No. 17-1692

In the Supreme Court of the United States

M. RAGHIB AHSAN,
PETITIONER

v.

STAPLES THE OFFICE SUPERSTORE EAST, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent (Staples) does not contest that

1. the split exists, see Pet. 6-13;

2. all geographic circuits have taken a side, see *ibid*.;

3. the Second Circuit alone holds that district court denials of motions for a new trial on the ground that the weight of the evidence does not support the verdict are categorically unreviewable, see *ibid*., and will not reseolve the conflict on its own, see Pet. 27-28;

4. that the question of reviewability, the only question presented, is one of pure law and does not depend on resolution of any facts, Pet. 27-28;

5. that *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S 415 (1996), held that courts of appeals could reverse district court denials of new trials on the ground that the verdict was excessive, recognizing that excessiveness review is a form of weight-of-the-evidence review, just one addressing damages rather than liability, Pet. 13-15;

6. that early American state practice held that appellate weight-of-the-evidence review posed a question of law, not fact, Pet. 14 n.2;

7. that the court of King's Bench acting en banc in deciding new trial motions after *nisi prius* hearings was effectively acting in an appellate capacity, see Pet. 16-20; and

8. that categorically refusing to review denials of weight-of-the-evidence motions violates Fed. R. Civ. P. 50(c), see Pet. 25-26 n.4.

I. The Issue Is Practically Important

Instead, Staples makes one big, bold argument: that the case is of "no practical importance," *e.g.*, Br. in Opp. i, 3, 4, because it "has never impacted the outcome of any federal case," *id*. at 1. In Staples's view, "there is *no* case in which a court of appeals has actually reversed a district court's denial of such a new trial motion based on the weight of the evidence." *Id*. at 5. Unfortunately, saying so does not make it so. Staple's primary argument is simply mistaken.

First, Staples concedes that in many cases the courts of appeals have reversed district court denials of weight-of-the-evidence motions. Br. in Opp. 6-7 (discussing court of appeals cases its own leading treatise recognizes as reversing district courts on this ground). It argues that these cases should not count, however, because the courts of appeals might have reversed them on sufficiency grounds as well. See *ibid*. Even if that were true, which is not clear in every case even to Staples's eyes, see, *e.g.*, *id*. at 7 (conceding *Bank of America, N.A.* v. *JB Hanna, LLC*, 766 F.3d 841 (8th Cir. 2014), might not fit its characterization), the fact remains that the courts did not do so. They treated them all as weight-of-the-evidence cases.

As Staples concedes, even its own authority, 11 Wright & Miller, *Federal Practice and Procedure* § 2819 (3d ed. 2017), recognizes that all these cases reversed the district court not on the narrow ground

of evidentiary insufficiency, but on the broader ground that the weight of the evidence did not support the verdict. Br. in Opp. 6. Still other cases take this same approach. See, *e.g.*, *Shorter* v. *Baca*, 895 F.3d 1176, 1190 (9th Cir. 2018) ("Because the [defendant] came forward with no evidence that [plaintiff] had received such grievance forms, the jury verdict was against the clear weight of the evidence."). These courts simply recognize (1) that weight-of-the-evidence review subsumes sufficiency review and (2) that traditional, narrower sufficiency review applies more properly to denials of motions for judgment as a matter of law, while weight-of-the-evidence review applies more generally to denials of motions for new trials. Compare Fed. R. Civ. P. 50 with Fed. R. Civ. P. 59. That these courts might have, but did not, reverse the district court on a different ground, does not detract from what they actually did.

Second, Staples overlooks the many weight-of-the-evidence cases that cannot—even implausibly—be respun as sufficiency cases. In these cases, the courts of appeals reversed the district court's denial of a new trial *solely* because they were doubtful about the weight, not the sufficiency, of the evidence. See, *e.g.*, *Glickenhaus & Co.* v. *Household Int'l, Inc.*, 787 F.3d 408, 423 (7th Cir. 2015) (reversing district court's denial of new trial on issue of loss causation because "the evidence at trial did not adequately account for the possibility that firm-specific, nonfraud related information may have affected the decline in * * * stock price during the relevant time period"); *800 Adept, Inc.* v. *Murex Secs., Ltd.*, 539 F.3d 1354, 1369 (Fed. Cir. 2008) ("[T]he trial judge should have

granted the motion for a new trial with regard to these two claims because the great weight of the evidence in the record was against the jury's verdict."); *Adzick* v. *Unum Life Ins. Co.*, 351 F.3d 883, 890 (8th Cir. 2003) ("After reviewing the entire record, we find that the district court clearly erred in determining that Adzick did not regularly use or was not currently using cocaine during the relevant period. * * * As such, we find that the district court abused its discretion in denying UNUM's motion for new trial."); *Carr* v. *Wal-Mart Stores, Inc.*, 312 F.3d 667, 672, 674-675 (5th Cir. 2002) (reversing district court's denial of new trial because "the jury's determination * * * was against the great weight of the evidence"); *Greenleaf* v. *Garlock, Inc.*, 174 F.3d 352, 367 (3rd Cir. 1999) ("[W]hatever may have been the reason for the verdicts * * *, we are left with the definite and firm conviction that a mistake has been made and that a new trial * * * is necessary to prevent a miscarriage of justice."); *Harden* v. *TRW, Inc.*, 959 F.2d 201, 206 (11th Cir. 1992) ("With regard to the contract claim, however, the record evidence in this case allows for more than one reasonable outcome, and consequently we direct the district court to hold a new trial on that claim.") (citation omitted); *Feener* v. *Dependable Trucking Co.*, 716 F.2d 598, 602 (9th Cir. 1983) ("Once the trial judge determined that the jury's verdict on liability was against the clear weight of the evidence, he had a duty to set aside the verdict and grant a new trial. * * * The court's failure to grant a new trial on the issue of liability was an abuse of discretion which compels us to reverse.") (quotations and citations omitted).

State appellate court practice within the Second Circuit also underscores the practical importance of the issue. In the last eight years, for example, New York's appellate courts have found it necessary to repeatedly reverse trial court denials of new trial motions on weight-of-the-evidence grounds on the same issue that this case turns on: causation. See, *e.g.*, *Ahmed* v. *Port Authority*, 14 N.Y.S.3d 501, 504 (N.Y. App. Div. 2015) ("Where the only reasonable view of the evidence presented at trial was that a defendant's negligence was a proximate cause of the plaintiff's injuries, a verdict finding that the defendant's negligence was not a proximate cause of the plaintiff's injuries must be set aside as contrary to the weight of the evidence."); *Acosta* v. *City of New York*, 921 N.Y.S.2d 644, 647 (N.Y. App. Div. 2011) ("The Court of Appeals determined that this Court erred in setting aside, as a matter of law, the verdict in favor of the plaintiff because a valid line of reasoning existed based on the record evidence to support that verdict. However, * * * we find that the verdict in the plaintiff's favor was contrary to the weight of the evidence and must be set aside. * * * Accordingly, we reverse the judgment, grant that branch of the defendants' motion * * * to set aside the verdict as contrary to the weight of the evidence, and remit the matter to the Supreme Court, Kings County, for a new trial on the issue of liability.") (citations omitted); *Amaral* v. *Reph*, 896 N.Y.S.2d 81, 82 (N.Y. App. Div. 2010) ("Evaluating the jury's determination in this case in light of the evidence presented at trial * * *, we conclude that the verdict could not have been reached on any fair interpretation of the evidence, since the plaintiff's

negligence was not the sole proximate cause of the accident.") (internal quotation marks and citations omitted). Staples makes no argument as to why it is appropriate to handle such cases any differently in the Second Circuit.

Even if, as Staples incorrectly believes, federal and state appellate courts never reverse trial court denials of weight-of-the-evidence motions, Staples draws the wrong conclusion. In finding no reason for concern in a world where courts routinely review denials of such motions even if (in Staples's view) they do not reverse any, it commits an ex-post fallacy. In other words, it measures whether review is practically important by looking at how often it results in reversals in a world where it is regularly practiced. But, of course, in such a world one would expect the lower courts to internalize the rules and standards that appellate courts announce, thereby minimizing the need for actual reversals. In fact, if lower courts were perfectly internalizing the norms of appellate courts, the ex-ante aim of hierarchical review, reversal should never occur. As any parent knows, the threat of discipline affects children's behavior—so well, one hopes, that punishment is never actually required.

But to conclude that lower courts would internalize the same rules and standards when appellate courts announce that no review is available is simply wrong-headed. Would one expect administrative agencies, for example, which have to some degree internalized the courts' expectations, to behave the same way if the courts announced a holiday from judicial review? The self-discipline that

the availability of appellate review encourages should make actual appellate reversal less likely.

II. Staples's Subsidiary Arguments Are Without Merit

Staples also makes several subsidiary arguments, which are just as flawed. First, citing an 80-year-old case note by an Illinois attorney on an Illinois state court case,[1] it claims that English courts sitting en banc in Westminster "*never actually granted* [new trial] motions on the ground that the verdict was contrary to the weight of the evidence *unless* the *nisi prius* judge himself certified that in his view the verdict should be set aside." Br. in Opp. 12 (citing Maxfield Weisbrod, *Limitations on Trial by Jury in Illinois: Some Observations on Corcoran v. City of Chicago*, 19 Chi. Kent. L. Rev. 91, 92 (1940)). That case comment, however, never cites, let alone

[1] In an effort to bolster its argument, Staples makes the remarkable claim that this case comment is "widely-cited." Br. in Opp. 12. HeinOnline, the standard go-to academic citation-counter, reveals, however, that it has been cited only 10 times in nearly 80 years—twice by courts (once every 4 decades) and eight times by articles, books, and indices (once a decade), see https://tinyurl.com/y7skqml5 (follow "Display ScholarCheck statistics for this page"). Of the court citations, one appears in a dissent and one in a state court opinion. See *ibid*. (follow "Display ScholarCheck statistics for this page"; then follow "Cited By 2 Cases"). Of the other citations, one appears in a piece quoting the judicial dissent; two appear in publication indices merely noting the case comment's 1940 appearance; and four appear in student notes or case comments. See *ibid*. (follow "Display ScholarCheck statistics for this page"; then follow "Cited By 8 Articles"). Notably, not one is to a piece by an historian—legal or otherwise. *Ibid*.

discusses, the three cases that prove otherwise. See Pet. 19-20 (citing authorities).[2]

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[2] Staples itself tries to address two of petitioner's four authorities. See Br. in Opp. 13-14 (discussing *Norris* v. *Freeman* (1769) 95 Eng. Rep. 921, 3 Wils. 39, and *Goodtitle* v. *Clayton* (1768) 98 Eng. Rep. 159, 4 Burr. 2224). It claims that these two cases, but not the other authorities petitioner discusses, see Pet. 19-20 (discussing relevant authorities), "fall within the long-recognized rule that appellate courts may set aside a verdict for some error of law which intervened in the proceeding." Br. in Opp. 13 (internal quotation marks and citation omitted). That is mistaken. If the en banc court had granted a new trial because of legal error in these two cases, it would have done so through a writ of *venire facias de novo*, not by simply granting a new trial through a writ of error. Although both mechanisms resulted in a new trial, they did so for different reasons. See *Witham* v. *Lewis* (1744) 95 Eng. Rep. 485, 489-490, 1 Wils. 48, 55-57 (explaining differences); Murray Allen, *New Trial and Venire Facias De Novo: A Distinction*, 1 N.C.J.L. 171 (1904) (same). In particular, an appellate court could reverse a trial court's denial of a new trial on grounds of legal error visible in the record only by granting a writ of *venire facias de novo*, not by granting a new trial, and conversely reverse a weight-of-the evidence denial only by granting a new trial through a writ of error. See *Witham*, 95 Eng. Rep. at 489, 1 Wils. at 55-56 ("[T]he most material difference between the [two mechanisms] is this, that a ve. fa. de novo must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it; * * * if the verdict appear to be contrary to the evidence given at the trial * * * a new trial will be granted: but it is otherwise as to a ve. fa. de novo."); compare Allen, 1 N.C.J.L. at 175-176 ("A venire de novo will be granted [when] there has been some defect or irregularity in the * * * trial") with *id*. at 176 ("The reason[s] for granting a new trial [include c]ases where the verdict is improper[] because it is * * * against evidence."). Thus, even if the court might have been able to reverse for legal error in these two cases through a writ *venire facias de novo*, it did not. The lack of mention of that writ and the affirmative discussion of a

Second, Staples cannot simply wave away *Gasperini,* as it tries to do. As it concedes, the Court there held that the courts of appeals can reverse district court denials of new trials when the verdict is excessive. Br. in Opp. 14. It overlooks, however, the Court's acknowledgement that such review is "include[d]" within the more general power to review verdicts as against the weight of the evidence. 518 U.S. at 433 ("[The] discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence * * * includes overturning verdicts for excessiveness.") (quoting *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 (1958) and citing *Dimick* v. *Schiedt*, 293 U.S. 474, 486-487 (1935)). Excessiveness review is, in fact, weight-of-the-evidence review—only directed to damages rather than liability. Staples makes no argument for why the same form of review should be allowable in the one case and not the other.[3] Instead, it casts

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new trial show that the court reversed instead because the weight of the evidence did not support the verdicts.

[3] Staples does raise the canard that

> [i]n contrast to the question whether a jury verdict is excessive, there is no practical way to identify a 'legal question'—let alone a legal error—in the trial court's inherently discretionary decision that the evidence is not only legally sufficient to support the verdict, but also not so contrary to the verdict that a new trial is warranted.

Br. in Opp. 15. But as *Gasperini* made clear, the "legal question" excessiveness review poses is whether the weight of the evidence supports a particular amount of damages. 518 U.S. at 433 ("[The] discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence * * * includes overturning verdicts for excessiveness.") (quoting *Byrd*, 356 U.S. at 540 and citing *Dimick*, 293 U.S. at 486-487). That is no

desperate doubt on *Gasperini*, see Br. in Opp. 14 ("assuming *Gasperini* is correct"), and reserves the right to argue that the Court should overrule it, see *ibid*. (reserving right to argue *Gasperini* should be overruled "if the Court were to grant certiorari"). Indeed. Staples's strategy concedes that *Gasperini* stands as an insuperable obstacle to its own position.

Third, Staples argues that this case is a poor vehicle because the "[c]ircuit [c]onflict" is "[n]ot [o]utcome [d]eterminative." Br. in Opp. 9. But that conclusion simply assumes that the court of appeals would take the same view of the evidence that Staples does. Why? The district court itself, for example, never held that the evidence was so compelling that a reasonable jury had to decide for Staples, merely that it *could* have done so. Its one-paragraph summary analysis of how the jury might have reasoned, in fact, resembles more a sufficiency than a weight-of-the-evidence discussion. See Pet. App. 29a-30a ("[T]he jury *may have reasonably concluded* [that pre-existing conditions were responsible]. The jury *may have chosen to credit* [some particular testimony]. It *may have also chosen to credit* [particular expert testimony]. The jury's evaluation of plaintiff's claimed brain injury *may also have taken into account* [some of plaintiff's post-injury behavior]. Finally, the jury *may have chosen not to credit* [plaintiff's testimony].") (emphasis added). And at no point did

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different from general weight-of-the-evidence review, where the "legal question" is whether the weight of the evidence supports a finding of liability or its opposite. The only distinction—that damages are continuous while liability is dichotomous—makes no difference.

the district court perform its analysis under the shadow of appellate review. It knew that whatever it said on this issue would be the last word.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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