made in the jury room as the basis for a new trial motion, every time a lawyer lost a jury trial he would be required to go to any permissible lengths to discover what was said by jurors during deliberations. Petitioner argues that "mere admission of evidence that tends to show juror dishonesty during voir dire would not automatically entitle a party to a new trial under *McDonough*." Pet'r Br. 44. But whether or not Petitioner's rule would actually undermine numerous jury verdicts – and in light of his capacious definition of

"dishonesty" there is reason to believe it would, *see infra* 17-22 – Petitioner's argument is a tacit acknowledgement that the consequences of a ruling in his favor would be to make a post-trial inquiry into juror dishonesty, and likely an ensuing motion, a feature of *every* jury trial. The consequences of this new raft of motions for the conservation of scarce judicial resources would necessarily be severe. *See* Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 533 (1988) ("An adverse jury verdict is a painful event, combining personal rejection and professional failure with injury to the client who relied on the lawyer. The losing trial lawyer, therefore, may have an unusually strong inclination to search vigorously for misconduct, attribute the loss to it, and construct arguments maximizing the effect of marginal violations, even as she searches her own mind for the cause of the verdict. For these reasons, open reception of evidence of jury misconduct would consume judicial resources inefficiently.").

Moreover, it is a red herring for Petitioner to point to the well-established ethical rules that "generally prohibit counsel from engaging in any form of juror harassment." Pet'r Br. 43 (citing, *e.g.*, Model Rules of Prof'l Conduct R. 3.5(c)). For one, the definition of what constitutes juror "harassment" is hardly uniform, and especially if lawyers become ethically bound to pursue potential juror dishonesty post-trial motions, what once might have been considered harassing could be deemed within the bounds of diligent

representation. *See, e.g., Comm'n for Lawyer Discipline v. Benson*, 980 S.W.2d 425, 439 (Tex. 1998) (noting that courts have disagreed on "whether the term 'harass' standing alone is clear enough to survive a vagueness review," and citing cases). Moreover, while it is true that lawyers are generally prohibited from contacting jurors who have made known a desire not to be contacted, *see* ABA Model Rules Prof'l Conduct R. 3.5(c), Petitioner entirely ignores the fact that a juror accused of dishonesty by a fellow juror – analogous to what happened in this very case – could nevertheless be forced into post-trial proceedings and potentially required to testify in court about statements she made during deliberations. So long as a single member of the jury has doubts about something that was said and reaches out to the losing counsel, the carefully calibrated rules that ensure jurors' involvement with a case ends once the verdict is read could be rendered largely meaningless. Finally, the mere presence of a rule prohibiting lawyers from harassing jurors of course does not prevent such harassment from already occurring, even without the added incentive of the potential reversal of an adverse verdict. *See, e.g., United States v. Brasco*, 516 F.2d 816, 819 n.4 (2d Cir. 1975) (describing as "reprehensible" the "complicity by counsel in a planned, systematic, broad-scale post-trial inquisition of the jurors by a private investigator"); *United States v. Miller*, 284 F. Supp. 220, 228 (D. Conn. 1968) (issuing an injunction preventing defense counsel from having further contact with jurors post-trial and noting that "[l]eaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task

of obtaining competent citizens willing to serve as jurors well nigh impossible").

B. Petitioner's Capacious Definition Of Juror Dishonesty Would Lead To Broad-Ranging Inquiries Into Jury Room Deliberations.

The potential adverse consequences of Petitioner's rule are only heightened in light of the capacious definition of juror "dishonesty" he advocates for in this case. Pinpointing the actual "dishonest" statement alleged in Petitioner's brief is something of a challenge. It appears, however, that Petitioner is relying on the foreperson's silence in response to the judge's questions about whether any prospective juror "would not be a proper juror to sit in a case of this kind," and would not be "able to render a verdict based solely and only on the law." Pet'r Br. 6 (quotation marks omitted). The argument appears to be that this was dishonest because the foreperson was strongly influenced by prior experiences of her daughter. *Id.* Although the question presented in this case assumes the foreperson's silence was dishonest, it is hardly clear that she was irrevocably conflicted and misrepresented that fact during voir dire.

In this respect, *Clark v. United States*, 289 U.S. 1 (1933), is instructive. In *Clark*, this Court upheld a finding of criminal contempt upon finding that a juror had failed to disclose that she had worked for a company owned by the defendant and that even after her employment had concluded her husband maintained close relations with the defendant. *Id.* at 7. Those personal contacts led the juror to "place[] her hands over her ears when other jurors tried to reason with

her," and she discussed extraneous evidence with the jury in an attempt to discredit the government and create sympathy for the defendant. *Id.* at 8-9. *Clark* is worlds apart from the conduct at issue in this case, and courts have found no prejudice to a party even when a juror has connections more significant than anything even alleged against the foreperson here. *See, e.g.*, *People v. Myers*, No. 291896, 2010 WL 3063687, at *4-5 (Mich. Ct. App. Aug. 5, 2010) (offender not prejudiced by having juror who recognized during trial that the complaining witness was the vice-president of the union to which the juror belonged); *Polk v. State*, No. M2002-02430-CCA-R3PC, 2003 WL 22243392, at *5 (Tenn. Crim. App. Sept. 30, 2003) (holding, on post-conviction review, that no evidence existed to show that offender was prejudiced by having juror who worked with the prosecutor's wife).

Indeed, Petitioner's rule could be particularly pernicious because it transforms a juror's life experiences and understanding of the community – long understood to be the benefit of adjudication by a jury of the parties' peers – into a unrebuttable presumption of bias and prejudice in favor of one side. *See* Laura I. Appleman, *The Community Right to Counsel*, 17 Berkeley J. Crim. L. 1, 34 (2012) ("Both in England and in the colonies, the community was represented by the jury, that bulwark of societal conscience, perfectly suited, in Hale's opinion, 'for the preservation of liberty, life, and property.'" (quoting Matthew Hale, *The History of the Common Law of England, and an Analysis of the Civil Part of the Law* 346 (6th ed., 1820)). Ridding a juror of her prior experiences is as

impossible as it is undesirable. *See Standard Oil Co. v. Van Etten*, 107 U.S. 325, 334 (1882) ("The very spirit of trial by jury is that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of opposing theories of the parties.").

Rule 606(b) was designed to prevent precisely this type of post-hoc dissection of juror motivations and internal mental processes. Not only does the text of the rule prevent any post-trial testimony (for the purposes of attacking a verdict) on "any juror's mental processes concerning the verdict," but the legislative history recognizes that a rule to the contrary would leave jurors' motivations constantly subject to question in an attempt to undermine validly-reached verdicts. *See, e.g., Rules of Evidence: Hearings Before the S. Comm. on the Judiciary*, 93d Cong. 225 (1974) (statement of Paul F. Rothstein, Professor of Law, Georgetown Univ. Law Ctr.) (noting that House version of FRE 606(b), which would have permitted testimony concerning jury deliberations "is antithetical to the smooth functioning of the jury system and conflicts with the traditional policy justifications for juror incompetency – the encouragement of full and frank jury deliberations and the avoidance of juror harassment, annoyance, and reprisals"); S. Rep. No. 93-1277, at 14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7061 ("Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just

verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors."); H.R. Rep. No. 93-1597, at 8 (1974) (Conf. Rep.) (adopting Senate amendments and rejecting the House version of the FRE, which would have allowed "a juror to testify about objective matters occurring during the jury's deliberation").

Even laying aside the theoretical problems with Petitioner's rule, his wide-ranging conception of what constitutes juror dishonesty would also lead to intractable administrative problems. To be clear, and contrary to virtually the entirety of the brief filed by amicus curiae National Association of Criminal Defense Lawyers, this case does not concern juror biases related to characteristics such as race, gender, or religion. While it may well be appropriate for this Court to recognize, in a different case, that the presence of such biases violates a party's constitutional rights, this case involves the entirely distinct question whether a prior life experience such as a family member's involvement with a car accident renders a juror unfit to serve.[3] If the foreperson's prior

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[3] The First Circuit has recognized that FRE 606(b) cannot be constitutionally applied when issues of racial or ethnic bias cast into doubt the impartiality of a jury. *See United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) ("While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and

experiences rendered her silence during voir dire dishonest, it is hard to see what types of experiences would *not* necessitate disqualification. For example, would a juror in a contract case be lying if he claimed impartiality during voir dire yet at some point in the past had been accused by a business partner of breach of contract? Or, does a previous negative experience with a police officer render a juror permanently unfit to serve on a jury in a criminal trial? Indeed, even juror forgetfulness could lead to a juror honesty challenge. For example, what if a juror forgot about a bad experience with a car dealership during voir dire, but later recalled such an experience and recounted it during deliberations? Or, what if a juror stated that she has never lived in a "gang neighborhood" during voir dire, yet later makes a statement during deliberations that other jurors interpret as evidence that the juror had in fact lived in such a neighborhood? The possible bases for juror dishonesty challenges are endless.

Given that every adult has already amassed a wealth of life experiences both positive and negative,

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grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury."); *see also* 27 Charles Alan Wright & Victor James Gold, Federal *Practice and Procedure* § 6074, at 513 (2d ed. 2007) ("[A]mong the most serious cases of jury bias are those involving racial prejudice... This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict.... This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.").

Petitioner's rule not only would vastly expand the scope of voir dire questioning, *see supra* 4-11, but also would encourage losing counsel to develop creative theories impugning the neutrality of jurors. At that point, jurors already discharged from service might well be required to return to court and testify as to their motivations and reasons for rendering the verdict they did. Judges, in turn, would be faced with the nearly impossible task of reviewing a juror's life history and justifications for the verdict to determine whether the juror was actually dishonest during voir dire. This would in effect require a post-verdict mini-trial, requiring adjudication of all the attendant questions of admissibility and burden of proof.

These concerns are not merely theoretical. Indeed, a survey of juror dishonesty claims brought in courts in the Ninth Circuit – which has adopted the rule Petitioner proposes – demonstrates the extent to which the alleged bases for dishonesty stray far afield from traditional notions of failing to disclose conflicts of interest.[4] Emboldened by the Ninth Circuit's standard,

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[4] When given a sign that a court is receptive to juror-dishonesty claims, defense attorneys have made some truly frivolous arguments. In one recent Pennsylvania case, a juror who worked 37.5 hours a week at an accounting firm stated that her "usual" job was as an accountant. The defendant later claimed that this answer had been dishonest in light of the fact that the same juror had a second, part-time job as a realtor, where she assisted in a home sale once every few months. The judge rejected this argument, concluding that the juror's self-identification as an accountant "simply cannot be considered a dishonest answer."

many defendants have argued that jurors acted "dishonestly" merely by failing to affirmatively volunteer probative information to defense counsel. *See, e.g.*, *Sanders v. Lamarque*, 357 F.3d 943, 949 (9th Cir. 2004) (no juror dishonesty when juror failed to disclose that she had lived in a gang neighborhood 25 years ago when asked whether she *currently* lived in a gang neighborhood); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1460 (9th Cir. 1989) (no jury dishonesty when juror failed to disclose past employment when asked about *current* employment).

C. Petitioner's Rule Would Diminish The Finality Of Jury Verdicts.

A jury's verdict, this Court has observed "represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager v. United States*, 557 U.S. 110, 122 (2009). The finality of verdicts is so central to the judicial process that this Court has noted "[e]ven if the verdict is 'based upon an egregiously erroneous foundation,' its finality is unassailable." *Id.* at 122-23 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam)). This is not to say of course that meritorious post-trial motions and appeals should not be pursued. But in recognition of the reality that litigants are entitled "to a fair trial but not a perfect one, for there are no perfect trials," *Brown v. United States*, 411 U.S. 223, 231-32 (1973) (internal quotation marks omitted),

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United States v. Holck, 398 F. Supp. 2d 338, 361 (E.D. Pa. 2005), *aff'd sub nom. United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007).

courts entertaining post-trial motions do not sit as "citadels of technicality" rooting out any possible error, regardless of how minor, as a basis upon which to reverse a jury verdict, *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (quotation marks omitted). *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 319 (1977) (Stevens, J., dissenting) (noting that while it is "always possible to imagine more evidence which could have been offered ... at some point litigation must come to an end."). Respect for the finality of jury verdicts not only is a question of judicial principles, but also reflects a recognition of the cost – both financial and emotional – to parties when proceedings run on *ad infinitum*. *See Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 489 (5th Cir. 1987) ("Of course, in the jury trial process there is always some danger that jurors will misunderstand the law or consider improper factors in reaching their verdict, but, by implementing Rule 606(b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation, to protect jurors from harassment after a verdict is rendered, and to prevent the possible exploitation of disgruntled ex-jurors.").

Permitting post-trial investigation of juror's mental processes to form the basis for a new trial motion would open up an entirely new factual avenue for lawyers to pursue, and would necessitate substantial investigation, discovery, and potentially even in-court testimony. In this respect, a juror dishonesty post-trial challenge is different in kind from the majority of post-trial motions and appeals, which are limited to the record created at trial and focus on events that were raised and litigated

during trial. By definition, a juror dishonesty challenge requires the discovery and introduction of new evidence – the juror's statements and motivations during deliberation – which will lead to costly investigations and repeated attempts to seek new information from both the challenged juror and other members of the jury. This process will be time-consuming and expensive and, given Petitioner's capacious definition of dishonesty, all of these efforts would be expended merely to reveal that a juror was informed by her prior life experiences in rendering a verdict, something that should be encouraged not prohibited.

Petitioner claims there is no cause for concern as regards the finality of the judicial process because "a *McDonough* motion would still be denied if a court determines that the juror's response to a voir dire question was not dishonest at the time it was made," or "that an honest answer to a material question would not have provided a valid basis for a challenge for cause." Pet'r Br. 45. In light of these substantive hurdles, Petitioner assures this Court that "*McDonough's* requirements have proven to be stringent in application." *Id.*

Petitioner's assurances are unavailing. If in practice *McDonough* challenges will frequently if not always be rejected in light of the tough substantive standards Petitioner allegedly proposes, then it is even more dubious that a costly and extensive new post-trial process is necessary or appropriate. While of course verdicts should not be rendered by jurors who should have been removed with valid strikes for cause, if

Petitioner is correct and these challenges are rarely successful, it suggests that the problem Petitioner claims is illusory or at least far less pervasive than he suggests. If this Court were to accept Petitioner's definition of juror dishonesty it is possible that claims of dishonesty would fare better going forward than they have to date. But, as suggested above, this would not be because more unfit jurors were properly being removed from panels, but rather because perfectly valid jurors whose verdicts were informed by their life experiences were improperly being denied an opportunity to serve.

III. Petitioner's Rule Would Impose Additional Burdens On Jurors, Further Eroding Public Participation In The Jury System While Providing Minimal Additional Assurance Of Jury Impartiality.

A wide majority of Americans consider the right of trial by jury integral to the legitimacy of the U.S. judicial system. *See* Am. Bar Ass'n, "... *And Justice for All": Ensuring Public Trust and Confidence in the Justice System* 6 (2001). Yet the burdens of jury service – from the commitment of time and often attendant loss of wages to the privacy intrusions incident to the selection process – frequently prove more than citizens are willing to bear when summoned. Consequently, whether relying on statutory excuses or simply failing to respond to summonses, citizens evade jury service at considerable rates. By imposing additional burdens on jurors, Petitioner's rule would only exacerbate the widespread problem of jury evasion, to the detriment of courts and litigants alike.

A. The Burdens Of Jury Service Undermine Public Participation In The Jury System.

Evasion of jury service has long plagued the administration of justice in the United States. Citizens' failure to respond to summons and failure to appear at court "are a chronic problem in jury operations," occurring at an average national rate of eight percent. Paula Hannaford-Agor, Nat'l Ctr. for State Courts, *An Overview of Contemporary Jury System Management* 7 (May 2011), *available at* http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/Contemporaryjurysystemmanagement.ashx. An equally high percentage of those who do respond to jury summons then request to be excused on grounds of medical or financial hardship or extreme inconvenience. *Id.*[5]

These problems are even more pronounced in particular jurisdictions. Recent statistics from San Antonio, Texas reveal that over 35 percent of those summoned for jury duty ignore their summons altogether. *See* Jayme Fraser, *Only A Third of Those Summoned for Jury Duty Show Up*, Hous. Chron., Dec. 4, 2013, http://www.houstonchronicle.com/news/politics/houston/article/Only-a-third-of-those-

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[5] Still others go to even greater lengths to avoid jury service. For example, some citizens do not register to vote in an effort to avoid placement on jury lists. *See* Stephen Knack, *Deterring Voter Registration Through Juror Selection Practices: Evidence from Survey Data*, 103 Pub. Choice 49, 59 (2000); John Paul Ryan, *The American Trial Jury: Current Issues and Controversies*, 63 Soc. Educ. 458 (1999).

summoned-for-jury-duty-show-5036084.php. In Dallas County and Harris County, Texas, "less than one-fifth of the people summoned to jury service ever make it to the courthouse." Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 319 (2005). Only about 15 percent of Connecticut citizens who received a jury summons in 2013 actually served on a jury. *See* Jury Administration, Conn. Judicial Branch (last visited Aug. 8, 2014), *available at* http://www.jud.ct.gov/statistics/jury/Jury_13.pdf. And in California, where Petitioner's rule prevails, "[b]arely a quarter of those summoned actually complete their service." Daniel Klerman, Am. Tort Reform Ass'n, *A Look at California Juries* 2 (Sept. 2002) (explaining study findings that nearly a third of those summoned sought excusal for hardship or failed to appear); *see also* Walters et al., *supra* at 328 ("[M]ost states wrestle with equally high no-show rates." (quoting Tom Munsterman, Director of Jury Studies at the National Center for State Courts); Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 Judges J. Fall 2004 at 17 (reporting that other jurisdictions, such as Washington, D.C., have even lower participation rates).

The reasons for such low rates of jury participation are readily apparent. Jury service imposes considerable burdens on citizens. Foremost among these burdens is the commitment of time associated with jury service and, in many cases, the attendant loss of income. Many employers do not pay employees for work missed due to jury service, and juror

compensation is meager. Federal courts – which are among the most generous – pay jurors only $40 per day of service, *see* 28 U.S.C. § 1871(b)(1); *cf.* Cal. Civ. Proc. Code § 215(a) (providing juror compensation of $15 per day after the first day), whereas an eight-hour workday at the federal minimum wage amounts to $58, *see* 29 U.S.C. § 206(a)(1)(C) (stating current federal minimum wage of $7.25 per hour). Thus, "financial hardship and extreme inconvenience are often as much the result of the burden imposed on prospective jurors from jury service as the prevailing socioeconomic conditions in the community." Hannaford-Agor, *Overview of Contemporary Jury System Management*, *supra*, at 7; *see also* John Schwartz, *Call to Jury Duty Strikes Fear of Financial Ruin*, N.Y. Times, Sept. 1, 2009, at A1, *available at* http://www.nytimes.com/2009/09/02/us/02jury.html (reporting on increasing number of citizens seeking excuse from jury service during economic recession).

Beyond financial hardship, citizens fear the invasion of privacy that often accompanies their appearance for jury service. For many jurors, "the price of such service may include intrusive questioning, disclosure of their answers to the news media, background investigations by counsel, release of their name and address to the defendant and the public, and repeated attempts by the press to obtain post-trial interviews." David Weinstein, *Protecting a Juror's Right To Privacy: Constitutional Constraints and Policy Options*, 70 Temple L. Rev. 1, 2-3 (1997). The threat of such loss of privacy acts as a powerful disincentive to appear for jury service in the first place. *See* Lior

Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw. U. L. Rev. 1667, 1694 (2008) ("Jury duty is already viewed as an unappetizing prospect for many Americans, and the loss of privacy associated with comprehensive government background checks [in the voir dire context] could prompt stiff resistance and exacerbate juror absenteeism."); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123, 126 (1996) (discussing reports "that many people are reluctant to serve as jurors even in misdemeanor cases and . . . fear being approached at home after their assigned case has ended").

B. Petitioner's Rule Would Impose Additional Burdens On Jurors, Further Eroding Public Participation In The Jury System And Thereby Subverting Jury Impartiality.

Petitioner's rule would add significantly to the burdens described above. By allowing the introduction of testimony concerning juror deliberations to show juror dishonesty during voir dire, Petitioner's rule would incorporate a post-trial inquiry into juror dishonesty, and likely an ensuing motion, into nearly every jury trial. *See supra* 14-15. Such post-trial inquiries and motions would necessarily extend the jurors' involvement with a case, thereby increasing the time commitment and financial hardships associated with jury service in general. Moreover, these inquiries would threaten an even deeper invasion of privacy than that occasioned by the typical trial: Attorneys would have an incentive, and likely even a duty, to mine jury

deliberations for any indications of a juror's life experiences or personal understandings that might conflict with his statements or omissions during voir dire. As a result, Petitioner's rule would augment two of the greatest disincentives to citizens' participation in the jury system, leading only to increased rates of jury evasion.

Perhaps Petitioner would justify the additional costs of judicial administration resulting from increased rates of jury evasion[6] as necessary to secure the worthy promise of jury impartiality. But while Petitioner and his supporting amici insist that "interpreting Rule 606(b) to preclude juror testimony regarding dishonesty during voir dire would conflict with the fundamental constitutional right to an impartial jury," Professors Br. in Supp. of Pet. 29; *see* Pet'r Br. 18, 38; NACDL Br. 6, they ignore entirely a competing aspect of impartiality embedded in the same constitutional right: the "diffused impartiality" of the jury achieved through selection from a venire that is "broadly representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) (quoting *Thiel v. S. Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); *see* James H. Druff, *Systemic and*

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[6] These costs may be considerable. *See* Paula L. Hannaford-Agor, Nat'l Ctr. for State Courts, *Increasing the Jury Pool: Impact of the Employer Tax Credit* 1 n.5 (Aug. 2004) (explaining that "[t]he greater the number of prospective jurors who are excused for financial hardship," or who simply fail to appear, "the greater the administrative cost of the jury system on a per juror basis" (citation omitted)).

Individual Partiality: The Cross-Section Requirement and Jury Impartiality, 73 Cal. L. Rev. 1555, 1558 (1988) ("The concept of impartiality ... has come to designate both the detachment of the selection process and the detachment of the individual jurors.").

Jury evasion undermines the efforts of courts to assemble a broad, representative cross-section of the community from which to empanel a jury.[7] *See* Walters & Curriden, *supra*, at 18 ("If a representative cross-section means anything, we must have significant public participation." (quoting Professor Thomas Baker)); Paula L. Hannaford-Agor, Nat'l Ctr. for State Courts, *Increasing the Jury Pool: Impact of the Employer Tax Credit* 1 (Aug. 2004) (explaining that absence due to financial hardship "tends to skew the resulting composition of the jury pool to the more affluent segments of society, potentially violating fair cross section requirements"). And there is evidence suggesting that higher rates of jury evasion result in disproportionately low representation of certain demographic groups, including minorities and low-

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[7] Juror absenteeism and recourse to hardship excuses may not support a fair cross-section challenge. *See* Gertner & Mizner, *supra*, § 2:1, at 28 (explaining that the Sixth Amendment "creates a negative right, *i.e.*, freedom from systematic exclusion"); *cf.* Hannaford-Agor, *An Overview of Contemporary Jury System Management*, *supra*, at 13 ("Nevertheless, the question of whether the impact of socioeconomic factors on the demographic composition of the jury pool could support a fair cross section claim is still unsettled."). Regardless, the Court should be hesitant to adopt a rule that would subvert in practice the principle it purportedly vindicates.

income workers, on jury venires. *See* Walters et al., *supra*, at 330-31 (suggesting that widespread jury evasion results in disproportionately low representation of Hispanics, young adults, and low-income workers on jury venires). Thus, by augmenting existing disincentives to participation in the jury system, Petitioner's rule would subvert a competing yet equally important component of the impartiality it purportedly vindicates.

C. There Already Exist Adequate Disincentives And Remedies To Juror Dishonesty During Voir Dire.

In any event, Petitioner's rule is not necessary to ensure the impartiality of the individual jurors ultimately selected to a panel. Misrepresentations by jurors during voir dire may still provide grounds for a new trial if substantiated by admissible evidence. Rule 606(b) cordons off only a small subset of the evidence an attorney could present in support of a *McDonough* challenge. *See United States v. Stewart*, 433 F.3d 273, 306 (2d Cir. 2006) (cautioning "district courts that, if any significant doubt as to a juror's impartiality remains in the wake of objective evidence of false *voir dire* responses, an evidentiary hearing generally should be held").[8] And the threat of prosecution and possible

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[8] Statutory disqualifications that surface after jury selection can form the basis for a motion for a new trial in other jurisdictions as well. *See, e.g., Gonzales v. State*, 3 S.W.3d 915, 916 (Tex. Crim. App. 1999) (explaining that, "with respect to oral questions asked during voir dire, ... error occurs where a prejudiced or biased juror is selected without fault or lack of diligence on the part of

imprisonment under *Clark*, where the Court held that "that "[c]oncealment or misstatement by a juror upon a voir dire examination is punishable as a contempt if its tendency and design are to obstruct the processes of justice," 289 U.S. at 10, is a direct, powerful, and therefore adequate deterrent to juror dishonesty during voir dire. *See United States v. Barnett*, 376 U.S. 681, 756 (1964) ("The sanction imposed for criminal contempt has always been . . . designed to deter future defiances of the court's authority and to vindicate its dignity"); *Ex parte Grossman*, 267 U.S. 87, 111 (1925) (noting that punishment for criminal contempt is intended, inter alia, to "deter other like derelictions").

Given these tested means of ensuring juror impartiality, Petitioner's rule would be of little additional service to that end. Meanwhile, the additional burdens it would impose on jurors would further erode broad public participation in the jury system and thereby subvert the "diffused impartiality" of the jury. In the interests of the robust jury impartiality guaranteed by the Constitution and the efficient administration of justice, therefore, the Court should decline to adopt such a rule.

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defense counsel," and that a new trial is warranted if such error results in harm (quotation marks and emphasis omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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