No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 THE UNITED STATES

This case involves the application of Federal Rule of Evidence 606(b) to claims of juror dishonesty during voir dire. Rule 606(b) applies to all actions in federal district courts, including federal criminal prosecutions and civil actions to which the United States is a party and in which a jury-trial right is implicated. Because the government frequently tries cases in federal district courts and defends verdicts against post-judgment attack, it has a substantial interest in the resolution of this case.

STATEMENT

1. On August 4, 2006, petitioner was riding a motorcycle southbound on U.S. Highway 385 in Pennington County, South Dakota. Pet. App. 13a, 18a, 21a-23a. Respondent was also driving southbound on

Highway 385, in a truck that was pulling a camper trailer. *Id.* at 13, 19a. When respondent attempted to drive around petitioner as petitioner waited to turn left, respondent's trailer hit petitioner's motorcycle. *Id.* at 18a-22a. As a result of the collision, petitioner suffered serious injuries including the loss of his lower left leg. *Id.* at 13a.

2. Petitioner filed suit against respondent in federal district court, asserting a claim of negligence. Pet. App. 13a.

a. The first jury trial ended in a mistrial. Pet. App. 2a, 13a-14a. During voir dire for the second trial, the district court informed potential jurors about the basic nature of the case. J.A. 38. The court asked the potential jurors: "Is there anyone knowing just those basic facts about this type of case who from your experience or background feel that you would not be a proper juror to hear this action?" *Ibid.* One person spoke up and was excused for cause. J.A. 39-40. The court repeated the substance of that question three times and no other juror responded. J.A. 40, 45.

Petitioner's counsel then asked individual jurors general questions about their feelings towards lawsuits, jury trials, and awarding damages for injuries. J.A. 59-76. Three jurors volunteered that they or members of their families had been involved in car or motorcycle collisions. J.A. 64-65, 68-70, 73. In response to two jurors' comments, petitioner's counsel noted that jurors cannot be "expect[ed]" to "shut out everything in the past," but jurors are expected to follow the law and do "the best [they] can." J.A. 70, 74.

Petitioner's counsel asked juror Regina Whipple (who later became the jury foreperson): "[H]ow do

you feel about lawsuits?" J.A. 62. She responded that they are "probably necessary * * * because everybody sees things differently." *Ibid.* When asked if she had a problem with awarding future medical expenses, Whipple said, "No." J.A. 83. She also said she could award damages for pain and suffering, J.A. 88-89, and would "make a decision on the facts and not on sympathy," J.A. 154. Petitioner's counsel asked other specific questions of the venire panel and closed by asking, "[I]s there any topic that you thought of since we started, other than the one we talked about, that you now have concluded, you know, I don't think I could be a fair and impartial juror on this kind of case[?]" J.A. 105. Whipple did not respond to any of the general questions, and she was seated on the jury. J.A. 57-59; 99-105; 188.

b. At trial, the parties introduced conflicting evidence about how fast respondent was driving and other details of the accident. Pet. App. 17a-23a. The jury returned a verdict in favor of respondent. *Id.* at 14a.

c. Petitioner filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, or in the alternative a new trial pursuant to Federal Rule of Civil Procedure 59. Pet. App. 14a. Petitioner argued that the verdict was (1) against the weight of the evidence, (2) the product of misconduct by respondent's counsel, and (3) the product of juror misconduct. *Ibid.*

In support of his juror-misconduct claim, petitioner submitted an affidavit from one of the jurors, Stacey Titus. Pet. App. 28a. Titus stated that, "during deliberations," Whipple "spoke about her daughter's experience, which included a motor vehicle collision in

which her daughter was at fault for the collision and a man died. She related that if her daughter had been sued, it would have ruined her life." *Id.* at 28a-29a. Titus expressed concern that Whipple "was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us." *Id.* at 28a. Titus also opined that Whipple's statements "influenced other jurors because other jurors also expressed their concern about ruining the Shauers' life as they were a young couple." *Id.* at 29a.

The district court denied petitioner's motion. Pet. App. 12a-39a. As relevant here, the court rejected petitioner's juror-misconduct claim because petitioner failed to "present[] *admissible* evidence of juror bias." *Id.* at 29a (citing *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984)). The court explained that Federal Rule of Evidence 606(b) "limits the court's inquiry" by "establish[ing] the general rule that a juror is not competent to testify as a witness on matters pertaining to the trial in which the juror sat." *Ibid.* The district court concluded that Titus's affidavit did not fall within Rule 606(b)(2)'s exceptions for evidence of "extraneous prejudicial information" or an "outside influence * * * improperly brought to bear on any juror." *Id.* at 31a (quoting Fed. R. Evid. 606(b)(2)). The court also rejected petitioner's argument that Titus's affidavit was admissible "to demonstrate the foreperson lied during voir dire," explaining that such a result "would undermine the purpose of Rule 606(b) and run[] counter to its directive." *Id.* at 35a, 38a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court held that Titus's affidavit was not admissible under the "extraneous prejudicial information"

exception to Rule 606(b)(2) because "[j]urors' personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room." *Id.* at 7a. The court explained that the extraneous-information exception "includes objective events such as 'publicity and extra-record evidence reaching the jury room, and communication or contact between juror and litigants, the court, or other third parties,'" but does not include "juror testimony regarding possible subjective prejudices or improper motives of individual jurors." *Ibid.* (quoting *United States* v. *Krall*, 835 F.2d 711, 716 (8th Cir. 1987)).

The court of appeals also rejected petitioner's alternative argument that "Rule 606(b) should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire." Pet. App. 8a. The court held that juror testimony tending to show dishonesty during voir dire is not admissible in support of a motion for a new trial. *Id.* at 8a-10a (relying on *United States* v. *Benally*, 546 F.3d 1230, 1235 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009); *Williams* v. *Price*, 343 F.3d 223, 235-237 (3d Cir. 2003) (Alito, J.)). Such an exception, the court explained, "risks swallowing the rule" because "[a] broad question during voir dire could then justify the admission of any number of jury statements that would be characterized as challenges to voir dire rather than challenges to the verdict." *Id.* at 9a (quoting *Benally*, 546 F.3d at 1236).

SUMMARY OF ARGUMENT

A. 1. Federal Rule of Evidence 606(b)(1) establishes a general rule prohibiting juror testimony about deliberations during an inquiry into the validity of a

verdict. When a litigant files a motion for a new trial, he is challenging the validity of a verdict and a hearing on such a motion is an inquiry into the validity of the verdict. A court cannot grant a new trial without vacating an existing verdict—and if a court vacates a verdict, that verdict is necessarily invalid. The same principle applies when a litigant argues for a new trial because the jury was improperly constituted—if the jury was improperly constituted, its verdict is invalid. Rule 606(b)(1)'s general prohibition therefore applies to all motions for new trials, including when the basis for such a motion is alleged juror dishonesty during voir dire.

2. Rule 606(b)'s general bar on jurors' testimony to impeach their own verdict has deep roots in the common law. The rule was established by Lord Mansfield in 1785 and was later adopted almost universally by American courts. Two strains of the Mansfield rule developed in America. Under the Iowa rule, jurors could not testify about matters that essentially inhere in the verdict itself (such as their own thought processes in reaching a verdict), but could testify about any other aspect of the jury's deliberations (such as whether the jury reached a verdict by flipping a coin). Only a few jurisdictions followed that approach. In contrast, a number of courts followed a broader exclusionary rule—a rule sometimes referred to as the federal rule—which prohibits a broader range of impeaching juror testimony, including testimony about overt acts that would be allowed under the Iowa rule. Many common-law courts applying the broader federal rule barred juror testimony about deliberations when offered to support a motion for a new trial based on alleged juror dishonesty in voir dire.

This Court's decision in *Clark* v. *United States*, 289 U.S. 1 (1933), is consistent with the broad federal rule. *Clark* involved a criminal contempt prosecution of a dishonest juror; it did not involve any inquiry into the validity of a jury's verdict. In allowing juror testimony about statements of another juror during deliberations to prove contempt, the Court recognized that impeachment of a verdict involved a distinct question.

3. When Congress enacted Rule 606(b) in 1974, it decisively chose the federal version of the Mansfield rule and rejected the Iowa version. After a rules-committee draft adopting the Iowa rule was widely criticized, the committee adopted a broader prohibition consistent with the federal version of the Mansfield rule. This Court approved that version of the rule and transmitted it to Congress. The House Judiciary Committee reverted to the Iowa rule. But the Senate Judiciary Committee and the Conference Committee both rejected that formulation, explaining that public policy requires a broader exclusionary rule.

As that drafting history makes plain, Congress was aware of the two different common-law strains of the Mansfield rule—and Congress rejected the Iowa rule in favor of the broader federal rule. Petitioner's argument is premised on the notion that Rule 606(b) codified the Iowa rule and must be rejected.

4. Petitioner's view of Rule 606(b) would undermine its purposes by inviting harassment of jurors, undermining the finality of judgments, and impeding full and frank discussion in the jury room. A central purpose of Congress was to bar testimony about matters such as whether a jury reached a verdict by flipping a coin. Under petitioner's interpretation, howev-

er, such testimony would be admissible as long as a juror was asked during voir dire (as essentially all jurors are) whether he would follow the judge's instructions and decide the case on the evidence alone. Such an exception would swallow the rule.

5. The canon of constitutional avoidance does not help petitioner in the face of Rule 606(b)(1)'s unambiguous language. And the court of appeals' correct interpretation of the rule does not raise any serious constitutional concerns. This Court has explained that the right to an impartial jury is adequately protected by various aspects of civil and criminal litigation and does not require eroding the prohibition in Rule 606(b)(1).

B. The Court should also reject petitioner's alternative argument that the testimony at issue is admissible under Rule 606(b)(2)(A)'s exception for extraneous prejudicial information. That exception applies only to information *relating to the case* that is improperly brought to the jury's attention. It does not apply to testimony about jurors' use of general background facts or other information unrelated to the case. Every juror brings her personal experiences and opinions to the jury room. Such information is not "extraneous" and is not admissible under Rule 606(b)(2)(A).

ARGUMENT

A JUROR MAY NOT TESTIFY ABOUT STATEMENTS MADE DURING JURY DELIBERATIONS IN A CHALLENGE TO THE VERDICT BASED ON ALLEGED JUROR DISHONESTY DURING VOIR DIRE

Federal Rule of Evidence 606(b)(1) provides that, "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's

deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1). That principle of exclusion applies in proceedings that "inquir[e] into the validity of a verdict," including hearings on a motion for a new trial alleging juror dishonesty during voir dire.

A. A Motion For A New Trial Based On Juror Dishonesty During Voir Dire Involves An "Inquiry Into The Validity Of A Verdict" Under Rule 606(b)

Petitioner's primary submission (Br. 16-45) is that Rule 606(b) does not apply to his effort to vacate the jury's verdict and obtain a new trial because his pursuit of a new trial does not necessitate an inquiry into the validity of the verdict. The only inquiry the district court must make in order to rule on his motion for a new trial, petitioner argues (Br. 21), is whether juror Whipple lied during voir dire. Petitioner contends that that such an inquiry "has nothing to do with the jury's verdict at all," even though the relief he seeks is "vacatur of the judgment and a new trial." *Ibid.* That is incorrect. Although a motion for a new trial may require a district court to inquire into various aspects of the pre-trial, trial, and sentencing phases of a matter, the ultimate inquiry is whether the existing verdict should stand. That is an inquiry into the validity of the verdict covered by Rule 606(b).

1. The plain meaning of the phrase "inquiry into the validity of a verdict" includes inquiries into whether the jury that issued the verdict was properly constituted

The Constitution guarantees to civil litigants and criminal defendants the right to an "impartial trier of

fact" or an "impartial jury." *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 549, 554 (1984) (*McDonough Power*); see U.S. Const. Amend. VI. In both contexts, the right to an impartial jury is protected by the right to "an adequate *voir dire*," *Morgan* v. *Illinois*, 504 U.S. 719, 729 (1992), which "expos[es] possible biases, both known and unknown, on the part of potential jurors," *McDonough Power*, 464 U.S. at 554. "The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." *Ibid.*

A new trial motion based on alleged juror dishonesty during voir dire is an "inquiry into the validity of a verdict" under Rule 606(b). When a court grants a new trial, it must set aside the existing verdict. Such a remedy is warranted only when an error impugns the validity of the existing verdict. In considering other types of challenges to the validity of a tribunal, this Court has characterized the judgment of an improperly constituted panel of decisionmakers as "void." *Ayrshire Colleries Corp.* v. *United States*, 331 U.S. 132, 144 (1947) (judgment rendered by panel of two judges when statute required three); see *Irvin* v. *Dowd*, 366 U.S. 717, 727-728 (1961) (verdict and sentence "void" when pretrial publicity and voir dire questioning indicated jurors were not impartial); cf. *Metropolitan R.R.* v. *Moore*, 121 U.S. 558, 564 (1887) (listing bases for setting aside the verdict, including jury misconduct). A claim that a juror's dishonesty during voir dire requires a new trial is a claim that the juror's misconduct rendered the verdict invalid because it rendered the tribunal invalid. By the same token, a proceeding to consider such a claim is necessarily an "inquiry into the validity of the verdict."

Whenever a court considers a motion for a new trial, it inquires into the validity of the existing verdict regardless of the grounds asserted in support of the motion.

As petitioner notes (Br. 12-13, 19-20), a litigant alleging juror dishonesty during voir dire is entitled to a new trial if he "demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power*, 464 U.S. at 556. It does not follow, however, that an inquiry into "juror dishonesty during voir dire," Pet. Br. I, "has nothing to do with the jury's verdict at all," *id.* at 21. The *McDonough Power* rule does not entitle a litigant to a new trial based on a showing of juror dishonesty alone. The litigant must demonstrate that correct information, if revealed, would have provided a valid basis to strike the juror *for cause*, ensuring that a court will grant a new trial *only* when defects in "a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556. In those instances, the seating of a biased juror renders the tribunal defective—which necessarily renders the tribunal's verdict invalid. The *McDonough Power* Court described its inquiry as whether "[t]o invalidate the result" of the trial based on a juror's dishonesty. *Id.* at 555. It is difficult to see how a decision whether to "invalidate" a verdict (*i.e.*, the result of a trial) can be described as having nothing to do with the validity of the verdict.

2. Common-law traditions support the conclusion that new trial motions alleging voir dire dishonesty implicate the validity of verdicts

As this Court explained in *Tanner* v. *United States*, 483 U.S. 107, 117-119 (1987), Rule 606(b)(1)'s general prohibition is based on the "firmly established common-law rule in the United States [that] flatly prohibited the admission of juror testimony to impeach a jury verdict," *id.* at 117. Petitioner argues (Br. 23-29) that the common-law tradition supports his view that an inquiry into a juror's dishonesty during voir dire is not an inquiry into the validity of a verdict—and that Rule 606(b) should be viewed as codifying that distinction. Petitioner is incorrect.

In 1785, Lord Mansfield first announced the rule that "flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner*, 483 U.S. at 117; see *Vaise* v. *Delaval*, [1785] 99 Eng. Rep. 944 (K.B.); 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2352, at 696-697 (John T. McNaughton rev., 1961) (Wigmore). By the beginning of the twentieth century, American common law had absorbed that rule "firmly" and "near[ly]-universal[ly]." *Tanner*, 483 U.S. at 117; Wigmore § 2352, at 697. Over time, however, two different strains of the rule emerged in American courts—the Iowa rule and what is sometimes referred to as the federal rule.[1] 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:16, at 70-71 (4th ed. 2013) (*Federal Evidence*). Petitioner relies on common-law authorities

[1] For ease of reference, this brief refers to the broader formulation of Mansfield's rule as the federal rule. As discussed at pp. 13-14, 18, *infra*, that version of the rule was applied in many state common-law courts.

that followed the Iowa rule. But when Congress enacted Rule 606(b), it rejected that approach in favor of the broader federal common-law rule. See pp. 18-23, *infra*. Under the common-law approach codified in Rule 606(b), a litigant seeking to overturn a verdict may not introduce juror testimony about statements made during deliberations in order to prove juror dishonesty at voir dire.

a. Under the federal version of the common-law rule against admission of verdict-impeaching juror statements, the testimony and affidavit petitioner seeks to rely on are inadmissible. Common-law courts that applied the federal rule treated a motion for a new trial based on juror dishonesty during voir dire as an inquiry into the validity of the verdict. See *Wilson* v. *Wiggins*, 94 P.2d 870, 871 (Ariz. 1939) (motion for new trial on grounds that juror lied during voir dire was effort "to impeach" the verdict) (superseded by rule, Ariz. R. Crim. P. 24.1(d)); *Mathisen* v. *Norton*, 60 P.2d 1, 4 (Wash. 1936) (concluding that a juror's failure to disclose bias during voir dire "render[s] the verdict wholly abortive"); *Alabama Fuel & Iron Co.* v. *Powaski*, 166 So. 782, 787 (Ala. 1936) (rejecting argument that motion for new trial based on jurors' concealment during voir dire was not effort to impeach verdict); *Norwood* v. *State*, 58 S.W.2d 100, 101 (Tex. Crim. App. 1933) (concluding that a juror's failure to disclose information on voir dire showed "disqualification or prejudice," which was "sufficient, upon motion for new trial, to vitiate the verdict") (quoting *Adams* v. *State*, 243 S.W. 474, 475 (Tex. Crim. App. 1921)); *Drury* v. *Franke*, 57 S.W.2d 969, 985 (Ky. 1933) ("[A] verdict is illegal when a peremptory challenge is not exercised by reason of false information."); *Payne* v.

Burke, 260 N.Y.S. 259, 261-262 (App. Div. 1932) (motion for new trial based on allegation that juror lied during voir dire sought to "discredit the * * * verdict" and "render the verdict invalid"); *Shulinsky* v. *Boston & Me. R.R.*, 139 A. 189, 191 (N.H. 1927) (concluding a "verdict is * * * illegal" when false information during voir dire prevents a party from using a peremptory challenge).

Rule 606(b) embodies the federal version of the common-law rule. Under that approach, juror affidavits were not admissible in support of a motion for a new trial based on allegations of juror dishonesty during voir dire—and they are not admissible under Rule 606(b) either.

b. Petitioner maintains (Br. 23-30) that the common law did not bar juror testimony about statements made during deliberations that would tend to show a juror's dishonesty during voir dire—and argues that Rule 606(b) should be interpreted to carry forward that tradition. Petitioner's logic proceeds in the following steps: (1) at common-law, jurors' statements were inadmissible only on matters that "essentially inhere in the verdict itself," Br. 25, 29, 34; (2) that common-law tradition "barred jurors from testifying about the process by which the verdict was reached," Br. 23, but not about any other aspect of the jury's deliberations; and (3) when Congress enacted Rule 606(b), it codified that common-law rule, Br. 30. But petitioner is incorrect. Petitioner's formulation of the common law describes only one of the two strains that developed in American law. Critically, Congress expressly rejected that strain in favor of the other rule, see pp. 18-23, *infra*, which generally excludes juror testimony about all aspects of deliberations, including

statements that might show a juror was dishonest during voir dire.

In 1866, the Iowa Supreme Court first articulated the narrower strain of Lord Mansfield's rule on which petitioner relies. That court held that "affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself." *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866). Under that rule, a juror could not testify that he "misunderstood the instructions of the court," was "unduly influenced by the statements or otherwise of his fellow jurors," or about any "other matter resting alone in the juror's breast." *Ibid.* A juror *could* testify, however, about any "overt act, open to the knowledge of all the jury, and not alone in the personal consciousness of one." *Perry* v. *Bailey*, 12 Kan. 539, 545 (1874) (following Iowa rule). A juror could testify, for example, that "the verdict was determined by aggregation and average or by lot," *Wright*, 20 Iowa at 210, or that "one juror was drunk while the jury were in their room deliberating," *Perry*, 12 Kan. at 545. Only a "few jurisdictions" followed Iowa's lead, while most jurisdictions followed the broader federal rule that did *not* permit jurors to testify about jurors' overt acts including whether the jury reached its verdict by lot and whether jurors were drunk. Wigmore § 2354, at 702; see *Vaise*, 99 Eng. Rep. at 944; *Tanner*, 483 U.S. at 117-118.

Before the enactment of Rule 606(b), this Court twice quoted the Iowa rule's formulation that jurors cannot testify about matters that "essentially inhere in the verdict." *Hyde* v. *United States*, 225 U.S. 347, 383-384 (1912); *Mattox* v. *United States*, 146 U.S. 140,

149 (1892). But in neither case did the Court's choice of words result in admitting juror testimony that would not have been admitted under the broader federal rule. In *Mattox*, the Court held that juror affidavits about prejudicial statements by a bailiff to jurors were admissible in support of a motion for a new trial. 146 U.S. at 147-149. The Court explored different formulations of Mansfield's rule and concluded that the statements at issue were admissible because they concerned an "extraneous influence," namely communications from a third party that occurred outside of the jury's deliberations. *Id.* at 148-149. The exception for "extraneous" information existed under both strains of the common-law rule and was codified in Rule 606(b). In *Hyde*, the Court purported to apply the Iowa rule in holding that juror affidavits were inadmissible to show an alleged bargain to convict some co-defendants and acquit others. 225 U.S. at 383-384. But that result is consistent with the federal version of the Mansfield rule—the Iowa rule, in contrast, permitted testimony by one juror about matters that more than one juror could verify or contradict, including jury compromises. *Wright*, 20 Iowa at 210. Thus, in neither case did this Court adopt the Iowa rule as the proper formulation of the common-law no-impeachment rule.

c. Petitioner argues (Br. 25-30) that this Court and a number of other "courts applying the common-law rule repeatedly held that the rule did not apply when juror testimony was being introduced to prove dishonesty at voir dire." Br. 25. The authorities on which petitioner relies do not support the rule he asks the Court to announce in this case. Petitioner relies primarily on this Court's decision in *Clark* v. *United*

States, 289 U.S. 1 (1933). That case lends no support to petitioner's position because it did not involve an attempt to impeach a jury's verdict. In *Clark*, a former juror was convicted of contempt based on her failure to disclose certain biases during voir dire in a separate case. *Id.* at 6-8. In the contempt proceeding, the district court considered testimony from her co-jurors that Clark had refused to listen during deliberations. *Id.* at 9. On appeal, Clark argued that the juror testimony violated an evidentiary privilege protecting "the arguments and votes of jurors." *Id.* at 12-14. This Court rejected Clark's assertion of privilege and upheld the conviction. *Id.* at 12-19. The Court was careful to explain, however, that nothing in that decision conflicted with—or even reflected on—the common-law rule prohibiting juror testimony to impeach a verdict. *Id.* at 13, 18. As the Court noted, because the jury on which Clark sat was a hung jury, no verdict was available to impeach. *Id.* at 18. "But in truth," the Court added, "the rule against impeachment is wholly unrelated to the problem now before us"—whether juror testimony may be admitted in a *separate* contempt proceeding. *Ibid.*; see *id.* at 13 (noting that treatise writers had "confused" the notion of a juror privilege "with something very different, the competency of witnesses to testify in impeachment of a verdict").

Given the Court's holding and reasoning, *Clark* does not establish that the common-law no-impeachment rule allowed juror testimony to show dishonesty during voir dire in order to set aside a verdict. Petitioner's contrary reading of *Clark* (Pet. Br. 25, 34) ignores that no aspect of the prosecution at issue in *Clark* sought to impeach a verdict. That was

not only because the jury in question had not reached a verdict, but also because a contempt conviction would not have resulted in vacatur of the jury's verdict or the grant of a new trial even if the jury had not hung.

Petitioner contends (Br. 28-29) that a number of other courts applying the common-law rule admitted juror testimony related to dishonesty during voir dire. Like *Clark*, several of the cases on which petitioner relies involved contempt or perjury proceedings against former jurors in which the no-impeachment rule does not apply (with respect to the prior verdict). See, *e.g.*, *United States* v. *Freedland*, 111 F. Supp. 852 (D.N.D. 1953); *State* v. *Serpas*, 179 So. 1, 3 (La. 1938) (both cases cited at Wigmore § 2354, at 712 n.5, cited at Pet. Br. 28). Most of the other cases on which petitioner relies applied the Iowa version of the no-impeachment rule. See *Williams* v. *Bridges*, 35 P.2d 407, 408-409 (Cal. Dist. Ct. App. 1934); *State* v. *Hayden Miller Co.*, 116 N.W.2d 535, 539 (Minn. 1962); *Mathiesen*, 60 P.2d at 2-4 (Wash.); see also *Shipley* v. *Permanente Hosps.*, 274 P.2d 53, 56-57 (Cal. Dist. Ct. App. 1954) (following *Williams*) (all cases cited at Pet. Br. 29). And, as petitioner recognizes (Br. 29 n.3), many other courts applying the broader federal law no-impeachment rule reached the opposite conclusion. See *Powaski*, 166 So. at 786-787 (Ala.); *Wilson*, 94 P.2d at 872 (Ariz.); *Turner* v. *Hall's Adm'x*, 252 S.W.2d 30, 34 (Ky. 1952); *State* v. *Cloud*, 58 So. 827, 828 (La. 1912); *Payne*, 260 N.Y.S. at 262-263; *Willis* v. *Davis*, 333 P.2d 311, 314 (Okla. 1958); *Hinkel* v. *Oregon Chair Co.*, 156 P. 438, 439 (Or. 1916); see also *Cain* v. *Cain*, 40 Ky. (1 B. Mon.) 213, 213 (1841) (affi-

davit inadmissible after verdict to show "partiality" of another juror).

In sum, although some common-law courts followed the Iowa rule on which petitioner relies, many others followed the broader federal rule that would have excluded the evidence at issue here. As shown below, Congress opted for the broader exclusionary rule when it enacted Rule 606(b).

3. The legislative history of Rule 606(b) supports the conclusion that new trial motions alleging voir dire dishonesty implicate the validity of verdicts

1. As originally drafted by the Advisory Committee on Rules of Evidence, Rule 606(b) prohibited admission of juror testimony only if it related to jurors' mental processes in reaching a verdict. The draft stated:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 387 (1971). The initial draft language relied on the Iowa rule, drawing "the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the

verdict, on the other hand." *Id.* at 387 advisory committee's note (citing *Wright*, *supra* (Iowa); *Perry*, *supra* (Kan.); *State* v. *Kociolek*, 118 A.2d 812 (N.J. 1955)). The Committee explained that "[a]llowing [jurors] to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected" and stated expressly that "[t]he rule is based upon this conclusion." *Id.* at 388 advisory committee's note.

The draft rule was widely criticized, in particular by the Department of Justice and the influential Senator McClellan. See *Tanner*, 483 U.S. at 122. The Department of Justice "disagree[d] with the comment in the Advisory Committee's Note, that there is a trend toward allowing jurors to testify about everything but their own mental process." 117 Cong. Rec. 33,655 (1971). The Department explained that "[r]ecent federal decisions show continued adherence to the rule that jurors cannot testify about irregularities in their deliberations." *Ibid.* (citing cases). The Department proposed new language for the rule that closely tracks the language of the rule that was ultimately adopted. Compare *ibid.* with Fed. R. Evid. 606(b). Senator McClellan's letter similarly criticized the draft for allowing "the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct in the jury room." 117 Cong. Rec. at 33,645. Such a rule, Senator McClellan explained, would create "mischief" and would make it "[im]possible to conduct trials, particularly criminal prosecutions, as we know them today." *Ibid.*

The Advisory Committee then adopted a broader version of the rule that prohibited the admission of

testimony on "any matter or statement occurring during the course of the jury's deliberations," and added exceptions for evidence of extraneous prejudicial information and outside influences. *Rules of Evidence for United States Courts & Magistrates*, 56 F.R.D. 183, 265 (1972). This Court adopted the second version of Rule 606(b) and transmitted it to Congress. See *Tanner*, 483 U.S. at 122. The Court explained that the proposed rule adhered to the decisions of federal courts, the "central focus" of which had "been upon insulation of the manner in which the jury reached its verdict, * * * extend[ing] to each of the components of deliberation, including arguments, discussions, mental and emotional reactions, votes, and any other feature of the process." H.R. Doc. No. 46, 93d Cong., 1st Sess. 99 (1973).

The House Judiciary Committee preferred the Advisory Committee's original version of the rule, believing that the Iowa version of the common-law rule was "the better practice." H.R. Rep. No. 650, 93d Cong., 1st Sess. 10 (1973). The Senate Judiciary Committee rejected the House version, which "would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations." S. Rep. No. 1277, 93d Cong., 2d Sess. 13 (1974). The Senate Report reflected a particular concern that deliberations be protected from scrutiny:

> 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 deliberation of the jurors.

Id. at 14. The Conference Committee adopted, and Congress ultimately enacted, this Court's proposed rule, which prohibited juror testimony as to "any matter or statement occurring during the course of the jury's deliberations." Act of Jan. 2, 1975, § 1, Pub. L. No. 93-595, 88 Stat. 1934 (Fed. R. Evid. 606(b)).[2]

By rejecting the Iowa-based version of the rule preferred by the House and instead adopting the Senate's rule prohibiting juror testimony about "any statement made or incident that occurred during the jury's deliberations," Congress chose sides between the two strains of common-law decisions. In short, Congress rejected petitioner's preferred strain of the common-law rule. Petitioner's view that Rule 606(b) is directed only at testimony about "how the verdict was reached," Br. 14, 30, 31, finds no support in the broader federal common-law rule that Congress codified. The consequences of Congress's choice are illustrated by *Tanner*, in which this Court held that jurors could not testify that other jurors were drunk during deliberations. Those jurors had evidence that might have demonstrated that other jurors were incompetent or incapacitated during deliberations—but testimony about such matters was inadmissible under the broader federal common-law rule

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[2] Congress has made several minor and non-material amendments to Rule 606(b) since its adoption. The only significant amendment was in 2006, when Congress added the exception in what is now Rule 606(b)(2)(C) and altered the text to list each exception separately. H.R. Doc. No. 108, 109th Cong., 2d Sess. 5 (2006).

and, this Court held, is inadmissible under Rule 606(b). "[T]he legislative history demonstrates with clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations," *Tanner*, 483 U.S. at 125, including juror statements that might demonstrate a juror was dishonest during voir dire. See *Federal Evidence* § 6:17, at 75 ("The important point is that it would be hard to paint with a broader brush. The exclusionary principle embodied in Rule 606(b) reaches quite literally everything that relates to, or describes or depicts, the jury's deliberative processes unless one of the exceptions applies.").

4. Petitioner's view of Rule 606(b) would undermine its purposes and create an exception that swallows the rule

In *Tanner*, this Court examined the "[s]ubstantial policy considerations [that] support the common-law rule against the admission of jury testimony to impeach a verdict." 483 U.S. at 119. The Court explained that the "common-law rule against the admission of jury testimony to impeach a verdict" protects jurors from being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Id.* at 119, 120 (quoting *McDonald* v. *Pless*, 238 U.S. 264, 267 (1915)). Such a result, the Court explained, would risk "the destruction of all frankness and freedom of discussion and conference." *Id.* at 120 (quoting *McDonald*, 238 U.S. at 268). The Court recognized that "postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior"—but concluded that "[i]t is

not at all clear * * * that the jury system could survive such efforts to perfect it." *Ibid.* The Court explained that Rule 606(b) protects "the finality of the process," "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.* at 120-121.

a. Petitioner argues that (Br. 40-44) that admitting juror testimony to show voir dire dishonesty in support of a motion for a new trial "would not discourage 'full and frank discussion in the jury room,'" Br. 40 (quoting *Tanner*, 483 U.S. at 120), and would not subject jurors to increased harassment because jurors are already permitted (or required) to reveal information about deliberations in other contexts. Jurors may, for example, speak to the press about deliberations following a verdict. And juror testimony about deliberations may be sought before a verdict is entered or in post-verdict collateral proceedings that do not seek to impeach the jury's verdict. Petitioner argues (Br. 40-42) that his reading of Rule 606(b) would not undermine its purposes any more than those already-available windows on jury deliberations have.

The problem with petitioner's argument is that it proves too much. Petitioner is correct that jurors may share jury-room deliberations in a number of contexts, such as media interviews or pre-verdict hearings. But this Court has repeatedly endorsed the value of protecting jurors in proceedings seeking to invalidate their verdict—and Congress plainly subscribed to that view in enacting Rule 606(b). All parties to this case would agree that a juror in the *Tanner* case could have spoken about other jurors' drinking either to

reporters after the verdict or to the presiding judge before the verdict. See 483 U.S. at 127. Yet this Court held that Rule 606(b) prohibits the admission of testimony about such misconduct in support of a motion for a new trial. Rule 606(b) promotes full and frank juror discussion and discourages harassment of jurors by prohibiting a particular type of inquiry into their deliberations. That clear prohibition is not rendered ineffective merely because it does not apply to all conceivable situations.

Petitioner also argues (Br. 41) that, because jurors might be required to testify about deliberations to show dishonesty during voir dire in a criminal contempt proceeding, allowing jurors to testify about deliberations in order to prove such dishonesty in a new-trial motion would not pose any additional risk of chilling jurors' full and frank discussions in the jury room. Petitioner is incorrect. In order to convict a juror for contempt, the government must prove that the juror intentionally concealed information or gave false information with a "design * * * to obstruct the processes of justice." *Clark*, 289 U.S. at 10. Because that standard of proof is high, such prosecutions are rare. In contrast, if the Court were to adopt petitioner's view of Rule 606(b), nearly every losing litigant would have an incentive to pry into jury deliberations in search of any stray statement that might diverge from a juror's answer to a general voir dire question. As this Court explained in *McDonough Power*, "jurors are not necessarily experts in English usage," and it can be difficult to draw a line between purposefully dishonest voir dire answers and "mistaken, though honest, response[s]." 464 U.S. at 555. Creating such a large loophole in Rule 606(b)'s gen-

eral rule of exclusion is much more likely to chill jurors' willingness to speak openly during deliberations than the threat of contempt does.

b. Petitioner also argues (Br. 44-45) that adopting his view of Rule 606(b) would not undermine the finality of trials because efforts to obtain a new trial based on alleged juror dishonesty during voir dire will not always succeed. It is difficult to see how that obvious point distinguishes this category of efforts to overturn a verdict from any other. A litigant who seeks a new trial based on juror testimony that a verdict was reached by lot or that jurors were drunk during the trial may find that, "[a]fter reviewing the proffered testimony, a court [w]ould reject it as not credible." Pet. Br. 45. Rule 606(b) still prohibits the admission of such testimony, not only because such evidence would "in some instances lead to the invalidation of verdicts," *Tanner*, 483 U.S. at 120, but also because a general rule of admissibility would lead to increased attacks on jury verdicts and inroads on the jurors' confidence that they would not be subject to post-verdict attacks by the public.

c. Even more to the point, adopting petitioner's approach to Rule 606(b) would create an exception that swallows the rule. Many attempts to impeach a verdict with juror testimony could be "recharacterized as challenges to voir dire." *United States* v. *Benally*, 546 F.3d 1230, 1236 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009). Judges and lawyers frequently ask potential jurors whether they will follow the law as explained in the judge's instructions and decide the case based on the evidence. Under petitioner's approach, an affirmative answer to such a question could open a verdict to impeachment based

on testimony that jurors flipped a coin, arrived at damages by taking an average, were influenced by a defendant's failure to testify, speculated on matters not supported by the evidence, reached a verdict for political purposes, or were influenced by dislike of an attorney or party. Rule 606(b) bars all these types of testimony during an inquiry into the validity of a verdict. See *Federal Evidence* § 6:17, at 76-88 (compiling cases).

Similarly, a general voir dire question about whether a juror can be impartial could open the door to a host of post-verdict allegations of bias that are well within Rule 606(b)'s general prohibition. Jurors necessarily bring their life experiences with them to the jury room. Such experiences will inevitably be brought to bear on the jury's decision-making by influencing, *e.g.*, jurors' application of a standard of reasonableness, jurors' assessment of the credibility of witnesses, and jurors' calculation of damages for pain and suffering. See *United States* v. *Barraza*, 655 F.3d 375, 380 (5th Cir. 2011) ("We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies.") (citation omitted), cert. denied, 132 S. Ct. 1590 (2012). A juror's general voir dire statement that she can be unbiased should not open a later verdict to impeachment based on the testimony of other jurors that she, for example, considered an insurance adjuster's testimony to lack credibility based on her previous experience with insurance adjusters. As this Court has explained, "it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey* v. *Kemp*,

481 U.S. 279, 311 (1987) (brackets in original) (quoting Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 498 (1966)). The level of internal scrutiny of jury deliberations that petitioner seeks "would have the result that 'every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave.'" *Benally*, 546 F.3d at 1233 (quoting *Carson* v. *Polley*, 689 F.2d 562, 581 (5th Cir. 1982)).

5. The canon of constitutional avoidance does not support petitioner's view of Rule 606(b)

Petitioner argues (Br. 37-40) that the canon of constitutional avoidance requires the Court to adopt his limited view of Rule 606(b) in order to avoid "a violation of the litigant's constitutional right to an impartial jury." Pet. Br. 38. Petitioner is incorrect. The canon of constitutional avoidance "is an interpretive tool," *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009), that "has no application in the absence of statutory ambiguity," *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). As explained, the phrase "inquiry into the validity of a verdict" unambiguously includes inquiries into whether a verdict should be set aside and a new trial granted based on alleged juror dishonesty. Constitutional avoidance has no role to play in interpreting that text.

In any event, the court of appeals' correct interpretation of Rule 606(b) does not raise serious constitutional concerns. Although the Constitution guarantees litigants an impartial jury, it does not guarantee that parties may use any means to vindicate that right post-trial. This Court rejected that argument in *Tanner* in the face of allegations that jurors had used drugs and alcohol during the trial. 483 U.S. at 113.

Although the Court recognized that "a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing,'" the Court rejected the notion that the Sixth Amendment (in the criminal context) required the Court to imply an exception to Rule 606(b) in order to determine whether a particular tribunal was in fact impartial and mentally competent. *Id.* at 126-127 (quoting *Jordan* v. *Massachusetts*, 225 U.S. 167, 176 (1912)).

The *Tanner* Court reasoned that the defendant's right to an unimpaired jury in that case was protected by four aspects of the trial process: (1) voir dire examination, (2) observation of the jury by the judge and other court personnel during the trial, (3) observation of jurors by each other with the opportunity to report inappropriate behavior to the court before a verdict is rendered, and (4) post-verdict impeachment of a verdict by non-juror evidence of misconduct. 483 U.S. at 127. Although each of those protections will not be equally effective at discovering different types of juror misconduct, in the aggregate they adequately protect a litigant's right to a fair trial. In this case, petitioner could have better availed himself of the available protections by, *e.g.*, asking Whipple (or the entire venire panel) whether she or her family members had ever been in a serious automobile collision or by seeking and introducing non-juror testimony that Whipple's daughter had been involved in a fatal car accident.

Although petitioner concedes that this case involves no claim of racial bias, he urges (Br. 39-40) the Court to adopt an atextual interpretation of Rule 606(b) in order to allow the use of juror testimony about racially prejudiced statements during delibera-

tions to prove that a juror dishonestly claimed in voir dire to be unbiased. Racial bias is certainly an odious force in the legal system; but courts are not helpless to uncover it without intruding on the jury's deliberative process. Voir dire, combined with the threat of contempt or perjury charges, is generally an effective means of uncovering hidden biases. In addition, before a verdict is entered, other jurors are free to bring to the presiding judge's attention any biased statements made during deliberations and judges are free to advise jurors of their right to do so. Finally, counsel for a party may use investigative means other than interviewing jurors to determine whether any juror harbored an improper bias. If a juror harbors a racial bias, it is unlikely that the only evidence of such a bias will be an isolated statement during jury service.

Petitioner's constitutional-avoidance argument fails for an additional reason. If petitioner were correct that a litigant's constitutionally guaranteed right to a fair trial can be protected only by admitting juror testimony about deliberations that would show that a juror was dishonest during voir dire, perhaps a litigant would also have a right to subpoena and examine jurors as to the content of deliberations. Petitioner lauds (Br. 42-43) the limits that local court rules and ethics rules place on lawyers and litigants' ability to question jurors after trial. And he acknowledges (Br. 43) that judges are free to limit such communications even absent a general practice. It would be strange if the Constitution entitled a litigant to introduce the type of evidence at issue here, while a litigant's ability to obtain such evidence depended entirely on chance impulsive disclosures by individual jurors.

B. Juror Testimony About Statements Made During Jury Deliberations That Tend To Show Dishonesty During Voir Dire Is Not Admissible Under Federal Rule Of Evidence 606(b)(2)'s Exception For "Extraneous Prejudicial Information"

Petitioner argues in the alternative (Br. 45-48) that juror testimony about statements in deliberations tending to show dishonesty in voir dire fits within the exception in Rule 606(b)(2)(A) for "extraneous prejudicial information." Petitioner is incorrect.

The exception for testimony about "extraneous prejudicial information" "brought to the jury's attention" applies only to "particular information *relating to the case* that might affect the verdict," such as a juror's "specific personal knowledge about the parties or controversy" or information about the case obtained through news media or a juror's own investigations. *Federal Evidence* § 6:18, at 91-92 (emphasis added) (citing cases). The exception does not allow admission of testimony about jurors' use of "general background facts or data having nothing specifically to do with the case." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6075, at 531 (2d ed. 2007) (Wright & Gold). Although jurors should not "act in any case upon particular facts material to its disposition resting in their private knowledge, * * * they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." *Head* v. *Hargrave*, 105 U.S. 45, 49 (1882).

The exception for admission of evidence about extraneous prejudicial information "has been construed to cover publicity received and discussed in the jury

room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons." *Government of the V.I.* v. *Gereau*, 523 F.2d 140, 149 (3d Cir. 1975) (footnotes omitted), cert. denied, 424 U.S. 917 (1976); see *Benally*, 546 F.3d at 1236. Courts of appeals generally agree that "[a] juror's personal experience, however, does not constitute 'extraneous prejudicial information.'" *Marquez* v. *City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (citation omitted); see *Benally*, 546 F.3d at 1237; *Arreola* v. *Choudry*, 533 F.3d 601, 606 (7th Cir.), cert. denied, 555 U.S. 1048 (2008); *United States* v. *O'Brien*, 14 F.3d 703, 708 (1st Cir. 1994); *Hard* v. *Burlington N.R.R.*, 812 F.2d 482, 486 (9th Cir. 1987); *United States* v. *Duzac*, 622 F.2d 911, 913 (5th Cir.), cert. denied, 449 U.S. 1012 (1980). Courts of appeals also generally agree that "possible subjective prejudices or improper motives of individual jurors" do not fall within the exception. *United States* v. *Krall*, 835 F.2d 711, 716 (8th Cir. 1987); see *United States* v. *Villar*, 586 F.3d 76, 83-84 (1st Cir. 2009); *Benally*, 546 F.3d at 1237-1238; *Martinez* v. *Food City, Inc.*, 658 F.2d 369, 373 (Former 5th Cir. 1981); see also Wright & Gold § 6075, at 520-521 (observing that "more general influences on a verdict, such as the values or biases applied by the jury to weigh the evidence, are not within the scope" of the exception).

The court of appeals in this case correctly declined to admit juror testimony about Whipple's statements during deliberations under the exception in Rule 606(b)(2)(A) because those statements did not involve "particular information relating to the case," *Federal Evidence* § 6:18, at 91. Whipple's alleged statements

about her daughter's car accident had nothing to do with the specific parties or incident at issue in this case. Her views about her daughter's accident were no more "extraneous prejudicial information" than the *Tanner* jurors' use of alcohol was or than any other jurors' opinion based on life experiences would be.

Petitioner argues (Br. 46) that, when a juror fails to reveal in voir dire information that would have disqualified her from jury service, that juror was not competent to serve on the jury and any statements she made about the information that would have disqualified her is extraneous. That argument is foreclosed by this Court's decision in *Tanner*, which explained that courts have traditionally "treated allegations of the physical or mental incompetence of a juror as 'internal' rather than 'external' matters." 483 U.S. at 118. Even if one viewed Whipple's alleged omissions during voir dire as disqualifying her from jury service, she was surely no less competent to serve on the jury than were the *Tanner* jurors who were drunk, using drugs, and sleeping through the trial. See *id.* at 113-115.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

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APPENDIX

1. Federal Rule of Evidence 606 provides:

Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

2. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat 1926, 1934 (original enactment of Fed. R. Evid. 606) provided in pertinent part:

Rule 606. Competency of Juror as Witness

(a) At the trial.—A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.