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IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY P. WARGER, :
Petitioner :

v. : No. 13-517

RANDY D. SHAUERS. :

- - - - - x

Washington, D.C.
Wednesday, October 8, 2014

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:06 a.m.

APPEARANCES:

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of Petitioners.

SHEILA L. BIRNBAUM, ESQ., New York, N.Y.; on behalf of
Respondent.

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor
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behalf of United States, as amicus curiae, supporting
the Respondent.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll here argument
4 next in case 13-517, Warger v. Shauers.

5 Mr. Shanmugam.

6 ORAL ARGUMENT OF KANNON K. SHANMUGAM

7 ON BEHALF OF THE PETITIONER

8 MR. SHANMUGAM: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 In McDonough v. Greenwood, this Court held
11 that a party is entitled to a new trial where it can
12 show that a juror was materially dishonest at voir dire,
13 regardless of whether the juror's dishonesty actually
14 infected the verdict.

15 A McDonough claim is thus an inquiry into
16 the composition of the jury. It is not an inquiry into
17 the validity of the verdict. And for that reason,
18 Federal Rule of Evidence 606(b) unambiguously permits
19 the introduction of testimony about statements made
20 during deliberations in support of a McDonough claim.

21 JUSTICE KENNEDY: But -- but wasn't that a
22 case in which a third party came and gave the
23 information?

24 MR. SHANMUGAM: That is correct. And so we
25 are certainly not arguing that McDonough itself resolved

1 the question of the scope of Rule 606(b). But we do
2 think that the nature of the McDonough inquiry is really
3 critical here in determining whether Rule 606(b)
4 applies.

5 And in particular we think that the critical
6 fact is that McDonough in no way requires an inquiry
7 into what actually took place in the jury room. It is,
8 as we say in the briefs, a type of structural error.
9 And by that, I mean that it has no prejudice component.

10 And in that regard it is critically
11 different from other types of claims, such as a claim of
12 outright jury bias, where prejudice is required. And
13 it's really for that reason that we think Rule 606(b)
14 unambiguously permits evidence of this variety to be
15 admitted.

16 JUSTICE GINSBURG: I thought that the whole
17 rationale behind this is we don't want to invade the
18 jury province with information about what went on in the
19 jury room. And that's a pretty old rule. And some
20 people might think it makes no sense. You can have an
21 eavesdropper, and that's okay, but you can't have a
22 juror itself.

23 So this, what's involved here is a juror
24 reporting what she heard during the deliberations. And
25 it seems to me that's exactly the kind of thing that is

1 not permitted.

2 MR. SHANMUGAM: Justice Ginsburg, we're
3 certainly talking about statements made during
4 deliberations, and we are not disputing that this is the
5 type of evidence that is subject to the rule. Our
6 argument concerns the first requirement of Rule 606(b),
7 which goes to the type of inquiry during which evidence
8 that is otherwise covered by the rule would be
9 admissible. And I do think that Rule 606(b) embodies a
10 balance. It isn't simply about the countervailing
11 policy concerns, which Respondent and the government
12 understandably emphasize, of finality and jury secrecy.

13 There is, of course, a countervailing
14 concern here about fairness. That is, after all, the
15 principal concern on which the rule of McDonough itself
16 was based.

17 JUSTICE GINSBURG: But it's too easy to
18 convert anything that occurs into the jury room as
19 reflecting on the voir dire. So the judge instructs the
20 jury. Can you follow my instructions? Oh, yes, I can
21 follow my instructions. In the jury room, that juror
22 says: Oh, come on, let's just average it all up and go
23 home. Didn't -- didn't follow instructions. On your
24 theory that could come in, because it goes to dishonesty
25 at the voir dire stage.

1 MR. SHANMUGAM: So two responses to that,
2 Justice Ginsburg. First of all, as we point out in our
3 reply brief, our rule has been the rule, both on the
4 Federal level and on the State level, in numerous
5 jurisdictions. And we would respectfully submit that
6 there is really no evidence of the floodgates problem
7 that Respondents suggest will follow if this Court
8 adopts our interpretation.

9 JUSTICE GINSBURG: Well, perhaps if you
10 prevail. Why not?

11 MR. SHANMUGAM: Well, that goes to my second
12 response, which is that I think that it is going to be
13 very difficult in the hypothetical you posit for a party
14 to make out a successful McDonough claim. And that is
15 simply because the requirements of McDonough are in fact
16 quite stringent.

17 And in particular, the first requirement of
18 McDonough is that the moving party must show that the
19 response was intentionally dishonest. And by that, I
20 think that the Court really meant intentionally
21 dishonest at the time of voir dire. So to take the
22 hypothetical that the government uses in its brief --

23 JUSTICE ALITO: I think you're missing the
24 point of Justice Ginsburg's question. The question is
25 not whether the McDonough claim ultimately would

1 prevail. The question is whether the testimony from
2 jurors about what went on in the jury room is going to
3 be solicited in an effort to prove a McDonough claim.

4 MR. SHANMUGAM: Well --

5 JUSTICE ALITO: And I guess your answer to
6 -- what's implicit in what you're saying is that it
7 would be permissible to receive that testimony in that
8 situation.

9 MR. SHANMUGAM: Well, Justice Alito, I think
10 there are two separate issues here. The first is the
11 concern about undue solicitation. And as we have
12 explained, there are a variety of rules that I think
13 impose appropriate limits on a lawyer's ability to go
14 out and get evidence of this variety. And of course
15 lawyers always have an incentive to talk to jurors if
16 they are able to do so.

17 Our point is simply that, to the extent that
18 there is a concern raised about harassment of jurors,
19 that is already dealt with, and appropriately so, by
20 governing rules.

21 Now, I think Justice Ginsburg's question --

22 CHIEF JUSTICE ROBERTS: I'm sorry. I didn't
23 follow that. You said lawyers always have an interest
24 in talking to -- what's to prevent them from doing so if
25 the payoff could be as significant as you're looking for.

1 MR. SHANMUGAM: Well, I think at a minimum,
2 Mr. Chief Justice, lawyers certainly would have that
3 incentive, even if we were to lose this case, because in
4 talking to jurors, that conversation could very well
5 lead to evidence that unquestionably would be
6 admissible, because, after all, a party can always make
7 a McDonough claim based on extrinsic evidence.

8 And so, for instance, if in fact a juror had
9 posted something on Facebook that indicated that the
10 juror had been dishonest at voir dire, there's really no
11 debate that that would be admissible.

12 But to go to Justice Ginsburg's question,
13 really sort of the second part of this, I think it's
14 important to remember that the mere fact that the
15 evidence is admissible under Rule 606(b) is not the end
16 of the inquiry. The evidence still has to be probative
17 and probative with regard to the requirements of
18 McDonough.

19 And I think perhaps the best example that I
20 would give is actually an example that the government
21 uses in its brief, the example of the situation where
22 the jurors go back into the jury room and they flip a
23 coin in order to resolve the case.

24 Now, the government suggests that perhaps a
25 party could seek to use that as evidence that the jurors

1 were in fact dishonest when they said that they could be
2 fair and impartial at the time of voir dire. But if so,
3 that is pretty weak evidence of that for the simple
4 reason that the requisite showing under McDonough is
5 that the juror intended to be dishonest at the time of
6 voir dire.

7 And in the coin flip hypothetical, it might
8 very well have been that the jurors flipped a coin
9 because they were frustrated with their inability to
10 reach a decision. They may have wanted to go watch the
11 football game. There any number of reasons. But that
12 is not really very strong evidence of intentional
13 dishonesty at the time of voir dire. I think this
14 case --

15 JUSTICE GINSBURG: But what is the strong
16 evidence of intentional dishonesty in this case? The
17 woman says: I can judge this case fairly, I can award
18 damages. And one of the other things that the judge
19 instructs the jury: You can take account of your own
20 life experience.

21 What is so blatant about that? How do we
22 infer that she intended to be dishonest at the time of
23 the voir dire?

24 MR. SHANMUGAM: Well, again, I think that
25 this really goes to the requirements of McDonough as

1 opposed to the interpretation of Rule 606(b). But I
2 think that there's a meaningful difference between a
3 juror simply bringing personal experiences to bear on
4 the one hand and a juror doing so in a way that
5 indicates that the juror was, as was true in this case,
6 simply unwilling to award damages to Petitioner in a
7 case of this variety.

8 And I think it's important to underscore the
9 extent that the facts of this case shed some light on
10 the legal question. But this is not simply a case about
11 a question involving fairness and impartiality. There
12 were also questions asked about whether the jurors would
13 be willing to award damages of various types in a case
14 of this variety.

15 And to point to the evidence of dishonesty
16 in the record at pages 40a, to 41a of the appendix to the
17 petition, Juror Titus said that Juror Whipple said in the
18 discussions that if her daughter had been sued for the
19 accident for which she was responsible, it would have
20 ruined her life.

21 In our view, that is evidence that the juror
22 was unwilling to follow the instructions and to apply
23 the law to the facts. And we believe that it also
24 strongly supports the inference that the juror was
25 dishonest at the time of voir dire when she answered --

1 CHIEF JUSTICE ROBERTS: Well, it's pretty
2 ambiguous. She said if -- if she had been sued, she
3 would have to pay a lot of damages, right? Well, this
4 guy has been sued. I mean, I don't know that you can
5 just take that and says that means she's not going to
6 award a judgment in favor of the -- of the plaintiff.

7 MR. SHANMUGAM: Well, she said it would have
8 ruined her life if she had been sued. And to be fair,
9 this is obviously not smoking gun evidence. This is not
10 a situation where the juror comes into the jury room and
11 says, look, I really lied when I answered those
12 questions at voir dire.

13 It is inferential evidence, and it will be a
14 matter for Judge Viken on remand if this Court agrees
15 with our interpretation to determine first of all
16 whether this affidavit is in fact probative evidence of
17 intentional dishonesty, and second --

18 CHIEF JUSTICE ROBERTS: Well I guess the reason
19 I ask is precisely for that reason. In other words, it's
20 a fairly broad inquiry. The circumstances in which you
21 would allow an inquiry are fairly broad. It's not
22 simply when there's a smoking gun, but a very debatable
23 point about, well, she -- she didn't want to award
24 damages because if her daughter had been sued it would
25 ruin her life, as opposed to, well, she realized there'd

1 be a lot of damages here because the guy was sued.

2 MR. SHANMUGAM: And again, that really goes
3 to the application of the McDonough standard. And we've
4 now had 30 years of experience with the McDonough
5 standard. This is not a recent decision of this Court.

6 Justice Kennedy: But McDonough did not
7 have --

8 JUSTICE SCALIA: My problem is not -- is not
9 that, the difficulty
10 of proving that it did demonstrate dishonesty during the
11 voir dire. My problem is what you also have to
12 establish, namely that this does not constitute an
13 inquiry into the validity of a verdict or indictment.

14 MR. SHANMUGAM: Well, thank you, Justice
15 Scalia, because this is obviously --

16 JUSTICE SCALIA: That's 606(b)(1), and why
17 are you raising this issue? Because you want to set
18 aside the verdict, right?

19 MR. SHANMUGAM: Well, this is obviously a
20 case about the interpretation of that language.

21 JUSTICE SCALIA: Right.

22 MR. SHANMUGAM: But I think it's critical to
23 realize that that language does not simply refer to any
24 challenge to the verdict. It refers to inquiries into
25 the validity of the verdict. And in our view, that

1 language unambiguously --

2 JUSTICE SOTOMAYOR: Except -- why -- why
3 would you have an inquiry into the validity of the
4 verdict absent juror misconduct? You're not going to
5 use that statement in any other part of your case.

6 MR. SHANMUGAM: But the critical point,
7 Justice Sotomayor, is that that language focuses on the
8 inquiry and it focuses on the substantive inquiry
9 mandated by the claim at issue.

10 And again, as I indicated at the outset, a
11 claim of juror dishonesty during voir dire does not
12 require any examination of the verdict itself. It does
13 not depend in any way on what took place in the jury
14 room. And it's really for that reason that we think
15 that a McDonough claim is qualitatively different from a
16 claim --

17 JUSTICE KAGAN: I guess I don't understand
18 that, Mr. Shanmugam. I mean, one reason that a verdict
19 can be invalid has to do with what happens in the jury
20 room. And another reason why a verdict can be invalid
21 might have to do with the composition of the jury
22 itself.

23 And why we should read that language to
24 include the first but not the second I guess I'm just
25 not getting as a matter of language.

1 MR. SHANMUGAM: Sure. Well, I do think that
2 you have to give meaning to every word in this
3 provision. And I really do think that this provision is
4 different from a provision that just refers to
5 challenges to the verdict. And it certainly it true
6 that in this case, as in many others, we are seeking as
7 the remedy on our McDonough claim a new trial. And a
8 component of that, once a verdict has been reached, is
9 obviously that the verdict should be set aside.

10 In other words, I'm not disputing the
11 proposition that our purpose here is to obtain a new
12 trial, and of course, therefore, to set aside the
13 verdict that has already been reached.

14 My point is simply that a McDonough claim in
15 no way turns on the manner in which the jury has reached
16 the verdict.

17 JUSTICE KAGAN: I know, but -- so maybe
18 we're just going back and forth here. But an inquiry
19 into the validity of the verdict means asking the
20 question, is the verdict valid? And the question, is
21 the verdict valid, can have answers that refer either to
22 the deliberative process itself or to the composition of
23 the jury.

24 MR. SHANMUGAM: But that is not the question
25 that a McDonough claim asks. And I think the best

1 evidence of that is that I think it's really undisputed
2 that a McDonough claim can be brought even before a
3 verdict has been reached.

4 JUSTICE KENNEDY: I haven't -- I haven't
5 quite counted, but you keep saying this is a McDonough
6 claim. If you read the McDonough case, Chief Justice
7 Rehnquist does not cite Rule 606. He does not cite.
8 I think I'm correct.

9 MR. SHANMUGAM: You're absolutely correct.

10 JUSTICE KENNEDY: And so you want to tell
11 us, don't look at Rule 606. Just look at McDonough.
12 That's what you're telling us. It's a whole --

13 MR. SHANMUGAM: I am eager for you to look
14 at the language of Rule 606 because I think it supports
15 our position. The only reason that we're talking about
16 McDonough at all is because Rule 606 requires you to
17 look at the type of inquiry that the claim at issue
18 mandates. And I think in many ways this nature --

19 JUSTICE KENNEDY: But it also requires you
20 to look at who is producing the evidence. And here, the
21 juror is producing the evidence and McDonough was a
22 third person. It's different.

23 MR. SHANMUGAM: Well, the rest of Rule
24 606(b) is, of course, all about that, because it is all
25 about the type of evidence that is subject to exclusion.

1 And again, there's no debate that that portion of the
2 rule sweeps quite broadly and would otherwise include
3 the evidence at issue here.

4 Our point is simply that a McDonough claim
5 is a type of structural error and I think that that
6 points up the --

7 JUSTICE GINSBURG: But you're taking a case
8 that had nothing to do with a juror testifying about
9 what -- what -- the deliberations in the jury room. I
10 think you're using the case for much more than it's
11 worth, much more than the opinion writer put into it.
12 It just didn't present the question of what about a
13 juror testifying about the deliberations in the jury
14 room.

15 MR. SHANMUGAM: But, Justice Ginsburg, I do
16 think that the nature of a McDonough claim points up one
17 of the oddities of Respondent's position, which is that
18 there's really no dispute that if a McDonough claim is
19 brought before a verdict has been reached, that
20 evidence -- even evidence from the jury room would be
21 admissible. And so, for instance, if a juror came
22 forward before the jury actually completed its
23 discussions and reached a verdict, I think there's no
24 dispute here -- at least I don't see any dispute in the
25 briefs -- that that evidence would be admissible.

1 And so, too, of course, in Clark, this Court
2 held that evidence of this variety would be admissible
3 in a contempt proceeding after the verdict has been
4 reached. And so --

5 JUSTICE ALITO: This is what troubles me
6 about your -- your argument. I suspect, maybe I'm wrong
7 and you tell me if I am, that in a case where there's a
8 lot at stake, a really good lawyer loses a case and
9 there was a lot on the line. And let's suppose this
10 lawyer gets a transcript of what was said in the jury
11 room. Do you think it is going to be very hard for the
12 lawyer to find something that some juror said that can
13 be used to make out a somewhat plausible claim that
14 the -- that the juror was dishonest during voir dire?
15 The juror promises during voir dire to be fair, and it
16 appears from this transcript the lawyer was for the
17 plaintiff or for the defendant from the first minute of
18 deliberations. Or the juror says, I will follow the
19 jury instructions. And then at some point, the juror is
20 making an argument that's inconsistent with the jury
21 instructions. Do you see the problem?

22 MR. SHANMUGAM: I -- I see the problem. I
23 would just respectfully submit, Justice Alito, that it
24 hasn't proven to be a problem in practice. And as we
25 note in our reply brief, this has been the rule in the

1 Ninth Circuit, it's been the rule in the nation's
2 largest State jurisdiction, California, for decades.
3 And yet in those jurisdictions, there is less than one
4 decision per year that we've been able to find involving
5 a McDonough claim based on this type of evidence.

6 And, of course, as we -- I was just going to
7 say, one last thing, Justice Alito, which is that, of
8 course, as we also point out, our rule was, if anything,
9 the prevailing rule at common law even before the
10 enactment of Rule 606(b) and there's no evidence that
11 there was a floodgates problem at common law either.

12 CHIEF JUSTICE ROBERTS: Is -- under your
13 reading of 606(b), is there anything that is an inquiry
14 into the validity of a verdict other than a motion to
15 set aside the verdict?

16 MR. SHANMUGAM: Well, I think that there
17 might be certain types of claims of which prejudice is a
18 component. And certainly, if you brought a motion that
19 was based on pure juror bias of the type that was at
20 issue in cases such as Remmer v. United States and Smith
21 v. Phillips --

22 CHIEF JUSTICE ROBERTS: Well, what would --
23 that motion would be presumably a motion to set aside
24 the verdict.

25 MR. SHANMUGAM: I assume it would be framed

1 that way rather than as a motion for a new trial.

2 CHIEF JUSTICE ROBERTS: The reason I ask is
3 because they don't say that. It seems to me a broader
4 definition of any inquiry into the validity of a
5 verdict. If they wanted to say, you know -- if they
6 only meant a motion to set aside a verdict, you'd think
7 they would have said that.

8 MR. SHANMUGAM: Yeah. I mean, I -- off the
9 top of my head, I can't think of another type of motion
10 for new trial that would be treated differently. But
11 certainly, wherever the claim depends in any way on what
12 took place in the jury room, the evidence would, of
13 course, still be subject to the rule. And again, that
14 sweeps in claims of juror bias, it sweeps in all of the
15 types of claims about which the framers of Rule 606(b)
16 were clearly concerned. Claims involving the manner in
17 which the jury reached the verdict, claims involving
18 compromised verdicts, quotient verdicts and the like.

19 And I think if anything, to the extent that
20 the drafting history of Rule 606(b) is relevant, it
21 tells us two things. First, there's no indication that
22 the framers of the rule intended to disturb what was the
23 prevailing practice at common law, particularly after
24 this Court's decision in Clark. There is simply nothing
25 in the history of the rule that suggests that. And if

1 anything, I think that the history of the rule suggests
2 that the central focus in framing the rule was on
3 excluding evidence concerning the manner in which the
4 jury reached its verdict, and not evidence that was used
5 to demonstrate that the jury was improperly constituted.

6 Now, again, because the rule focuses on the
7 inquiry mandated by the claim at issue, we think that
8 ours is the better textual interpretation. But at a
9 minimum, if the Court thinks that the rule is somehow,
10 by its terms, ambiguous, I would simply make two points.
11 First, we do think that the canon of constitutional
12 avoidance would apply in this context. At least one
13 court of appeals has held that there would be a
14 constitutional problem with excluding evidence in cases
15 involving racial bias. We believe that there would be a
16 serious constitutional concern. More generally, because
17 the right to adequate voir dire is, as this Court has
18 said, part of the right to trial by an impartial jury.

19 But even if the Court doesn't think that
20 this is a matter for constitutional avoidance, we
21 certainly think that there is a constitutionally based
22 interest here. The interest in protecting a litigant's
23 right to a fair trial. And we believe that that
24 interest does outweigh the countervailing interest in
25 finality in jury secrecy. Now, in Clark --

1 JUSTICE ALITO: A party has a right to a
2 competent jury, doesn't it?

3 MR. SHANMUGAM: Yes, that is true.

4 JUSTICE ALITO: Constitutional right to
5 that. And yet, you couldn't inquire -- we -- the Court
6 has held that there can't be an inquiry into whether the
7 jurors were intoxicated?

8 MR. SHANMUGAM: Well, that is true. But I
9 think that the Court reached that conclusion based
10 entirely on the outside influence exception. And I
11 think part of the reason why that is true is that I
12 think that the Court viewed the inquiry in that case in
13 Tanner as requiring a showing of prejudice. In other
14 words, I think that the Court was operating on the
15 premise that the underlying claim there would require a
16 showing that the drunkenness actually redounded to the
17 moving party's prejudice.

18 My point is simply that when we're looking
19 at the policy balancing that is required here, the
20 better point of reference is this Court's decision in
21 Clark where the Court suggested -- albeit in the context
22 of contempt proceedings -- the concerns about fairness
23 outweighed the litany of concerns about jury secrecy and
24 harassment. And to be sure --

25 JUSTICE GINSBURG: That was leaving out the

1 conspicuous difference, there was no jury verdict
2 impugned in the contempt case.

3 MR. SHANMUGAM: That is correct. Although
4 the Court did indicate that its rule was consistent with
5 the common law no impeachment rule. But I think with
6 regard to the policy considerations, it certainly is
7 true that this case is different because it does possess
8 a final verdict. But I think with regard to finality, I
9 would point to the experience in the jurisdictions that
10 have adopted our rule, which confirms that if evidence
11 of this variety is admissible, verdicts are only rarely
12 set aside and that is because McDonough itself sets an
13 appropriately high standard.

14 And, of course, the only question before the
15 Court in this case concerns the admissibility of this
16 evidence. It would be open to the district court on
17 remand to decide what to do with this evidence if it is
18 admitted. Our submission is simply that Rule 606(b) by
19 its terms permits the admission of this evidence because
20 it is not being admitted in an inquiry into the validity
21 of the verdict.

22 And if I can reserve the balance of my time
23 for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Miss Birnbaum.

1 ORAL ARGUMENT OF SHEILA L. BIRNBAUM

2 ON BEHALF OF THE RESPONDENT

3 MS. BIRNBAUM: Thank you, Your Honor. May
4 it please the Court, Mr. Chief Justice:

5 What the Petitioner would do here is change
6 the rules of 606 and how it would apply. 606 is clear.
7 This Court has said its language is clear. What
8 Petitioner does not emphasize is that what they did
9 below was to make a motion for a new trial and to
10 invalidate the verdict. The fact that the ground was
11 dishonesty of the juror doesn't change anything from the
12 Tanner case where the grounds for the new trial was that
13 the jurors were drinking during the trial and during
14 deliberations.

15 McDonough doesn't change the nature of
16 606(b). All McDonough says, I think as you have pointed
17 out, is that if there is an inquiry, that inquiry would
18 have to be such, but it does not tell you why it's
19 admissible. And Rule 606 tells us what's admissible.
20 And this, the Petitioner has conceded is not admissible.
21 It is jury testimony of what happened during
22 deliberations. So that's clear.

23 So what are we fighting about? We're
24 fighting about what did Congress mean by during an
25 inquiry into the validity of the verdict. This is an

1 inquiry into the validity of the verdict. You can't
2 just separate the grounds. What they want here is a new
3 trial and the verdict invalidated.

4 And so it falls exactly into 606(b), and the
5 legislative history absolutely supports that. Congress,
6 this Court made decisions and balanced the fairness on
7 one hand of allowing in this testimony and problems
8 about the sanctity of a jury trial and the entire
9 structure of our judicial system. And to adopt
10 Petitioner's analysis would put this all on its head.
11 What would we have? I think we all know what we would
12 have here. Every lawyer, good ones or bad ones, Your
13 Honor, would try to ask generalized questions -- can you
14 be fair -- and then wait and see what happens.

15 CHIEF JUSTICE ROBERTS: Your friend says
16 that hasn't been the experience in a large portion of
17 the country.

18 MS. BIRNBAUM: Well, that's not true
19 because, first of all, my friend doesn't tell you that
20 there are only five States that allow in this kind of
21 evidence at all.

22 CHIEF JUSTICE ROBERTS: Is California one of
23 them?

24 MS. BIRNBAUM: California is one of them.

25 CHIEF JUSTICE ROBERTS: Well --

1 MS. BIRNBAUM: But even in California, Your
2 Honor, there are different requirements. These cases go
3 off -- I'll just give you a perfect example. He cites a
4 bunch of cases in the Ninth Circuit that he says these
5 are the cases that apply the rule. Well, they don't.
6 Even the cases that they rely on from the Ninth Circuit,
7 Henley and Hard, it is dicta in those cases that you can
8 admit testimony on -- of a juror on what happened during
9 deliberations if you're trying to determine whether
10 there's dishonesty. In those cases themselves, that was
11 not the holding of the case. There was dicta that says
12 you should be able to do that, but the holdings of the
13 case went off on extraneous prejudicial influences or
14 extraneous prejudicial information.

15 And there are --

16 CHIEF JUSTICE ROBERTS: But your argument --
17 your argument is this is going to be something lawyers
18 are going to ask about in every case.

19 MS. BIRNBAUM: And they will --

20 CHIEF JUSTICE ROBERTS: It seems to me -- it
21 seems to me if you're dealing with California, you would
22 have a lot more evidence of that, since they operate
23 under the rule that your friend is arguing for.

24 MS. BIRNBAUM: Well, they do and they don't,
25 Your Honor. They -- you can introduce certain things in

1 California, but you can't introduce the mental processes
2 in California.

3 But the answer to that is we don't know
4 what's happening in California. There is no -- no
5 experience that anybody has about what's going on in
6 California or how the courts are applying it. We didn't
7 have an opportunity to respond to all those California
8 cases, because they are only cited in the reply. But
9 we've gone through all those cases and in many of those
10 cases this kind of testimony was not let into evidence.

11 So we don't know what the experience was in
12 California, but we do know what Congress said. And we
13 do know what Congress had before them and what Congress
14 wanted. Congress did the balancing here. Congress
15 balanced the fairness of jurors, the fairness of a jury
16 trial against all of the issues and policies of keeping
17 the jury in a black box because it's good for the
18 system. Without it, we couldn't function.

19 JUSTICE SOTOMAYOR: Ms. Birnbaum, what sense
20 does it make to do what we did in Clark, which is to say
21 you can invade the jury deliberations in a contempt
22 proceeding. So that -- the jury is not sacrosanct. The
23 court has already said that the proceeding for contempt
24 doesn't involve the verdict and it's a criminal action,
25 and not permit the use of that evidence in the civil

1 trial.

2 The same thing will have happened in both
3 situations. The jury's sanctity has been invaded.

4 MS. BIRNBAUM: But, Your Honor, the reason
5 that we allow it in a contempt proceeding is it doesn't
6 affect the validity of the verdict. It doesn't go to
7 what happened with regard to the verdict.

8 And the contempt proceedings are few and far
9 between. Jurors aren't going to be harassed on a
10 regular basis, and if you have a criminal contempt
11 proceeding, you have a prosecutor who is going to make a
12 determination and stand between the jurors and the --
13 and the contempt proceeding before they will bring a
14 contempt proceeding. We know how few these are.

15 Here we're talking about in every criminal
16 case, in every important civil case, or not such an
17 important civil case. This is a run-of-the-mill case we
18 have here, a simple accident case.

19 JUSTICE GINSBURG: Is -- Ms. Birnbaum, is
20 there no way, is there no way to police the honesty of
21 jurors' answers on voir dire? This is an obvious way,
22 if it were permissible, to police the honesty. But is
23 there any other way?

24 MS. BIRNBAUM: Your Honor, in this case
25 especially, and I'm not sure I'm answering your

1 question, we could have had a different kind of voir
2 dire. There was no -- there was no specific question
3 here: Has any member of your family or you been
4 involved in an automobile accident? That was never
5 asked of the jury. And bad if a juror lied about that;
6 well, they could, or the juror could have said yes.
7 Assuming there was -- assuming that the juror
8 foreperson's daughter was involved in an auto accident,
9 she could have said that, and they could have inquired.
10 But they didn't do that.

11 And look at the gamesmanship that can be
12 played with lawyers. They don't ask specific questions
13 which they should to get to the right answers and to get
14 to the right jurors in voir dire, and then they sit back
15 and wait and game the system and see how the verdict
16 comes back, talk to the jurors, and then they have a
17 ground to set aside a verdict.

18 This is not what Congress wanted. That's
19 not what the Supreme Court said should happen in Tanner.
20 And the Petitioner here says under the common law, this
21 was the rule. You could admit this kind of testimony.
22 That's utterly untrue. In Tanner, this Court said under
23 the common law, it is clear that you could not admit
24 this evidence.

25 That was the majority rule. There was a

1 minority rule. And you know what happened? When
2 Congress looked at this issue, they adopted the majority
3 rule. They said the jury room is a black box except for
4 certain extraneous influences, extraneous prejudicial
5 information. This is not it. Doesn't fall within that
6 category.

7 JUSTICE ALITO: And why not?

8 MS. BIRNBAUM: Because, Your Honor, this is
9 generalized information. When we talk about extraneous
10 prejudicial information, I think the case law is
11 absolutely clear. It has to be about the case, about
12 information that you put into the jury room about the
13 defendant or about the incident, the accident.

14 If you went and looked at the scene of the
15 accident and then came back and talked to the jurors
16 about it, that would be extraneous. But this kind of
17 generalized information, assuming it's true -- my
18 daughter was in an auto accident. Okay, the Petitioner
19 talks about her unwillingness to determine certain
20 damages. This case never came to damages. What
21 actually happened in this case is the jury met for two
22 hours. This was a question of contributory fault and
23 what happened was the jurors came, asked the court a
24 question: If we apply -- if we apply contributory
25 negligence and we find that there's slight contributory

1 negligence, must we find for the defendant?

2 JUSTICE ALITO: What would happen in the
3 really egregious case? The jurors are asked during voir
4 dire, can you be fair to every -- to parties regardless
5 of race. Oh, yes, yes, we can. And then after there's
6 a verdict, a juror comes -- comes forward and says
7 during the jury deliberations, the jurors were making
8 all kinds of biased statements and they were clearly
9 prejudiced. What would happen there?

10 MS. BIRNBAUM: I think, Your Honor, under
11 606(b), there would be no difference. You still could
12 not introduce that juror testimony. Now, maybe that's
13 wrong and maybe Congress should change 606(b), but
14 that's a job for Congress in connection with the
15 judicial conference and with all of the people that
16 would ask Congress to come in and testify and Congress
17 can make that decision if they want to have an
18 exception.

19 But Congress knew about that when -- when it
20 passed 606(b), and it -- it didn't make an exception for
21 racial bias. And if Congress wants to do it, it could
22 do it, but this Court can't do it or shouldn't do it
23 because it's not part of what Congress intended.
24 Congress knew quite well, there was a lot of discussion
25 here, and the Petitioner is correct. Most of the

1 discussion did not go to the words "during an inquiry
2 into the validity of the verdict."

3 JUSTICE KAGAN: Well, do you think that with
4 respect to the kind of case that Justice Alito has in
5 mind, a case of racial bias and let's put it in a
6 criminal context, that maybe it's not up to Congress,
7 that at some point one begins to run into constitutional
8 issues?

9 MS. BIRNBAUM: Well, I think at least if
10 this Court, in Tanner, looked at those constitutional
11 issues not in -- not in the racial bias context, but in
12 the context of having a drunk juror deciding a
13 particular case --

14 JUSTICE SCALIA: Why -- why is that the -- I
15 mean, would we make an exception to normal hearsay rules
16 where racial bias is the issue?

17 MS. BIRNBAUM: You would not, Your Honor.

18 JUSTICE SCALIA: I don't think so.

19 MS. BIRNBAUM: But the -- but the further
20 answer to that is this Court has already said there are
21 other safeguards that are in place that we feel will be
22 sufficient in order to safeguard the Sixth Amendment
23 rights in that particular instance, or the Seventh
24 Amendment rights, of a fair trial. This Court has said
25 we can't give litigants a perfect trial. We -- we know

1 that there are going to be some cases where a juror acts
2 improperly, acts with bias, but we can't change the
3 system and open it up to jurors being harassed, to
4 jurors being asked what happened in the jury room,
5 because we will then take a private process and make it
6 a public inquiry. And Congress didn't want that. This
7 Court in Tanner said that was not --

8 JUSTICE KAGAN: I suppose one idea --
9 because we have relied a lot on the efficacy of other
10 safeguards, and this isn't this case, so you can just
11 say it's not this case. But -- that those safeguards
12 might not be so effective in certain contexts and
13 particularly with respect to ferreting out racial bias
14 or religious or ethnic or something like that.

15 MS. BIRNBAUM: I think, Your Honor, again
16 I'll come back to really this is an issue for Congress.
17 The rules of evidence are now adopted. Even if the
18 Court feels there is unfairness in them, they have to
19 interpret them. And they have to interpret them as
20 Congress wrote them. Certainly, Congress knew about
21 racial bias and ethnic bias when it was writing these
22 rules and passing these rules in 1972. There were
23 not --

24 CHIEF JUSTICE ROBERTS: Is there any -- is
25 there any alternative remedy available that doesn't go

1 to the validity of the verdict? You know, the
2 Petitioners allegedly were injured to a great extent by
3 the jurors' -- I could call it fraud, I guess. Can they
4 bring an act -- direct action against her?

5 MS. BIRNBAUM: No, Your Honor, I don't -- I
6 don't think so. I think the only thing is if a juror
7 lies, there is the contempt proceeding that can be
8 brought. It's -- it's part of what we have to live with
9 in the system because we can't provide perfect trials
10 for people. We can only provide as fair as they can.

11 And in this particular case, the broad
12 questions that were asked, the fact that -- there was
13 no -- they didn't -- the Petitioner says there was an
14 unwillingness on this -- on this juror to find damages.
15 There's nothing in the affidavit that was presented that
16 even hints at that. It says she may have influenced
17 other jurors. By the way, do we bring in the other
18 jurors? Well, this is what this would open up.

19 Let's say we go back. The juror that put in
20 the affidavit goes and testifies. The forelady goes and
21 testifies. They have diametrically different views of
22 what happened in the jury room. Do we then bring in all
23 the rest of the jurors? That's what -- and the fact
24 that McDonough may, in certain circumstances, allow
25 jurors to -- and by the way, McDonough does not allow

1 jurors to testify. As you said, there was no juror
2 testimony there.

3 And the fact is that the rule is clear on
4 its face. This falls exactly within 606(b) and the
5 legislative history and the policy behind it, and we
6 should not be extending it to this kind of situation.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Ms. Harrington.

10 ORAL ARGUMENT OF SARAH E. HARRINGTON

11 FOR THE UNITED STATES,

12 AS AMICUS CURIAE, SUPPORTING RESPONDENT

13 MS. HARRINGTON: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 Any hearing on a motion for a new trial is
16 an inquiry into the validity of a verdict. That's true
17 when a plaintiff -- when a litigant brings a McDonough
18 claim because of what it -- the litigant is arguing is
19 that verdict that was issued in his case is invalid
20 because the tribunal that issued the verdict was
21 improperly constituted. It would be the same if the
22 litigant were arguing that the judge that issued a
23 decision in a case should have recused herself from the
24 case based on some sort of conflict. It would be the
25 same if a litigant were arguing that the jury had 5

1 members or 25 members.

2 In each of those examples, how the argument
3 goes is that the -- the tribunal was improperly
4 constituted and so the verdict that was issued was
5 invalid because an improperly constituted tribunal
6 cannot issue a valid verdict.

7 Now, Mr. Shanmugam says that we should limit
8 the phrase "inquiry into the validity of a verdict" to
9 cases where what you're inquiring into is what happened
10 in a jury room. But just as a matter of normal English
11 usage, I think we -- it's not hard to imagine an inquiry
12 into the validity of a verdict that would not look into
13 what happened in a jury room. For example, if a
14 criminal defendant who's convicted files a motion for a
15 new trial based on sufficiency of the evidence, I think
16 anyone would think that the hearing on that motion is an
17 inquiry into the validity of a verdict because a verdict
18 that's based on insufficient evidence is not valid. You
19 wouldn't look at what happened in the jury room and so
20 you may have no occasion to apply Rule 606(b) in that
21 kind of inquiry, but it would certainly be an inquiry
22 into the validity of a verdict.

23 When someone brings a McDonough claim, it's
24 just not a freestanding thing. They bring it as part of
25 a motion for a new trial; that's part of an inquiry into

1 the validity of a verdict.

2 Now, there's been some questions about
3 what's happened in California where this type of
4 evidence is admitted. What Mr. Shanmugam says is that
5 there have not been -- there hasn't been an appreciable
6 increase in the number of successful McDonough claims in
7 California. Of course, the problem that Rule 606(b)
8 targets is not too many successful McDonough claims,
9 it's overly intrusive inquiries into what's happened
10 in -- during jury deliberations and so that's really not
11 responsive.

12 But it is true that in California and in
13 about five other States, this type of evidence is
14 admitted because those States apply the common -- the
15 Iowa version of the common law rule. And under the Iowa
16 rule, anything that jurors said during deliberations you
17 can admit testimony about because it wasn't something
18 that was internal to a juror's mind, it was something
19 that could be corroborated or rebutted by other jurors.
20 And so this type of evidence would be admissible in
21 those five or six States because of they apply a
22 different type of -- different version of -- in the
23 no-impeachment rule.

24 Of course, Congress was aware that that was
25 an option available to it when it adopted Rule 606(b)

1 and that was the version of the rule that the House of
2 Representatives wanted. There's lots of back and forth
3 that's covered in the briefs.

4 It's not true that that was the prevailing
5 rule of common law. The Wigmore Treatise of 1961
6 identifies 12 out of 50 States that apply the Iowa
7 version. The other 38 States applied the majority
8 version, which was more restrictive or -- you know,
9 excluded more evidence. That was plainly the version of
10 the rule that was adopted by the Senate.

11 And so I think that really points up the
12 fact that in this kind of area where you have these
13 competing important interests, it's really up to the
14 legislature to decide where it's going to draw the line.
15 Here the line is pretty clear. Congress couldn't
16 have -- it would have been hard for them to write the
17 rule any more broadly than they wrote it. It applies in
18 any -- during any inquiry to the validity of a verdict.
19 It covers anything that happens in the jury room unless
20 one of the specific exceptions applies.

21 The exception for extraneous information
22 does not apply here, it's our view, because that
23 exception has been construed only to apply to evidence
24 that specifically related to the case. Congress
25 understood that. That's reflected in the legislative

1 history. It's reflected in the common law. And if the
2 Court doesn't have any questions, I think I've hit the
3 highlights.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MS. HARRINGTON: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Shanmugam, you
7 have 7 minutes remaining.

8 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

9 ON BEHALF OF THE PETITIONER

10 MR. SHANMUGAM: Thank you, Mr. Chief
11 Justice.

12 I think there are just four very quick
13 points that I'd like to make. First of all, with regard
14 to the text of the rule and this question of whether
15 this constitutes an inquiry into the validity of the
16 verdict, I would just say one thing in response to what
17 Ms. Harrington has just said. If, for instance, a party
18 files a motion for a new trial based on the
19 insufficiency of the evidence, that is, by definition, a
20 claim that can be brought only at the close of the
21 evidence in the case.

22 A McDonough claim is critically different
23 because that claim ripens at the point at which the
24 allegedly dishonest juror is actually empaneled. And so
25 a McDonough claim could be brought before the verdict

1 has been reached or after the verdict has been reached.
2 And to the extent that the argument here is that the
3 jury is a black box and that one shouldn't look into the
4 jury's deliberations, I would note, again, that evidence
5 of this variety would plainly be admissible either
6 before a verdict has been reached or in a contempt
7 proceeding after a verdict has been reached.

8 JUSTICE SCALIA: Yes. But, of course,
9 you'd -- you'd have no incentive to do that until you
10 lose, right? So you would rather sit around and see if
11 the verdict goes against you at which point you -- you
12 would make the claim.

13 MR. SHANMUGAM: Well, that is -- that is
14 certainly true, but the --

15 JUSTICE SCALIA: Nobody is going to make the
16 claim before verdict comes out. Is anybody going to do
17 that?

18 MR. SHANMUGAM: Well, there are cases where
19 the evidence comes to light, typically when a juror
20 actually comes to the judge and then the judge takes
21 some action based on the statements that have been
22 recorded. But I think it's important to realize that a
23 McDonough claim doesn't in any way depend on the
24 outcome. One could be the prevailing party and seek
25 relief on a McDonough claim, although one would,

1 obviously, have no incentive to do so.

2 That simply points up the fact that a
3 McDonough claim, again, in no way depends on what
4 actually took place in the jury room in terms of the
5 manner in which the jury reached its verdict.

6 Second, I want to address this question of
7 the state of the law which I think is critically
8 important here because it really goes --

9 JUSTICE GINSBURG: Can you explain the
10 manner in which the jury reached its verdict? I thought
11 that the testimony of Titus was she made this statement
12 about her daughter and she persuaded all the other
13 jurors to go along with her. That's the manner in which
14 the jury reached its verdict. It didn't follow the law,
15 it followed what this woman was alleged to have said.

16 MR. SHANMUGAM: Justice Ginsburg, the Titus
17 affidavit does contain those allegations, but those
18 allegations are utterly irrelevant to the resolution of
19 a McDonough claim. In other words, it doesn't matter
20 for purposes of the McDonough claim whether the other
21 jurors were influenced or whether the other jurors said,
22 we don't care about your daughter's experience, that
23 doesn't affect our decisionmaking in the slightest. And
24 that is because a McDonough claim is designed to
25 identify juror dishonesty at voir dire without regard to

1 the impact on the jury's deliberations.

2 Now, second, I want to say something about
3 the current state of the law --

4 JUSTICE KAGAN: Well, presumably that's
5 because we assume impact, isn't it? So the impact is
6 sort of built into the rule.

7 MR. SHANMUGAM: Well, it's built into the
8 rule only in the sense that it has to be material
9 dishonesty. And so, if a juror dishonestly answered a
10 question about his or her name at voir dire, a court
11 would say that that's immaterial. My point is simply
12 that McDonough does not require any analysis of actual
13 prejudice as the proceedings actually played out, and
14 that in our view is the critical distinction.

15 Now, let me say something about the current
16 state of the law because I think there's a certain
17 amount of uncertainty based on this argument about that
18 and I want to clarify that. It has unambiguously been
19 the rule in the Ninth Circuit since its decision in Hard
20 that evidence of this variety is admissible. And I
21 respectfully submit that my friend Ms. Birnbaum simply
22 misreads the Hard case when she argues that that is
23 dicta, and the best evidence of that is how that rule
24 has been applied in the Ninth Circuit because I think it
25 has been treated as the law now for some three decades.

1 And it is clearly the law in California in the wake of
2 the California Supreme Court's decision in *People v.*
3 *Castaldia*.

4 Our point is that there has been less than
5 one decision that we've been able to find, whether
6 reported or unreported, in each of those jurisdictions
7 per year since those rules were adopted. And when I'm
8 talking about decisions, I'm not just talking about
9 decisions in which McDonough claims were successful.
10 I'm talking about decisions in which evidence of this
11 variety has even been sought to be admitted. And so
12 there's really no evidence that this is a problem in
13 those jurisdictions and we have been unable to find any
14 suggestion in the secondary literature that this is a
15 problem either.

16 And to the extent that Ms. Birnbaum
17 complains that we only cited those cases in our reply
18 brief, I would note that it's really Respondent's burden
19 here to identify evidence that this is, in fact, proven
20 to be a problem.

21 Now, Respondent and the government say that
22 there are five States in which evidence of this variety
23 is admissible. I think that actually understates the
24 current state of the law. We've identified
25 approximately 14 States where the evidence is

1 admissible. But this points out another point of
2 confusion here. Respondent and the government talk
3 about this distinction between the Iowa rule and the
4 Federal rule, and the Iowa rule applies to jurisdictions
5 where only evidence of the jurors' thought processes is
6 subject to exclusion and the Federal rule, like Rule
7 606(b), covers a broader type of evidence.

8 But even in jurisdictions that apply the
9 Federal rule, courts have held that evidence of this
10 variety is admissible. And that's simply because we're
11 talking about two separate questions: On the one hand,
12 the type of evidence that is subject to exclusion; and
13 on the other hand, the type of inquiry during which such
14 evidence is excluded.

15 So again, we would respectfully submit that
16 there is no evidence that this is anything other than a
17 speculative concern that our interpretation would lead
18 to these difficulties with juror harassment and
19 undermining the finality of verdicts.

20 Let me say just a word about the issue of
21 racial bias. I think this is critically different from
22 a case involving, say, the application of the hearsay
23 rule, because this really goes to the fundamental
24 question of whether the factfinder itself was racially
25 biased.

1 JUSTICE SCALIA: How about religious bias?
2 Is that also an exception?

3 MR. SHANMUGAM: Well --

4 JUSTICE SCALIA: What about bias against
5 handicapped people? I mean, all of those things are
6 difficult to find. Right?

7 MR. SHANMUGAM: Well, it raises
8 constitutional concerns, beyond the constitutional
9 concerns that we think are applicable in every case of
10 this variety, because, after all, regardless of the type
11 of bias, what we're talking about here is the right to
12 trial by an impartial jury. A right that is founded
13 both on the specific constitutional rights involving
14 jury trials and the fundamental right to due process.
15 And our point is simply that to the extent that the
16 Court thinks the rule is ambiguous, those concerns
17 should come into play and support our interpretation.

18 I would just say one last thing before the
19 end of the argument and that is simply that Ms. Birnbaum
20 referred to this as a run-of-the-mill case and my
21 client, Petitioner Greg Warger, I think would strongly
22 object to that. He, after all, lost his leg in this
23 accident. And so, while this case doesn't involve
24 multiple millions of dollars or some fundamental
25 constitutional right, it is vitally important to him.

1 And while Ms. Birnbaum refers to the concern
2 about gaming the system, it's important to remember that
3 this was a case in which the juror in question, Stacey
4 Titus, actually came to the lawyer. And if Mr. Warger
5 is unable to seek the admission of this evidence, he
6 will have no ability to obtain relief on his underlying
7 McDonough claim.

8 We would respectfully submit that the
9 judgment of the court of appeals should be reversed.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 (Whereupon, at 11:56 a.m., the case in the
13 above-entitled matter was submitted.)

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