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IN THE SUPREME COURT OF THE UNITED STATES

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MIGUEL ANGEL PENA-RODRIGUEZ, :

Petitioner : No. 15-606

v. :

COLORADO, :

Respondent. :

- - - - - x

Washington, D.C.

Tuesday, October 11, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of the Petitioner.

FREDERICK R. YARGER, ESQ., Solicitor General, Denver, Colorado; on behalf of the Respondent.

RACHEL P. KOVNER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-606, Pena-Rodriguez v. Colorado.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

Roughly half the trials in this country from New York to California to South Carolina are already conducted under the rule we seek today: Mainly, a requirement that judges consider evidence of racial bias when it's offered to prove a violation of the Sixth Amendment right to an impartial jury.

This Court should require Colorado to follow the same rule. Indeed, Colorado already has a turnkey system for implementing an exception to racial bias. Like every other jurisdiction across the land, Colorado already has multiple exceptions to the principle of jury secrecy. So all Colorado has to do is use that same system already in place to administer an exception for racial bias.

CHIEF JUSTICE ROBERTS: What about religious bias? Same thing in this case, except it's not, you

1 know, this is how Mexicans act. It's this is how
2 Catholics or Jews act, so they're obviously guilty.
3 Wouldn't that also come under your exception?

4 MR. FISHER: Well, there's obviously,
5 Mr. Chief Justice, frequently an overlap between race
6 and religion. And so for that reason, religion might be
7 viewed very similarly --

8 CHIEF JUSTICE ROBERTS: All right. Well,
9 that seems to be avoiding the question. Let's say there
10 isn't Catholics.

11 MR. FISHER: All the Court needs to decide
12 in this case today is race. That --

13 CHIEF JUSTICE ROBERTS: No, I don't think
14 that's fair. Once we decide race -- this is not an
15 equal protection case; it's a Sixth Amendment case. So
16 a recent invocation of race is an impermissible --
17 impermissible enough, I guess, that we will pierce the
18 jury confidentiality. Well, the next case is going to
19 be religion. So whatever we say on race is going to
20 have to have either a limiting principle that makes
21 sense, or it's going to open up a broad category of
22 cases.

23 MR. FISHER: I don't deny that there may be
24 subsequent cases if you decide this one in my favor.
25 But I'm saying two things to the Court.

1 First of all, you can and should do what the
2 Court's done in previous situations like this, which is
3 start with race. And the reason why is because the
4 Court has said time and again, in cases like *Rose v.*
5 *Mitchell*, in cases like *Ham v. South Carolina*, that race
6 is different, race is unique. It is a unique --

7 JUSTICE ALITO: Suppose we start with race.
8 You're not being very helpful to the Court
9 in your answers.

10 Suppose we start with race, and the next
11 case involves religion. Now, how would you distinguish
12 religion from race if we were to reach an opposite
13 conclusion in the religious case?

14 MR. FISHER: What you would do in that case,
15 Justice Alito, is conduct the same analysis you're being
16 asked to conduct here, which is look at the Tanner
17 factors and ask how effective other safeguards are at
18 rooting out --

19 JUSTICE SOTOMAYOR: Mr. Fisher, why?

20 MR. FISHER: Pardon me?

21 JUSTICE SOTOMAYOR: Why?

22 MR. FISHER: Why would you ask that --

23 JUSTICE SOTOMAYOR: Why? I mean, you know,
24 the Chief says this is not an equal protection case, but
25 the Sixth Amendment applies to the States through the

1 Fourteenth Amendment; correct?

2 MR. FISHER: Yes.

3 JUSTICE SOTOMAYOR: I always thought the
4 most pernicious and odious discrimination in our law is
5 based on race.

6 MR. FISHER: I agree with that.

7 JUSTICE SOTOMAYOR: All right. So why is a
8 rule that says, given the exceptions we've recognized
9 since the 1800s that have said that race is the most
10 pernicious thing in our justice system, why can't we
11 limit this just to race using principles of the
12 Fourteenth Amendment as well?

13 MR. FISHER: I'm not denying that you can.
14 And of course, the Constitution needs to be read
15 structurally. So not only --

16 CHIEF JUSTICE ROBERTS: You think it's
17 odious to have the same sort of discrimination against
18 someone because he's a Muslim or practices Islamic
19 faith? You're saying, he's a Muslim. Of course, you
20 know, given this, I know how Muslims behave; he
21 committed this crime. Is that not sufficiently like
22 racial discrimination that it should be carved out?

23 MR. FISHER: It may well be, Your Honor. It
24 certainly is odious. And so --

25 CHIEF JUSTICE ROBERTS: What about sexual

1 orientation? Somebody gives, you know, a bigoted speech
2 in the jury room about sexual orientation and how
3 particular types of people are more likely to commit
4 crimes like the one before them? Is that sufficiently
5 odious?

6 MR. FISHER: It's quite odious. But whether
7 it would satisfy the balancing test we're setting forth
8 today would be needed to decide --

9 JUSTICE BREYER: You have to have an answer
10 for this reason. No one on the other side thinks
11 anything but this is terrible jury misbehavior. That's
12 a given across the case. It is not a question of the
13 validity of the behavior. It's invalid. The question
14 is the timing of when somebody has to object.

15 And their point is they have to object
16 before the verdict comes in. Because if you don't have
17 that rule, you will, in fact, open the door to all kinds
18 of evils which they mention. All right? That's their
19 argument.

20 So what we're really asking for is your
21 reply to that argument. And it doesn't really reply to
22 say maybe you're going to have a bunch of other things
23 too, 'cause then that strengthens their argument. And
24 on the other hand, maybe that's what you think. I mean,
25 the whole question is that inevitably, opening the door

1 to these other things, which will mean tell the jury,
2 Jury, if somebody says a racist comment, write me a
3 note, the judge says, before you reach a verdict.

4 Do you get the point? That's why the
5 question is being asked.

6 MR. FISHER: I --

7 JUSTICE BREYER: And so that's why I, too,
8 would like an answer.

9 MR. FISHER: So I think you've asked a more
10 specific question about objecting, and then the more
11 general question that we've been talking about, about
12 drawing lines.

13 So for objecting, let me just say, it's
14 impossible for the defendant to object to the misconduct
15 in this case because the defendant is not in the jury
16 room to hear it. There's never been a right that
17 depends on the jurors themselves.

18 JUSTICE SOTOMAYOR: Mr. -- please, please
19 concentrate on the question Justice Breyer --

20 MR. FISHER: I'm sorry. Okay. Okay.

21 JUSTICE SOTOMAYOR: -- has asked you, which
22 is answer his question, he's talking about the general
23 principle. He says everybody is afraid to open the
24 door. All right? And to the extent that your answer is
25 simply the door is open once you rule for me, 'cause

1 other bias is going to be viewed the same, it's going to
2 hurt you. That's what Justice Breyer said. So tell me
3 why that fear is not valid.

4 MR. FISHER: I think there's two reasons
5 why.

6 One is you can look at the Court's cases
7 that I've described already, things like *Rose v.*
8 *Mitchell*, *Ham v. South Carolina*, where we have
9 race-specific rules that have never been extended beyond
10 race.

11 And the second reason is because, I know
12 this isn't, strictly speaking, an equal protection case,
13 but the same values of the Fourteenth Amendment infuse
14 the Sixth Amendment. And I think a helpful analogy can
15 be drawn to the tiers of scrutiny.

16 JUSTICE GINSBURG: Why isn't this national
17 origin? I mean, you -- you're trying to isolate race.
18 But this was a case of a Mexican American. So why
19 doesn't it belong under national origin rather than
20 race?

21 MR. FISHER: Well, I think the Court's case
22 law has fused the two concepts, particularly when it
23 comes to people with Hispanic origin. And so like the
24 parties, and I think the government and everybody
25 agrees, race and ethnicity is interchangeable in this

1 case.

2 But if I could continue my answer about the
3 analogy to the tiers of scrutiny. It's not that --

4 JUSTICE ALITO: Well, is it true with
5 respect to other ethnic groups, or only true with
6 respect to Hispanics?

7 MR. FISHER: Oh, it's most true with respect
8 to Hispanics in this Court's cases, which is why we've
9 used the term "race," and every other party in court in
10 the case has used the term "race."

11 And I think the tiers of scrutiny provide a
12 helpful analogy.

13 JUSTICE KAGAN: Can you -- you keep on being
14 cut off before you get to the tiers of scrutiny, but --
15 (Laughter.)

16 JUSTICE KAGAN: -- the cases where the court
17 has said that a lawyer has to be allowed to ask on voir
18 dire about bias, does that -- is that only true of
19 racial bias, or is that true of any other kind of bias
20 as well?

21 MR. FISHER: Under this Court's cases, only
22 race. And remember, Ham was decided in 1973. So there
23 have been plenty of times for that issue to percolate,
24 and I don't of any lower court decisions that --

25 JUSTICE KAGAN: I think it's --

1 JUSTICE SOTOMAYOR: And then gender.

2 JUSTICE KAGAN: I'm sorry. Is that -- is
3 that right?

4 MR. FISHER: I'm sorry?

5 JUSTICE KAGAN: It's just race you're
6 saying?

7 MR. FISHER: I believe so.

8 JUSTICE KAGAN: It's just race.

9 And then Batson would be race and gender; is
10 that right.

11 MR. FISHER: That's right. And I think
12 Batson is another helpful analogy.

13 First of all, in Batson itself, you wrote an
14 opinion about race. And of course the question of
15 gender came back several years later. There were three
16 dissenters in that case. It didn't automatically follow
17 from the first.

18 And there is a different analysis that I
19 suggest you conduct here as well. You ask about the
20 Tanner factors and the other factors the State has
21 pointed out, things like the composition of ordinary
22 juries look very different when you're talking about sex
23 than race.

24 JUSTICE GINSBURG: Well, suppose --

25 MR. FISHER: Things like --

1 JUSTICE GINSBURG: Is it so different?
2 Suppose somebody in the jury room, say it's an
3 automobile accident, says, what do you expect of women
4 drivers? Women shouldn't be allowed to drive cars.
5 Every woman I know is a terrible driver. Suppose that's
6 what was said.

7 MR. FISHER: Well, you would ask the same
8 questions we're asking today, but you'd ask it through a
9 different record and a different set of balancing. You
10 might conclude -- and I'm not going to deny this -- the
11 Court might conclude, as it did in Batson, that you
12 should extend to sex. But you might not conclude that,
13 and that would be a separate case.

14 And -- and maybe now I can make my tiers of
15 scrutiny point, because remember, sex discrimination is
16 treated differently under the Equal Protection Clause
17 than race discrimination.

18 And under a similar analogy, it's not that
19 one is more odious than the other, or one is better, or
20 one doesn't -- one doesn't violate the amendment; it's
21 that different tools must be available to root out
22 different kinds of discrimination. And that's the whole
23 point of strict scrutiny is we do not leave any stones
24 unturned when it comes to race. It's racial bias.

25 JUSTICE GINSBURG: Isn't it a fact that in

1 the decisions of this Court, those tiers are not what
2 they once were; that is, strict scrutiny is no longer
3 fatal in fact, and for gender discrimination you must
4 have an exceedingly persuasive justification for it?

5 MR. FISHER: Of course, Justice Ginsburg;
6 that's correct. And I'm just trying to give this Court
7 an analogy that it might use to think about the problem
8 of how to apply the Sixth Amendment to different kinds
9 of alleged bias.

10 CHIEF JUSTICE ROBERTS: No. It's not just
11 alleged bias. It's bias based on innate characteristics
12 of the offensive remarks. But the question is: What is
13 most likely to -- or a significant risk of depriving the
14 defendant of a fair trial? And it seems to me there are
15 statements that have nothing to do with race or gender
16 or sexual orientation or anything that might have a far
17 greater impact. And I'm wondering why we -- we don't
18 allow impeachment of the jury verdict in those cases?

19 Someone, I don't know, comes in and says, I
20 know that witness. That witness lies all the time.
21 Believe me, you can't take anything he says. I mean
22 that, in a certain -- in a particular case, could have a
23 greater impact.

24 So why don't we allow impeachment of the
25 jury processes in that case?

1 MR. FISHER: I think it's a very important
2 question that goes to the heart of the case, because I
3 think you could have also used the hypotheticals from
4 cases like McDonald v. Pless and Tanner and Warger. And
5 the reason why is because the Court has said time and
6 again that race is different.

7 There's a difference between a bias, harmful
8 though it may be, that affects only a private litigant,
9 compared to racial bias which is a stain on the entire
10 judicial system and the integrity that it's built upon.
11 And that is the difference, the Court said, in Rose v.
12 Mitchell. It's the difference, the Court said, in
13 Ham v. South Carolina. It's what the Court has talked
14 about in its Batson line of cases. It's that stain on
15 the system --

16 JUSTICE BREYER: What did the -- what did
17 the 20 States do?

18 MR. FISHER: Pardon me?

19 JUSTICE BREYER: What did the 20 States do?

20 MR. FISHER: The 20 -- it's actually 18
21 States and two Federal jurisdictions. But those
22 jurisdictions have all limited their -- their exception
23 to race. That's what you're asking.

24 And remember, some of those exceptions have
25 been around -- in New York, it's been around since the

1 '60s. In Minnesota, it's been around since the '70s.
2 So we have vast experience in the States. And when all
3 the arguments are made on the other side, which I would
4 respectfully say are all theoretical arguments about the
5 harm that would come from adopting a rule, I stress to
6 the Court, this is not a theoretical question. There's
7 an empirical answer that is available to the Court based
8 on the experience across the country, multiple
9 jurisdictions.

10 JUSTICE ALITO: Race is -- race is different
11 for some purposes. But why is it different from other
12 things for Sixth Amendment purposes? What the Sixth
13 Amendment protects is the right to a fair trial -- to an
14 impartial jury. And if we allow the exception that you
15 are advocating, what do you say to the defendant who --
16 the prisoner who is going to be spending the rest of his
17 life in prison as a result of the jury verdict that was
18 determined by flipping a coin?

19 MR. FISHER: I think I can give you the same
20 answer I gave to the Chief Justice earlier, which is
21 that is woefully unfair. But when the Court does its
22 balancing of the harm to -- on the one side to the
23 judicial system of the defendant against the State
24 interest, the balance is different when it comes to
25 race.

1 JUSTICE ALITO: How does that --

2 MR. FISHER: As bad as --

3 JUSTICE ALITO: How does that connect with
4 the right to an impartial jury? A jury can be partial
5 for racial reasons. It can be --

6 MR. FISHER: Right.

7 JUSTICE ALITO: -- partial for some other
8 reason.

9 MR. FISHER: Because the values of the
10 Fourteenth Amendment are read into the Sixth Amendment
11 as well. And if I can give the Court an analogy, think
12 of *Bolling v. Sharpe*, where the Court asked whether the
13 Due Process Clause applies to the Federal government --
14 I'm sorry -- the Equal Protection Clause applies to the
15 Federal government, which it doesn't, by its terms. But
16 the Court said, you know what, the Due Process Clause in
17 the Fifth Amendment does, and that should be infused
18 with the values of the Equal Protection. And the
19 particular harms of racial discrimination should be read
20 into that amendment as well. That's all we're asking
21 here.

22 JUSTICE GINSBURG: Has -- has there been any
23 case, other than *Bolling v. Sharpe*? In *Bolling v.*
24 *Sharpe*, the conspicuous absence was any equal protection
25 principle operative v. the Federal government. And I

1 don't know of any case other than *Bolling v. Sharpe*
2 where you have that kind of reverse incorporation.

3 MR. FISHER: No. I think, Justice Ginsburg,
4 another example would just be *Ham*. Remember that the
5 *voir dire* line of cases are all due process cases.
6 There's nothing in the Due Process Clause that singles
7 out race, but this Court's opinion does. And it says
8 that the structure of the Constitution and the unique
9 problem of race in our history and our society requires
10 special medicine.

11 CHIEF JUSTICE ROBERTS: Do you think the
12 entire body of law that we have developed in connection
13 with racial discrimination or the Equal Protection
14 Clause is the issue and apply that to your case? For
15 example, here, you have a very obviously offensive and
16 direct appeal to -- to race. What if it's, oh, you
17 know, he's from that neighborhood; I know people from
18 that -- people from that neighborhood always commit
19 crimes like this.

20 Now, obviously, that could well be
21 challenged as based on race, or -- I mean, is that also,
22 do you impeach the jury's -- the secrecy of the jury
23 proceedings for something like that?

24 MR. FISHER: Well, I think the analysis
25 would be similar to what you do under the Equal

1 Protection Clause, but it wouldn't have to be lockstep.

2 So the question that's asked in the 20
3 jurisdictions that already do this is, would a
4 reasonable juror have understood the comments to be
5 about race? Would the -- would the jurors have
6 understood the juror who spoke to be asking them to
7 decide the case or view the evidence based on racial
8 bias?

9 And remember, too, Mr. Chief Justice --

10 JUSTICE SOTOMAYOR: The second is very
11 different from the first. That second --

12 MR. FISHER: I'm sorry if I miss -- if I
13 confused the Court, but the key, when you're talking
14 about people such as from that neighborhood or whether
15 or not it would be understood as race-based comments as
16 opposed to something else.

17 So a similar question --

18 JUSTICE SOTOMAYOR: I like the second better
19 because what -- otherwise, you're going to have an
20 evidentiary hearing in every allegation, and 20
21 jurisdictions don't, right?

22 MR. FISHER: Right.

23 JUSTICE SOTOMAYOR: There has to be a test
24 that tells you when, what's the difference between a
25 stray remark --

1 MR. FISHER: Right.

2 JUSTICE SOTOMAYOR: -- and something that
3 has impact.

4 MR. FISHER: Right. And so both are
5 required, Justice Sotomayor, and I'm sorry if I was
6 confusing about that.

7 First, you asked whether or not it was
8 racial bias as opposed to some other kind of bias.

9 Second, you asked whether it went to the
10 evidence in the case and the defendant's guilt, or
11 whether it was an off-color joke made during a break or
12 something like that.

13 And let me stress two things. One is, the
14 jurisdictions that exist already do this, and even
15 jurisdictions like Colorado already do this.

16 Go back to the first -- I think -- go back
17 to Justice Breyer's question. If a juror had sent a
18 note out five minutes before the verdict, in this case
19 or any other, describing racial bias, the judge would
20 make all the same inquiries --

21 JUSTICE BREYER: I don't see the problem
22 there. What -- what's actually worrying me about it, if
23 I had to write this on paper, somebody could say, well,
24 you know, on -- on request the defense attorney can get
25 an instruction, send us a note before you reach the

1 jury. That could be happen.

2 But you want to go beyond that and impeach
3 the verdict.

4 The real reason, I suspect, is even though
5 we can imagine cases that are just as unfair, flipping a
6 coin, et cetera, that part of the purpose of these
7 amendments is to create a judicial system that is seen
8 as fair beyond the individual case, and indeed, being
9 seen as fair beyond the individual case means that it is
10 more likely to be fair in other cases as well.

11 Now, if I'm really honest, I think, yeah,
12 that's probably right. And then the history and
13 everything become relevant. But have you found any
14 support for that?

15 MR. FISHER: For what exactly, Justice
16 Breyer?

17 JUSTICE BREYER: That what we're doing here
18 in creating the exception, despite the fact that we can
19 think of Justice Alito's case which is just as unfair,
20 though it doesn't involve race, is we're trying to
21 create a fairer system in general and one that will be
22 perceived as such, and there race is a special problem.

23 MR. FISHER: Right. So --

24 JUSTICE BREYER: So I wonder if you, and --
25 and I -- if I could write it right, I think it would

1 make sense, but I'm asking you is there support for such
2 a thing.

3 MR. FISHER: Yes. You almost spoke verbatim
4 out of the Rosales-Lopez opinion, which draws from the
5 Aldridge v. United States opinion in 1931. So this is a
6 principle that goes quite a ways back in the Court's
7 jurisprudence, which is the perception of fairness when
8 it comes to racial bias and racial discrimination is
9 paramount.

10 And, Justice Breyer, if I could add
11 something -- if I could add two points about your
12 question, which we return to, about what if the jury
13 could be instructed to send a note out.

14 Well, there's two problems with that. First
15 is, remember the jurors are always instructed, as they
16 were in this case, to use their common-sense experience
17 in the jury room, to draw on that. And remember how
18 these comments are couched, as is often the case, as
19 Juror H.C.'s personal experience that Mexican men blah,
20 blah, blah, blah, blah.

21 And so a jury instruction at best is going
22 to be cross-cutting v. another jury instruction and not
23 always work.

24 And even in the much easier case of
25 extraneous evidence and improper influence, which are

1 exceptions that Colorado recognizes, as does the Federal
2 system and everyone else, jurors are always instructed
3 not to do those things, and yet they do sometimes. And
4 the system demands that we give a remedy when jurors
5 don't follow those instructions.

6 CHIEF JUSTICE ROBERTS: What is it that the
7 proceeding that you would have, I mean, if we accept
8 your proposal and -- and interview the jurors, subject
9 them to the -- what do you -- what do you ask them?

10 MR. FISHER: So there's two -- there's two
11 steps, Mr. Chief Justice.

12 First is a threshold showing that I
13 described earlier, that there was a statement that was
14 racially --

15 CHIEF JUSTICE ROBERTS: Okay. But the facts
16 are as alleged here, I guess. What do you do once you
17 have that in -- in the record? What's next?

18 MR. FISHER: So the judge asks exactly the
19 same question the judge would ask with other kinds of
20 jury misconduct like extraneous evidence. The judge
21 asks, is there a reasonable possibility that the verdict
22 was influenced by that bias?

23 CHIEF JUSTICE ROBERTS: So if the other
24 jurors come in and they testify, there's testimony and
25 everybody says, yes, that's what he said, and they say,

1 well, what would you -- but of course the guy was
2 guilty, no doubt about it, and the other 11 said, of
3 course he was guilty, it was very offensive what, you
4 know, HC or whatever it was said, but, of course, he was
5 guilty. Everybody -- we agreed to -- you know, in five
6 minutes. Does that make a difference?

7 MR. FISHER: Right. So I think you've asked
8 two questions there.

9 The first is, is one juror enough, and the
10 second is, do you look at the strength of the
11 government's case.

12 On the first question, whether one biased
13 juror is enough, the Court's Parker v. Gladden decision
14 in 1966 quite clearly says yes, which, of course, is in
15 line with the way you treated a multimember
16 decision-making body last term in Williams.

17 Now, the question on whether you look at the
18 strength of the government's case as to whether to grant
19 relief, I would tell this Court that's the one issue on
20 which the 20 jurisdictions across the country are
21 divided.

22 Some say the mere fact that a single
23 racially biased juror took that into account in -- in
24 issuing his verdict is enough for relief. And some
25 other States will look at the overall strength of the

1 government's case. For, I think, obvious reasons, the
2 Court need not resolve that here in this case and could
3 come out on that question however it wished.

4 JUSTICE GINSBURG: Right. But you -- and
5 specifically what happens next? The Chief asked the
6 question.

7 MR. FISHER: So -- so --

8 JUSTICE GINSBURG: Do you have to poll -- do
9 all the jurors have to come back and each one testify?
10 First of all, did HC say what the two jurors said he
11 said? There may be doubt about that. And then whether
12 any of them were influenced by it.

13 MR. FISHER: So -- so there's two questions,
14 Justice Ginsburg.

15 The first one is, what does the evidence
16 show, and so some juror testimony is required to bring
17 out who said what and in what context. Once that's
18 determined, the judge asks whether there's a reasonable
19 probability that the verdict was infected by racial
20 bias, and that question, Justice Ginsburg, is purely
21 objective.

22 It's very much like what courts do every day
23 when there's a bad jury instruction. They don't bring
24 all the jurors in and have them testify how they -- how
25 they interpreted the jury instruction and the like.

1 They ask an objective test, saying with those improper
2 statements brought into the jury room, would the juror
3 have -- the reasonable probability the juror would have
4 erred in the way they decided.

5 JUSTICE KAGAN: So the idea would be the
6 judge would say, we'll look at all this other evidence
7 v. the defendant. I think that they would have found
8 him guilty regardless.

9 MR. FISHER: No, that -- well, that's the
10 issue I was talking about with the Chief Justice on
11 which courts are divided.

12 We think the Court might hold in a future
13 case that it's enough to have a racially biased juror --

14 JUSTICE KAGAN: But that would be a kind of
15 structural error.

16 MR. FISHER: That would be a question the
17 Court would ask.

18 What I meant when I said, look at the other
19 facts, I meant the context in which a statement was made
20 during deliberations. So it might be that somebody said
21 something and then somebody immediately spoke up and
22 corrected that person. They said, oh, that's not what I
23 meant. I meant something else. And the judge, as they
24 do every day in jurisdictions across the country, would
25 hear this evidence and decide, oh, this jury wasn't

1 actually --

2 JUSTICE ALITO: But here we have -- in this
3 case, we have a very blatant statement, but let's
4 consider the standard that now applies on a lot of
5 college campuses as to statements that are considered by
6 some people to be racist.

7 What would happen if one of the jurors has
8 the sensibility of a lot of current college students,
9 and thinks that one of the -- something that's said in
10 the jury room that falls into one of those categories
11 was a racious -- was a racial comment?

12 MR. FISHER: We're talking here, Justice
13 Alito, only about intentional racial bias. So --

14 JUSTICE ALITO: Even the first time a person
15 says something that is considered improper on a college
16 campus today and another juror thinks that that shows
17 intentional racial bias.

18 MR. FISHER: No, I think, as I said, it's an
19 objective test. Even under the Court's equal protection
20 jurisprudence, the Court hasn't --

21 JUSTICE ALITO: Yeah. How will the judge
22 decide -- how will the judge decide whether the
23 statement is -- is racist?

24 MR. FISHER: Well, I think it's the same
25 analysis the judge would conduct in an equal protection

1 case, which is, is the statement asking to decide
2 directly and intentionally on its face the case based on
3 race.

4 JUSTICE KAGAN: Presumably --

5 MR. FISHER: That's all you need to --

6 JUSTICE KAGAN: Presumably the judge faces
7 the same situation if a juror comes in during
8 proceedings, is that right, and then the judge has to
9 make whether this is something real or not.

10 MR. FISHER: Precisely right, Justice Kagan,
11 or after proceedings. Remember, jurors can walk out to
12 the courthouse steps, as they were told in this case.
13 It's entirely proper to discuss the basis for your
14 verdict. So if that afternoon jurors are saying, this
15 is how we decided the case, the judge might be asked to
16 make the exact same inquiries. So there's nothing new
17 about the inquiry we're asking. It's just --

18 JUSTICE GINSBURG: Does it make any
19 difference if it were not the jurors as here, but the --
20 the lawyer for the defense went around, contacted all
21 the jurors and elicited this testimony? So it wasn't
22 the jurors volunteering, but the lawyer questioning the
23 jurors to see if he can come up with something that
24 would gain a new trial.

25 MR. FISHER: So long as what the lawyer was

1 doing comported with the local rules with respect to
2 contacting jurors, it would be the same case. In
3 Minnesota, which is the one place where I think there is
4 a case about a lawyer breaking the rules in terms of
5 talking to a juror, there's a situation where it's a
6 different case than this and the judge might deny
7 relief.

8 If I could reserve the remainder of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Yarger.

11 ORAL ARGUMENT OF FREDERICK R. YARGER

12 ON BEHALF OF THE RESPONDENT

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

15 Everyone, including Petitioner, agrees that
16 the citizen jury system requires safeguards to ensure
17 full and fair debate in the jury room and prevent
18 harassment and tampering after verdicts are handed down.
19 And the juror's alleged statements in this case are no
20 doubt reprehensible, but the vital interests that the
21 no-impeachment rule serves apply just as readily here as
22 they do in other serious alleged cases of juror
23 misconduct and bias. And Petitioner has not shown --

24 JUSTICE KAGAN: Mr. Yarger, let's -- let's
25 assume that that's true, that the State interests are

1 basically the same, and also let's assume that the
2 safeguards, voir dire, don't operate particularly
3 differently. All right?

4 So I'll just give you what -- what I think
5 is the strongest argument on Mr. Fisher's side, which is
6 that the -- that the interests in preventing unfairness
7 of this kind are much greater; that that's really the
8 difference, is the fact that verdicts based on race
9 discrimination pose a harm that verdicts based on other
10 kinds of unfairnesses, which exist in the world, and --
11 and are terrible, but still, that it's just not the same
12 kind of harm.

13 MR. YARGER: And we certainly don't dispute
14 that racial bias is a particular problem, and a
15 particular problem under the Constitution. But I don't
16 think it's -- it's correct that other forms of bias
17 won't cause the same types of institutional harms. Of
18 course, this Court's recognized that in JEB versus
19 Alabama when it extended Batson to claims of gender
20 bias. And certainly a verdict based on the fact that a
21 defendant is a Muslim or a Catholic or a Mormon or any
22 religious group would just as significantly call into
23 question --

24 JUSTICE KAGAN: The one question is whether
25 identity-based harms are different than other kinds of

1 unfairnesses, as we've talked about in the Warger case,
2 for example, or the one before that.

3 And then another question is whether race --
4 racial bias is different from other identity-based bias,
5 right? But -- but would you -- would you concede that
6 identity-based bias is different from like, you know,
7 the kinds of bias that we've discussed in other cases?

8 MR. YARGER: I wouldn't concede that in this
9 specific context where you're dealing with an individual
10 defendant's Sixth Amendment right to an impartial jury
11 and a fair trial set v. the important and vital
12 interests that the no-impeachment rule serves to allow
13 the jury to do its job.

14 JUSTICE KAGAN: But it's true that this is a
15 Sixth Amendment case, but it seems artificial not to
16 think about the Sixth Amendment issue as informed by the
17 principles of the Equal Protection Clause. And in those
18 principles, as we've always understood them, says that
19 there's a special kind of harm in treating people worse
20 and, I mean, and certainly, in punishing people because
21 of their race. And maybe especially because race is so
22 associated with particular stereotypes respecting
23 criminality, that that's about the worst thing that you
24 can do to a person, and it's also the worst thing that
25 you can suggest about the criminal justice system, that

1 it allows that to happen.

2 So both of those two things, the harm to the
3 individual for being punished because of your race, and
4 the harm to society writ large. And that would, I
5 think, be the -- the fact, yes, you're right the State
6 interests are exactly the same, and voir dire functions
7 pretty similarly. But it's just a different kind of
8 harm.

9 MR. YARGER: I -- I think it would be
10 difficult in the context of the Sixth Amendment in the
11 same courthouse in Colorado to tell one defendant that
12 that defendant gets to impeach the verdict because the
13 error that happened to occur during deliberations is
14 racial, whereas across the hall it was religious, or it
15 was simply the jurors disrespecting the jury system
16 enough to flip a coin. And -- and that's the problem.

17 In all of these cases in which Rule 606(b)
18 is going to apply, you're going to be putting the
19 individual defendant's Sixth Amendment right, which
20 Petitioner acknowledges can be implicated in a wide
21 range of cases, v. the interests that, Justice Kagan, I
22 think you acknowledge are weighty and important, and
23 precisely why Rule 606(b) has survived for so many
24 years.

25 JUSTICE KENNEDY: Suppose this were a

1 capital case. Would the government of the United States
2 come and make this argument, that the person can be
3 executed despite what we know happened in the jury room?

4 MR. YARGER: Well, Your Honor, I think
5 the -- certainly, this isn't a capital case, and that
6 might raise different issues. There are cases set in
7 the briefing that are capital cases in which the --

8 JUSTICE KENNEDY: Well, it doesn't follow
9 from your position.

10 MR. YARGER: And -- and it does. And our
11 position is it -- it should apply there. If -- if the
12 jury system is so important to be protected in these
13 other contexts, and is -- and this rule is necessary to
14 allow them to fully and fairly deliberate the issues, it
15 ought to apply in that context as well. But, again, I
16 don't think that question needs to be confronted or
17 answered in this case.

18 JUSTICE SOTOMAYOR: Do you have any evidence
19 that in the 20 jurisdictions that permit this -- this
20 challenge that they've been overwhelmed with cases?

21 MR. YARGER: Your Honor, there -- I think
22 there are two responses to that.

23 First of all, we -- we don't agree with that
24 count of jurisdictions or how it breaks down.

25 But second of all, Petitioner does -- does

1 point to jurisdictions in which this exception was made,
2 but he doesn't link that up with evidence that -- that
3 this is not occurring, that the harassment and the
4 effects on full and fair deliberation are not being
5 heard.

6 JUSTICE SOTOMAYOR: Well, you can't prove a
7 negative. That's -- that's almost impossible. So I
8 want you to tell me the positive. Is there evidence of
9 some run-amuck sort of number of motions filed in any
10 particular case based on racial discrimination, rampant
11 jury harassment, any of the evils that you are
12 predicting in your brief?

13 MR. YARGER: Well, what we do have, Your
14 Honor, is specific examples in these particular cases
15 where harassment is a very real problem, specifically
16 with respect to racial bias, where, after all 12 jurors
17 or a large number of jurors are pulled into the
18 courtroom, it's -- it's determined that the affidavit at
19 issue was manufactured by the attorney, and that the
20 allegations were -- were untrue. And an example to give
21 is the Greer case from Massachusetts.

22 The other thing I'd say is that the Iowa
23 rule, the most permissible version of the no-impeachment
24 rule, certainly was on the table in 1975 when this Court
25 and Congress considered adopting Rule 606(b). All of

1 those arguments were the same then. All of those
2 arguments were made in Tanner and made in Warger, and
3 what Congress and this Court decided, and the vast
4 majority of states decided, was that the strict version
5 of the no-impeachment rule best balances these -- these
6 interests. And it's a very difficult balance. We
7 certainly acknowledge that.

8 But as to Petitioner's count, six states
9 apply that Iowa rule, and certainly, that's their
10 judgment to make. But that doesn't mean that the
11 exception is limited only to racial bias. In six states
12 that acknowledge a Sixth Amendment exception, they don't
13 apply a categorical rule that allows evidence of racial
14 bias to come in, in every case in which it's alleged.
15 They apply it sort of an extreme-cases test, and most
16 often --

17 JUSTICE GINSBURG: Can you just clarify
18 something? This -- I think Mr. Fisher told -- told us
19 that in the states, whether the -- his number of 20,
20 yours of six, is right, that this is limited to race.
21 So it would not be applied to gender, sexual
22 orientation, and apparently, national origin other than
23 Hispanic.

24 MR. YARGER: Justice Ginsburg, that -- that
25 is true, that the cases that we've seen do only deal

1 with racial bias. But we've seen extreme instances of
2 other types of bias, religious bias v. Jews and Muslims.
3 And certainly, I think, those courts would have a hard
4 time not extending whatever particular rule they've
5 adopted to those settings. But, yes, we do acknowledge
6 that -- that to date, the exceptions have been racial
7 bias.

8 In those jurisdictions, the six
9 jurisdictions that adopt the extreme-cases rule, though,
10 even when there is a very disturbing statement and
11 surfaces post trial, the courts still say, well, the
12 importance of the no-impeachment rule still applies
13 here, and we're not going to create an exception. And,
14 of course, that's exactly what the Seventh Circuit did.

15 JUSTICE SOTOMAYOR: What -- what exception
16 would you recognize? As far back as Reed we have
17 said -- qualified 606(b)'s -- predecessors in 606(b).
18 Wagner said it: There might be a case so extreme that
19 we would not apply this rule.

20 If race is not so extreme, what, in your
21 judgment, would be?

22 MR. YARGER: Your Honor, I think the line
23 that -- that can be drawn consistent with that footnote
24 would be whether or not the other safeguards that are
25 necessary to assure a fair trial were made available in

1 that particular case. So, for example, there are cases
2 in which voir dire on race or religious bias was not
3 made available. That would be a case in which, if
4 evidence surfaced post-trial that that kind of
5 misconduct influenced the deliberations, an exception
6 might be necessary. The same, if a court was given some
7 hint that bias crept in to the jury deliberations and
8 didn't do anything about it. That would be possibly a
9 situation in which the no-impeachment rule should yield.
10 But it's -- if we're focused on that balance between --

11 JUSTICE SOTOMAYOR: Well, right now, we
12 don't permit or require questioning on bias except for
13 race in voir dire, so where does your exception work?

14 MR. YARGER: Well, it --

15 JUSTICE SOTOMAYOR: Because things do creep
16 in. We don't make exceptions for those things.

17 MR. YARGER: Well, I think that's precisely
18 right. We don't make exceptions, and we expect counsel
19 in voir dire to be the mechanism through which we
20 explore all of these biases. And so when it is not
21 taken advantage of when it could have been taken
22 advantage of in this case and the trial court --

23 JUSTICE SOTOMAYOR: The problem is it
24 assumes that if the question is asked that every juror
25 is going to be truthful. You know, different people can

1 have different experiences. But, you know, it is more
2 rare than common that when a question is asked is anyone
3 biased that most jurors won't raise their hand.

4 MR. YARGER: And, Your Honor, I think the
5 same challenges arises with regard to nearly any bias
6 that is crucial to a defendant's Sixth Amendment rights,
7 which is precisely why the practice guides the defendant
8 himself cites or Petitioner himself cites say, asking
9 the general question is generally not the best way to
10 expose those types of biases during voir dire. And
11 here, not even the general question was asked about the
12 race of the defendant in this case.

13 CHIEF JUSTICE ROBERTS: But what other types
14 of questions would -- what types of questions would you
15 propound if you were trying to elicit whether there was
16 bias on the part of a prospective juror?

17 MR. YARGER: I would propound the same types
18 of questions that Petitioner's counsel used below as to
19 other issues: People's experiences on the subject,
20 whether they believe racial issues still persist in this
21 country, and what their attitudes are.

22 JUSTICE GINSBURG: But there are -- isn't it
23 so that many lawyers won't ask that question even if
24 they could? Because just by asking the question, you're
25 putting race in the minds of the jurors, and you'd

1 rather not do that.

2 MR. YARGER: That's certainly the argument
3 the Petitioner makes here. But what experience has
4 shown is that a careful and mature voir dire on race is
5 not likely to infuse racism into jurors. In fact, quite
6 the opposite has been observed to happen. When jurors
7 are respectfully confronted with racial issues at the
8 outset of a trial, they tend to counter any racial bias,
9 whether explicit or implicit, that might come up during
10 the thought process.

11 CHIEF JUSTICE ROBERTS: How do you know
12 that?

13 MR. YARGER: That's the research that we
14 cited for Professor Sommers in the briefing. Courts
15 have looked at that research. The McCowen case from
16 Massachusetts, they said precisely the same thing. Voir
17 dire is a good time and a good mechanism to raise these
18 issues to ensure that they don't --

19 CHIEF JUSTICE ROBERTS: Well, that's one of
20 the --

21 MR. YARGER: -- crop up.

22 CHIEF JUSTICE ROBERTS: But that's one of
23 the problems here. It may be a good time to alert
24 people who have this bias not to talk about it. It
25 seems to me that's a very hard thing to measure, this

1 sort of bias. And, I mean, one question, I guess, is
2 whether impeaching the verdict in this way will cause
3 people with biases like that to keep quiet about it and
4 yet still have the same sort of pernicious effect on the
5 verdict.

6 MR. YARGER: Well, and that's one of our
7 concerns, Mr. Chief Justice. And Petitioner
8 acknowledges, I think it's page 16 of his reply brief,
9 that allowing this type of inquiry only on issues of
10 racial bias might, in fact, drive racial bias
11 underground.

12 Now, he says that's unlikely. The Florida
13 Supreme Court said it might happen. And it strikes us
14 and it strikes Colorado that if the effect of a
15 racial-bias-only exception to the no-impeachment rule
16 drives racism underground where it can't be confronted
17 and can't be reported to the judge, the balance that
18 Colorado strikes by not carving out subject matter
19 exceptions to the no-impeachment rule is a good one.

20 JUSTICE SOTOMAYOR: Well, why? Isn't -- you
21 know, there's a lot of talk about political correctness
22 or not. And some people think it's a negative thing,
23 and others think it's a positive thing. But if an
24 individual is harboring racial bias, isn't it better to
25 harbor it than infect everyone else's deliberations on

1 the basis of it?

2 I mean, if you're not saying every Mexican
3 commits this kind of crime, but you're forced to argue
4 the evidence to convince your jurors, isn't that exactly
5 what we want? Don't we want deliberations on evidence
6 and not deliberations on someone's stereotypes and
7 feelings about the race of a defendant?

8 MR. YARGER: That is absolutely what we
9 want.

10 JUSTICE SOTOMAYOR: So why shouldn't we try
11 to drive it underground?

12 MR. YARGER: Well, Your Honor, with respect,
13 I think that if the juror harbors that bias and is on
14 the jury, that's going to influence the verdict one way
15 or the other.

16 JUSTICE GINSBURG: Do jurors --

17 MR. YARGER: I don't think it's --

18 JUSTICE GINSBURG: Do jurors even know about
19 the existence of a -- a de la rel rule -- rule -- I
20 mean, that jurors can't impeach their verdict?

21 MR. YARGER: Justice Ginsburg, what jurors
22 do know when they enter the deliberation room is that
23 that's a secret proceeding. And they're told after they
24 leave that they can talk to people as much or as little
25 as they want about what goes on in the jury room.

1 So calling them back in and calling multiple
2 jurors back in to take the stand under penalty of
3 perjury and cross-examination to be examined about what
4 was said during those deliberations will have a
5 significant effect on the deliberative climate in the
6 jury room.

7 JUSTICE KENNEDY: Can you please tell me,
8 just as a matter of what goes on in the bar in your
9 State, in Colorado, particularly, I take it that in
10 civil cases, lawyers who may be trying a similar case
11 all the time questioned jurors after the fact, after the
12 verdict, in order to see how to improve their arguments,
13 et cetera, et cetera, in civil and criminal cases. Is
14 this a problem generally?

15 And a related question: Are there articles
16 and statistics about the prevalence of this and whether
17 or not this is disruptive to the legal system?

18 MR. YARGER: The specific post-trial sort of
19 conversation between counsel and jurors?

20 JUSTICE KENNEDY: Yes.

21 MR. YARGER: I haven't seen anything like
22 that. That is a common practice in the State of
23 Colorado. But one concern is that, certainly, a skilled
24 lawyer in every case is going to present evidence of
25 alleged bias as if it were volunteered to that attorney.

1 And it's only after actually inquiring of the jurors,
2 putting multiple jurors on the stand to get to the
3 bottom of those allegations of what was said, when it
4 was said, and what it was meant in context, will we get
5 to whether this actually exposed racial bias on the part
6 of a juror or whether it was something else.

7 And by that point, you have done exactly
8 what Rule 606(b) seeks to prevent courts from doing in
9 order to create the atmosphere of full and fair debate
10 in the jury room.

11 JUSTICE GINSBURG: Well, when this rule was
12 first pronounced, they were thinking about quotient
13 verdicts, coin-flipping, perhaps. And identity bias
14 didn't figure in back in England when this rule was
15 first articulated.

16 MR. YARGER: Certainly, that might be true
17 at the time the common law rule was announced. But
18 Rule 606(b) was debated and adopted in the 1970s
19 recently. And since that time, no rule maker has
20 decided to draw lines within the rule based on the
21 subject matter of the misconduct of the juror.

22 And I think that reflects the tension that
23 we were talking about earlier, which is it doesn't
24 matter what kind of bias arises in the course of
25 proceedings. All of it has significant Sixth Amendment

1 concerns for individual defendants. And drawing the
2 right lines only as to racial bias, but to no other type
3 of misconduct, would disserve the rule and wouldn't give
4 an adequate reason not to draw further lines down the
5 road. And I think that would lead to the
6 constitutionalization of the most permissive form of the
7 rule, the Iowa rule, which this Court and Congress and
8 the vast majority of States have rejected.

9 Your Honors, if there are no further
10 questions.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Ms. Kovner.

13 ORAL ARGUMENT OF RACHEL P. KOVNER
14 FOR UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE RESPONDENT

16 MS. KOVNER: Mr. Chief Justice, and may it
17 please the Court:

18 Racial bias is a real problem that the
19 United States is committed to eradicating. But there
20 are ways to address that problem without undermining
21 structural protections of the jury system that have
22 withstood legal challenges for hundreds of years.

23 I take Petitioner's principal submission
24 here to be that a different rule should apply under the
25 Sixth Amendment when a particular form of bias is at

1 issue. And I just want to take a moment to underscore
2 how that's really without foundation in this Court's
3 cases.

4 JUSTICE KAGAN: Ms. Kovner, and it seems
5 there are two lines of cases which -- in which we've
6 recognized that racial bias in a jury room is an
7 especially important problem, and that there need to be
8 special rules to address that problem.

9 And the first line of cases is the ones that
10 on voir dire say that a lawyer who wants to ask about
11 racial bias on voir dire has to be able to ask about
12 racial bias, and that we've applied to nothing else
13 except for racial bias.

14 And the second is the Batson line of cases
15 where we've said we're going to prevent lawyers from
16 doing what we otherwise allow them to do when striking
17 jurors will lead to -- may lead to race bias in the jury
18 room.

19 Now, here, we have like a screaming race
20 bias in the jury room. We have the best smoking-gun
21 evidence you're ever going to see about race bias in the
22 jury room, and notwithstanding that in these two lines
23 of cases we've said there need to be special rules to
24 address this prevalent and toxic problem in our criminal
25 justice system, here, we're not going to do that.

1 And the question is, why would this category
2 of cases be different from those other two?

3 MS. KOVNER: So, Your Honor, we think this
4 Court has never treated some Sixth Amendment violations
5 as more serious than others, and to talk about these two
6 lines of cases that Your Honor raises.

7 If Your Honor looks at what, I think, the
8 Court was doing in the voir dire cases, race was the
9 particular issue that it confronted there, but it was
10 indicating -- and I think it's indicated in other cases,
11 you have to conduct the kind of voir dire that's
12 reasonably calculated to detect the biases that may be
13 present in a particular case.

14 So those particular kinds of case involve
15 the high risk of racial bias, and that's what why the
16 Court said voir dire on race is required there. And
17 to -- to, I think, answer the question Your Honor asked
18 co-counsel, I think the Court has applied that principle
19 in other contexts.

20 In the capital context, the Court has
21 indicated under the Sixth Amendment you sometimes need
22 to ask questions about ability to consider mitigation
23 evidence, and lower courts have said that same principle
24 requires voir dire on other topics.

25 And then the second area Your Honor raises

1 is the equal protection area, and we think even there,
2 the Court has not distinguished among different types of
3 constitutional violations and said we're going to treat
4 some violations of the Constitution as particularly
5 serious.

6 What the Court said in those cases, we
7 think, Your Honor, is that there has to be special care
8 taken when the government acts based on race, and so
9 some conduct that wouldn't be unconstitutional at all,
10 if it were taken based on some other criteria, is
11 unconstitutional when it's taken based on race.

12 JUSTICE BREYER: The reason I think would be
13 the Sixth Amendment says, in all criminal prosecutions
14 the accused shall enjoy the right to a trial by an
15 impartial jury.

16 I agree with you that racial comments in the
17 room can be equivalent to other comments. But there may
18 be -- that's what I wanted to know, a prophylactic
19 aspect, that if you want impartial juries in general,
20 you have to deal with the problem of racial confidence
21 in the work of the jury. And that's a reason stemming
22 from the language of the amendment, to treat race
23 specially, and we have 20 states that have done so
24 without the reasons for limitation swamping the process.

25 Now, that's what I understand is a textural

1 argument, and purposive, that would, in fact, allow
2 constitutional protection of the kind they're asking
3 for.

4 MS. KOVNER: So I think when considering --
5 I think, Your Honor, when considering a prophylactic
6 approach to preventing Sixth Amendment violations, it's
7 important to consider both the cost of this rule and the
8 other alternative mechanisms that are available, because
9 those are things that the Court has traditionally
10 considered under the Sixth Amendment.

11 So turning to that with respect to race, we
12 think the prophylactic mechanisms that the Court has
13 relied on are likely to be particularly available in
14 many cases with regard to race, and to talk about,
15 first, voir dire and then the in-trial mechanisms that
16 Your Honor mentioned.

17 So in voir dire, as Justice Kagan's
18 questions alluded to, there's a -- a well-settled
19 principle, and it's the law in Colorado that you are
20 going to have the opportunity to ask these questions
21 about race. And there's also been a lot of study and
22 thinking that's gone into how to effectively detect bias
23 with respect to race in particular.

24 And then Your Honor alludes to mid-trial
25 reporting. Now, things can be done to strengthen that

1 safeguard. I think Your Honor alluded to some of the
2 things that can be done about particular instructions,
3 but in general, jurors are instructed that this kind --
4 that bias, in general, is impermissible. And they can
5 be instructed that racial bias, in particular, is
6 impermissible, and even to contact the judge.

7 On the cost side of the ledger, Your Honor,
8 this Court has always recognized that there's a very
9 high danger and a fair trial danger. If you are trying
10 to reconstruct, after the fact, jury deliberations with
11 a sort of he said/she said about what was said, that
12 that can really undermine confidence in the jury system.
13 And we think that that risk may be particularly acute
14 when you're talking about a very sensitive allegation
15 like that racial bias occurred.

16 And I think we know, as time goes on, that
17 racial bias can be expressed in subtle ways, and
18 particularly after a jury verdict is rendered and
19 somebody goes back into the community where a sensitive
20 issue has been debated, and they're trying to recall
21 what was said, there's the real risk that there will be
22 these kinds of credibility --

23 JUSTICE KENNEDY: So -- so the more
24 insidious the evil, the less reason we -- the more
25 caution we should have in -- in inquiring of the jury?

1 MS. KOVNER: No. We just think that the --

2 JUSTICE KENNEDY: By them?

3 MS. KOVNER: No. We think that this is a
4 really serious issue and that it ought to be addressed
5 through the kinds of safeguards this Court has always
6 applied. But we think that to the extent the Court has
7 recognized dangers, they are present here, and so to
8 take, for instance, the danger of impeding full and fair
9 jury room deliberations, we think that's a particular
10 risk when you're talking about this kind of very
11 allegation that contains a very high degree of social
12 opprobrium attached to it.

13 So, Your Honor, I mean, there may be cases
14 in which race is discussed in the jury room because it's
15 appropriate, because the claim involves racial bias,
16 because there's allegations surrounding police
17 misconduct in which race is often discussed. And that's
18 different from, for example, coin flipping or
19 intoxication, where there's really never going to be any
20 reason why those things should go on.

21 This is really the kind of allegation that's
22 most likely -- that opening the door to is most likely
23 to impede full and fair debate in the jury room. And
24 that's one of the --

25 JUSTICE KAGAN: It does strike me, though,

1 that given that one of the rules is that a juror can,
2 during deliberations, say something appropriate --
3 something inappropriate is happening here, to the extent
4 that there is this chilling effect, and more -- why
5 doesn't that produce the exact same chilling effect?

6 MS. KOVNER: Yeah. I mean, I think --

7 JUSTICE KAGAN: I mean, it seems like it's
8 such on the margins, what you're saying.

9 MS. KOVNER: I think, you know, for hundreds
10 of years courts have treated the mid-trial context as
11 different. And I think a reason why is in that
12 mid-trial reporting, you're really talking about
13 something that sets off jurors' alarm bells at the time.

14 Once the trial is over, not only do you have
15 other interests kick in, in finality and tampering and
16 harassment, but there's also just really the risk that
17 jurors regret their decision in the case. They start to
18 second-guess what they did, and as a result they start
19 to misremember, or they're subject to community
20 pressures that aren't present when the trial is
21 occurring.

22 Your Honor, we're not suggesting that this
23 is not a serious issue, and even one that jurisdictions,
24 including this Court when it sits as a rulemaking body,
25 can study and consider. It's a difficult balance. But

1 what this Court has generally said with respect to rules
2 of evidence is that states have a lot of flexibility
3 on -- to adopt different approaches. And we think this
4 is a case in which the interests that the rule serves
5 are fully present, and the safeguards that the rule has
6 relied on historically are fully present, and so the
7 Court --

8 JUSTICE KENNEDY: Like -- like the
9 government of the State of Colorado, the government of
10 the United States would make the same argument in a
11 capital case?

12 MS. KOVNER: We think that capital cases do
13 present Eighth Amendment considerations that are not
14 present here. The Court has often suggested under the
15 Eighth Amendment different sets of rules apply, and
16 there may be different considerations in that context.

17 But, Your Honor, we think, to the extent the
18 Court regards the rule as problematic or as one that
19 deserves further study, the appropriate way to do that
20 is as a rulemaking body, which is another way in which
21 this Court considers and continually exercises oversight
22 as to the rules of evidence. But it shouldn't impose a
23 new constitutional rule that requires setting aside a
24 historic structural --

25 JUSTICE GINSBURG: In the states that allow

1 this kind of evidence, is it -- is it all done by
2 legislation, or by rule -- or by a rule of court? Or
3 has it come about by judicial decision?

4 MS. KOVNER: I think it's a mix. Some of
5 these jurisdictions are jurisdictions that employ,
6 basically, the Iowa rule, so they let in a lot of
7 evidence about what was said in jury deliberations.
8 They just have a broader rule.

9 Some have said, under our State law we think
10 this is an exception that has to exist to the rule. And
11 some of the decisions on which Petitioner relies are
12 constitutional decisions.

13 JUSTICE GINSBURG: But if I can -- I'm
14 sorry.

15 JUSTICE ALITO: The issue of -- of a capital
16 case could involve all sorts of misconduct in the jury
17 room. So suppose it -- it came out later that the
18 jurors at the penalty phase in the capital case said, we
19 don't really care what the law is. We just want to
20 impose capital punishment, or they flipped a coin.

21 Would you -- if there were a special rule
22 for capital cases. Would you draw the distinction based
23 on race?

24 MS. KOVNER: I -- I don't think so, Your
25 Honor. I don't think that if there were -- if there

1 were a capital rule, we think it would go to whether
2 it's permissible to apply Rule 606(b) as a general
3 matter in this context.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Five minutes, Mr. Fisher.

7 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

9 MR. FISHER: Thank you. I'd like to make
10 four points, please.

11 First, just to pick up where that
12 conversation left off, to the extent my friends on the
13 other side are saying that in a capital case the Eighth
14 Amendment would become relevant, that's exactly the kind
15 of common-sense structural constitutional argument that
16 we're making and the other side is suggesting improper,
17 that when you look at the Sixth Amendment right to an
18 impartial jury, you also consider other elements of the
19 constitution, like the Fourteenth Amendment.

20 Secondly, with respect to the prophylactic
21 measures that the other side propounds, and specifically
22 voir dire, two points. First is, the studies they point
23 to are studies where race is already infused from -- in
24 the case from the outset. Cases like Ham v.
25 South Carolina, where the defense is all about the

1 person's race. And in those settings, questioning of
2 voir dire is almost incumbent on deference lawyers and
3 sometimes has good effect.

4 But that's not what the question really
5 before the Court today is. If they are saying that voir
6 dire is a cure-all for this situation, what they are
7 saying is in every single criminal case, it's
8 shoplifting, whether it's white-collar crime, whether
9 it's a DUI, any case a defense lawyer is -- is really
10 required to interject race into the case from the
11 outset.

12 And so as between interjecting race into the
13 case from the outset, potentially offending jurors,
14 potentially suggesting race is relevant where it doesn't
15 exist, and our solution, which is just simply having a
16 constitutional failsafe for this once-in-a-blue-moon
17 where you have this grave problem. We think our
18 solution actually does a lot less upheaval to the system
19 than an opinion from this Court that says voir dire is
20 the answer here.

21 Next, let me say something where we agree
22 with the other side. I think I heard both counsel for
23 the other side say this is a balance. And we agree
24 that's what the Court's cases dictate and that's what
25 606(b) itself strikes as a balance between the interest

1 of justice and the principle of jury secrecy.

2 I would suggest to this Court, though, that
3 when you conduct that balance, where we disagree with
4 the other side -- let me use the line from the Solicitor
5 General's brief. They said the Court's duty here is to
6 choose the lesser of two evils. Racial bias is never
7 the lesser evil. The Court has never said that racial
8 bias is a lesser evil than something like the public
9 policy considerations here. And I know the Court is
10 concerned about line drawing. It's obvious in -- in a
11 situation like this where you announce a new rule as a
12 constitutional matter that you're wondering what cases
13 are going to come next.

14 But I respectfully submit that the Court has
15 never refused to remedy intentional race discrimination
16 in the criminal justice system for fear of having to
17 address other questions down the line. And if you look
18 at the Court's cases, whether they're the Ham line of
19 cases, whether the Batson line of cases or anything
20 else, the Court will have ample tools and ample time to
21 decide down the road whether other situations are the
22 same or whether they are different.

23 Our submission here, though, is that race is
24 unique, race is a particular poison, and that the
25 experience of the 20 jurisdictions that have this rule

1 shows that implementing the rule we're asking will not
2 create any significant problems with respect to the
3 State interests or the administrators --

4 JUSTICE ALITO: Well, Mr. Fisher, it's not a
5 fear of confronting issues down the road. It's a
6 question of understanding the scope of the rule that you
7 are asking us to adopt. And I'll give you one last
8 chance. You will not tell us today whether your rule
9 applies to discrimination on the basis of -- of religion
10 or gender or sexual orientation or to add another one,
11 political affiliation.

12 So if the jurors -- if it came out the
13 jurors said this person is a Democrat, send him to jail,
14 that would be a different result. You will not tell us
15 whether the same -- whether the rule would apply in
16 those situations.

17 MR. FISHER: I think it's easy to say,
18 Justice Alito, that categories covered in the Equal
19 Protection Clause case by rational basis analysis would
20 not require the rule we're seeking today. I'm trying to
21 be forthright with the Court by saying I acknowledge
22 there will be other hard questions about identity, as
23 Justice Kagan put it. I'm not representing somebody
24 today that has that case. And I think the Court would
25 want full briefing on it.

1 And if I could just return to the --

2 JUSTICE KAGAN: Maybe you could put the
3 question a little bit differently, because I understand
4 why you don't want to say, well, it wouldn't apply to
5 this or it wouldn't apply to that. But in what ways is
6 race unique?

7 MR. FISHER: Race, this is unique in terms
8 of our history and constitutional structure and in terms
9 of the more practical considerations of rooting it out
10 with the prophylactic measures we've discussed. The
11 briefing is filled with citations and examples of why
12 race is particularly hard to get at through the Tanner
13 factors as compared to even something like other kinds
14 of discrimination.

15 And the tiers of scrutiny analysis I think
16 is a good place for the Court to look, because it's not
17 that we're saying other forms of discrimination are okay
18 under the constitution whereas race discrimination is
19 unconstitutional.

20 We're saying that different tools need to be
21 available, more searching inquiries need to be done,
22 when it comes to race. And that's why we think the rule
23 of evidence here gives way in a situation where it might
24 not in other cases.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

(Whereupon, at 12:07 p.m., the case in the
above-entitled matter was submitted.)

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