No. _____

In the
Supreme Court of the United States

FIRST STATE COMMUNITY ACTION AGENCY,
Petitioner,

v.

TAMRA N. ROBINSON,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party that first raises an issue on appeal has per se waived plain error review because it did not raise the issue in the trial court or in post-trial briefing though the Circuit has ruled that the correction of legal issues are the function of the appellate court?

2. Whether the joint approval of erroneous jury instructions is invited error that is a per se waiver to plain error review? In diverting from this Court's prior precedent in *United States v. Olano*, and in conflict with the Ninth Circuit, the Third Circuit in its precedential decision joins the Fourth Circuit in ruling that approval of erroneous jury instructions is invited error, and therefore waiver not reviewable under plain error.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceedings are listed in the caption. The petitioner is a nongovernmental corporation. The petitioner does not have a parent corporation or shares held by a publicly traded company.

RULE 14.1(b)(iii) STATEMENT

The proceedings below in federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Tamra Robinson v. First State Community Action Agency, Civil Action No.: 1:14-cv-01205-RGA (D.Del.) The District of Delaware entered judgment in this matter on August 29, 2017.

First State Community Action Agency v. Tamra Robinson, Case No.: 17-3141 (3rd Cir.). The Third Circuit entered judgment in a precedential opinion in this matter on April 1, 2019. The Third Circuit denied Petitioner's combined petition for panel rehearing and rehearing en banc on April 30, 2019.

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First State Community Action Agency respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Rule 36 disposition, a precedential opinion of the court of appeals (App. 1-20) is reported at 920 F.3d 182 (3d Cir. 2019). The opinion of the district court denying a new trial and granting attorney's fees (App. 21-38), is reported at 2017 U.S. Dist. LEXIS 138625.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2019. (App. 1-20) A timely petition for rehearing was denied on April 30, 2019. (App. 42-43) This Petition for Writ of Certiorari is filed within ninety days of that date. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12201(h)

> A covered entity under subchapter I, a public entity under subchapter II, and any person who owns, leases (or leases to), or operates a place of public accommodation under subchapter III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) of this

title solely under subparagraph (C) of such section.

42 U.S.C. § 12111(2)

Covered entity. The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee.

42 U.S.C. § 12102(1)(C)

(1) Disability. The term "disability" means, with respect to an individual—(C) being regarded as having such an impairment (as described in paragraph 3).

42 U.S.C. § 12102(1)(C)(3)

(3) Regarded as having such an impairment. For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

INTRODUCTION AND STATEMENT OF THE CASE

Respondent, Tamra Robinson ("Robinson") was employed by Petitioner, First State Community Action Agency, Inc. ("First State") from 2009 to 2012. In 2014, Robinson sued First State for violating the Americans with Disabilities Act ("ADA") claiming that First State did not provide her a reasonable accommodation for dyslexia and that it instead terminated her because she was dyslexic. Robinson relied upon an evaluation report that was authored by Robinson's cousin, Dr. Parker; the report did not in fact diagnose Robinson with dyslexia and in deposition, Parker admitted that she was a school psychologist and not qualified to diagnose dyslexia.

In Summer of 2016, in order to avoid summary judgment because of the challenge to the proffered expert report, Robinson asserted in briefing that First State regarded her as dyslexic and she could also proceed with her claims as a "regarded as" disabled person. Summary judgment was accordingly denied. The case continued, and at the Pretrial Conference on November 18, 2016, the Court ruled that Robinson's expert report was not admissible to prove that she had dyslexia. The lack of evidence of dyslexia foreclosed Robinson's ability to proceed based on her actually being dyslexic, so at that point, her claims were only based on her being "regarded as" dyslexic.

Unbeknownst to the parties, in 2008 the ADA was amended, renamed the Americans with Disabilities Act as Amended ("ADAAA"), and a provision at 42 U.S.C. § 12201(h) was added to exempt certain groups,

including employers, from its requirement to provide a reasonable accommodation to an individual who is "regarded as" disabled. So, Robinson's reasonable accommodation claim, which was only based on her being "regarded as" dyslexic by First State was abrogated by statute. The parties utilized the Third Circuit Model Jury Instructions and jointly fashioned and agreed to the jury instructions on Tamra N. Robinson's "disregarded as" reasonable accommodation claim. Those instructions were not updated to reflect the statutory amendment on "regarded as" claimants.

On December 5, 2016, Robinson presented two claims to the jury: 1) First State terminated her because she was "regarded as" dyslexic and 2) it failed to provide her a reasonable accommodation by failing to engage in the interactive process. The jury followed the law as misstated in the instructions provided and awarded Robinson $22,501.00 for nominal and punitive damages. (App. 40-41) Defendant moved for a new trial for irregularities in the trial. On August 29, 2017, the District Court denied the Motion and awarded Robinson attorney's fees and costs of $ 135,452.26. (App. 21-38)

First State timely filed an appeal in the Court of Appeals for the Third Circuit. It asserted that the claim for which Robinson was awarded damages and attorney's fees was not a legally cognizable claim due to a statutory amendment of the ADAAA that exempted employers from the obligation to provide reasonable accommodations to claimants that are only "regarded as" disabled. Having not known of the issue a trial, Petitioner sought review under the doctrine of

plain error. First State identified the issue on appeal, presented a motion for summary reversal based thereon, then fully briefed the issue and submitted supplemental letter briefing as required by the court.

On April 1, 2019, the Court of Appeals affirmed the $157,953.26 judgment against First State, despite the fact that the actions for which the jury found it liable to Robinson were not unlawful. (App. 1-20) In its Precedential Opinion, it identified two per se rules of waiver that would automatically foreclose plain error review in the Third Circuit. (App. 13-14) The first: the failure of an appellant to raise an objection at trial and to include such objection in post-trial briefing is a per se waiver of plain error review. The second: the joint recommendation of a jury instruction by a party is a per se waiver of plain error review of that instruction. The Court of Appeals acknowledged the legal error in Robinson's theory of recovery and in the jury instructions. (App. 8) It did not make any finding that First State knew of the legal error in the flawed reasonable accommodation claim or in the instructions that outlined the flawed theory. Neither did it find that First State intentionally relinquished its right to challenge the theory and have the law accurately stated and applied to the claim. Instead, the court relied on per se waivers to decline plain error review and deny First State relief from the judgments.

First State brings this petition seeking a writ of certiorari to the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition based on its superintendence of the Federal Judiciary in criminal and civil matters 1) to ensure that it does not apply unjustified exceptions to the application of plain error review and accordingly upset the balance that it strikes between judicial efficiency and the redress of injustice, and 2) to resolve the conflict between the circuits and internal certainty within the circuits as to the viability of the invited error doctrine as it relates to plain error review.

The Third Circuit's application of the plain error standard conflicts with this Court's interpretation in that it subverts the requirement to examine whether there was the intentional relinquishment or abandonment of a known right by instead applying rules and doctrine that assign waiver per se and accordingly foreclose plain error review. In its precedential opinion, the Third Circuit applied two per se rules in order to decline vacating the judgment that it found to be based on a claim that was not cognizable, having been abrogated by statute. The first rule: Issues raised for the first time on appeal are waived. And, the second: When a party jointly recommends a jury instruction, it has invited the error and waived appellate review thereof. The application of these per se rules of waiver conflict with this court's ruling in *United States v. Olano*, 507 U.S. 725 (1993) and creates an unjustified bar to relief under plain error review. In diverting from this Court's plain error analysis in *Olano*, and in conflict with the Ninth Circuit, the Third Circuit in its precedential opinion joins the Fourth

Circuit in ruling that approval of erroneous jury instructions is invited error, and therefore waiver not reviewable under plain error.

I. This Court should reject the Third Circuit's imposition of an absolute bar to relief from legal error because the error is first raised in the appellate court as being an unjustified exclusion of plain error that conflicts with the standard set in *United States v. Olano*.

This Court has recognized that "a rigid and undeviating judicially declared practice under which courts of review would invariably under all circumstances decline to consider all questions which had not been specifically urged would be out of harmony with . . . the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Accordingly, the doctrine of plain error has been applied to civil and criminal cases to correct legal errors not preserved in the lower court if the error affects substantial rights of a party, with the overarching goal of redressing injustice and preserving the integrity, fairness, and reputation of the judicial system. *Olano* at 732. To that end, this Court established the frame work for analysis under plain error review in the criminal context in *United States v. Olano*, 507 U.S. 725 (1993). The three prong analysis starts with the determination of whether there is an "error," or a "deviation from a legal rule" that has been forfeited, not waived. *Id*. at 733. Forfeiture is "the failure to make the timely assertion of a right," and waiver, "the intentional relinquishment or abandonment of a known right." *Id*. If a court finds a

legal error has been waived, the analysis ends, and no relief is afforded.[1]

The issues in this case concern the Third Circuit's application of the first prong. It found that Robinson's theory of recovery was legally flawed as to her reasonable accommodation claim. (App. 8-9) The ADA originally entitled individuals that were "regarded as" disabled to reasonable accommodation of their disability. Then, in 2008 the ADA was amended (ADAAA) to exempt employers from the obligation to provide reasonable accommodation to persons who were only "regarded as" disabled. So, the theory upon which the jury awarded recovery was abrogated by statute, thus erroneous. And, the corresponding jury instructions were likewise erroneous. (App. 8-9)

Having found legal error, the Court next was to determine if the error was waived or forfeited. It examined the record, but not to identify facts pertinent to First State's knowledge or lack of knowledge of the legal error in Robinson's claim. Instead the Court picked out opportunities where First State could have objected to Robinson's claim in the trial court: 1) in 2016 in briefing on its motion for summary judgment; 2) thereafter, by not taking exceptions when the magistrate denied First State's motion for summary

[1] The second requires that the error be clear or obvious under the law at the time of review, and the third prong requires the error affect substantial rights, also interpreted as being prejudicial, affecting the outcome of the lower court proceedings. If the three prongs are met, the appellate short exercises its discretion to grant relief if the error seriously affects the integrity, fairness, and reputation of the judicial proceedings. *United States v. Olano*, 507 U.S. at 734.

judgment; 3) at trial during the jury charging conference while also agreeing to the inclusion of the erroneous law; and 4) post-trial in briefing. (App. 10-13). Robinson first asserted her reliance on being "regarded as" disabled along with being actually disabled in her briefing of summary judgment motions in the Summer of 2016. Then, in November 2016, the court ruled Robinson's expert report inadmissible to prove actual disability. At that point, she could only proceed on her claims of being "regarded as" disabled. So these opportunities occurred in an abbreviated period of time. But, based on First State's failures, the court concluded that "[t]his course of conduct evinces an intent to proceed under Robinson's "regarded as" case theory and waive any objection based on the 2008 Amendments." (App. 13)

This finding of waiver is inconsistent with the framework of *Olano*, which requires a finding of 1) knowledge of the error and 2) intent to relinquish a right to challenge it. *Olano*, 507 U.S. at 733. The Third Circuit points to no such expression or indication that First State knew of the error in Robinson's "regarded as" theory. First State was not aware of the flaw in the "regarded as theory" when the matter was before the trial court. It had no motivation or stood to gain no tactical advantage by not raising the issue and promptly disposing of the reasonable accommodation claim as early as possible. *See generally Puckett v. United States*, 556 U.S. 129, 134 (2009) (discussion of importance of timely objections to prevent "sandbagging").

When First State originally learned of the statutory abrogation of the claim, the parties were at the appellate stage, the motion for new trial having already been decided. At this point, it could file a motion in the trial court or appeal but learned that a motion to set aside cannot be utilized to correct error where the issue can be considered on appeal and ultimately concludes that "the correction of legal errors committed by the district courts is the function of the Courts of Appeals." *Martinez-McBean v. Gov't of V.I.*, 52 F.2d 908, 911-12 (3d Cir. 1977). The court had recently cited *Martinez-McBean* to reiterate the inappropriateness of motions concerning judgments where the issue can be reviewed on appeal. *Hibbard v. Penn-Trafford Sch. Dist.*, 621 Fed. Appx. 718, 723 (3d Cir. 2015). So, First State brought the matter forth on appeal, moved for summary reversal of the judgment, and thereafter proceeded with full briefing on appeal.[2] The applicable law in the circuit led First State to present the matter on appeal instead of addressing it to the court post trial as the issue was legal error that could be addressed on appeal under the plain error standard. However, in the instant case, the Third Circuit set precedent that the failure to raise the issue in the trial court is a per se waiver that bars plain error review. In doing so, it denied First State plain error review, which is the designed to redress injustice caused by errors not raised in the trial court, because it did not raise the

[2] The Third Circuit requested supplemental briefing as to whether the failure to raise the issue in the trial court is a waiver as it decided in *United States v. Wasserson*, 418 F.3d 225 (3d Cir. 2005), and First State brought it to the court of appeals attention that the prior rulings of the court made it clear that a post-trial motion was not an option.

error in the trial court. The Third Circuit's analysis is hostile to plain error review and should be rejected by this Court.

II. This Court should reject the viability of the "invited error" doctrine in plain error review because it excuses the waiver analysis requirement of *Olano* in favor of the per se assignment of waiver.

The Third Circuit's finding that First State waived plain error review of the jury instructions was premised on First State's joint recommendation of the instruction containing the erroneous law on the abrogated reasonable accommodation claim in the prayer conference. In support of its denial of plain error review, the court points to First State's statement that "it would be simpler if the accommodation claim is included." (App. 12) This statement does not support a finding of waiver under *Olano*. To find a waiver of the error, the court needed to find that First State knew of the misstatement of law in the jury instructions on reasonable accommodations and intended to relinquish its right to waive any challenge to them. The exchange during the prayer conference that is detailed in the Opinion does not meet that standard. The quoted excerpt is part of a larger discussion where Robinson is explaining its reasonable accommodation claim to the court and requesting it be presented in the instructions in one step, or test, as opposed to two. (App. 12-3 n.32) First State agrees that the reasonable accommodation claim should be included in one test as opposed to set out in two separate tests. In that exchange, both parties are

referring to the test set forth in *Williams v. Philadelphia Housing Authority Police Dept.,* 380 F.3d 751, 775 (3d Cir. 2004), which they believed expressed the applicable law on reasonable accommodation claims for "regarded as" disability. To further support that First State and Robinson were not aware of the change in the law, the Model Civil Jury Instruction for the District Courts of the Third Circuit, which the parties utilized in crafting the instruction, did not reflect the 2008 Amendments and also contained the erroneous theory of Robinson reasonable accommodation claim.[3]

In categorically denying plain error review of jointly recommended jury instruction, the court interjects the "invited error" doctrine, which absolutely forecloses appellate review of error for the party that caused the error. There is a split in the holdings of the Third, Fourth, and Ninth Circuits on this issue. The "invited error" preclusion in the Third Circuit dates back to at least 1975 when in the civil case *Herman v. Hess Oil Virgin Islands Corp.*, it determined that invited error could not be the basis for reversal. 524 F.2d 767, 772 (3d Cir. 1975)). This court continued in that vein in criminal case, *United States v. Console*, 13 F.3d 641 (3d Cir. 1993) and it has continued to apply this interpretation across the board to civil and criminal proceedings even after the decision in *Olano*.[4]

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[3] The court was aware of the parties' use of the instructions and devoted a portion of the opinion to address the parties' reliance thereon. (App. 14-16)

[4] *See United States v. West Indies Transp.*, 127 F.3d 299, 311 (3d Cir. 1997) (When the defendants raised the jury instruction as fatally deficient, the court noted their proposed jury instruction

The Ninth Circuit followed a similar rule until *Olano* prompted it to examine the continued viability of its "invited error" doctrine. The Ninth Circuit en banc undertook that examination in *United States v. Perez* and noted that *Olano* does not expressly address the concept of invited error in its framework, but concluded that because it delineates forfeited and waived rights, any application of the doctrine must conform to that analysis. 116 F.3d 840, 845 (9th Cir. 1997)(en banc). So, while it did not find that *Olano* overruled the doctrine of invited error in its entirety, it resolved that it cannot solely focus on whether the party induced or caused the error but must determine whether the party knew of the right and relinquished it. *Id*.

In 2003 the Third Circuit followed the Ninth Circuit's rationale in *Perez* when it decided *Virgin Islands v. Rosa*, a case where the Defendant failed to object to jury instructions containing erroneous law and stipulated to those instructions on three different occasions. 399 F.3d 283, 291(3d Cir. 2003). The question considered was "whether the defendant who failed to object in the trial court to an error that violated his rights was aware of the abandoned right." *Id*. at 291 *citing Perez*, *supra* at 845. It determined that if Rosa had that knowledge yet chose to abandon the right, his failure to object was a waiver that foreclosed his right to an appeal under the plain error standard. *Rosa, supra* at 291. This Court further concluded that an explicit agreement or stipulation

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made no mention of the "harbor lines" element. "'Thus, if there was any error at all, it was 'invited error' and cannot now be a basis for reversal.'" (citations omitted)).

constitutes a waiver *only if the defendant was aware of the right*. *Id*. (emphasis added) After its review of the facts, the Court found that Rosa's failure to object to and his repeated agreement to erroneous instructions was not a waiver because there was not "any indication that his counsel explicitly stipulated to the erroneous instructions with knowledge of the error in them or refrained from objecting to the jury instructions for tactical reasons." *Rosa*, 399 F.2d at 291. The court was satisfied that Rosa's counsel was either unaware of the correct rule of law or did not realize that it was misstated. *Id*. Rosa's right was therefore deemed forfeited, not waived, and the remaining prongs of the plain error analysis applied.

However, thereafter, the Third Circuit reverted to its interpretation that invited error foreclosed plain error review and decided its cases accordingly. In *United States v. Ozcelik*, the court declined review of two jury instructions because the Defendant "made a joint request in favor of the very instructions he now challenges, he waived his right to raise these instructional issues on appeal under the invited error doctrine." 527 F.3d 88, 97 n.6 (3d Cir. 2008) (citations omitted). Then, in its precedential opinion in this case, the Third Circuit solidified its long held pre-*Olano* position that "when a party jointly recommends a jury instruction, it cannot later complain about that very instruction." (App. 13) The Fourth Circuit agrees with the Third Circuit. It has persisted with its application of invited error to foreclose plain error in every instance in accordance with its long history and adherence to the binding law of the Circuit. *Wilson v.*

Lindler, 995 F.2d 1256 (4th Cir. 1993)(en banc).[5] Applying this interpretation, legal errors that would otherwise merit relief under plain error review are automatically denied consideration, and the resulting injustices left uncorrected.

CONCLUSION

The Third Circuit already found that the "regarded as" reasonable accommodation claim was error when it analyzed the amendment to the ADA that exempted employers from the obligation to provide a reasonable accommodation and abrogated Robinson's claim. It follows that the error was plain because in comparison to the applicable law, or the ADAAA, the claim was no longer cognizable. The Third Circuit did not identify facts to support that First State knew of the erroneous theory or instructions and intended to waive a

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[5] The Court identifies its position and history in *United States v. Ellis*, 1999 U.S. App. LEXIS 2690 at p. *16-17 (4th Cir. 1999).:

> This Court has repeatedly stated that "we have never held in this court that an appeal may lie from an invited error." *AG Systems, Inc. v. United Decorative Plastics Corp.*, 55 F.3d 970, 972 (4th Cir. 1995) (citing *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994); *Wilson*, 8 F.3d 173; *American Ins. Co. v. Vann*, 118 F.2d 1004, 1005 (4th Cir. 1941) (per curiam); 9A Wright & Miller, Federal Practice and Procedure § 2558, at 470-71 (1995)). Heretofore, we have applied the invited error rule without exception, and we are now foreclosed from changing course. *See Industrial Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court." (internal quotation marks omitted)).

challenge to it. So, if it proceeded according to *Olano*, it would be left to decide if the error was prejudicial, or affected substantial rights, or the outcome of the trial. In this case, the error affected the outcome of the case as it was the only basis for the theory upon which the jury found discrimination and imposed nominal damages, punitive damages, attorney's fees, and costs that amounted to a considerable financial judgment of over $150,000.00 against First State. The outcome of the case would have been different in that there would be no reasonable accommodation claim, thus no finding of discrimination and no financial liability. Having met the three prongs of the plain error standard, the court should exercise its discretion to vacate the judgment because First State having legal finding of discrimination and judgment of considerable damages for not providing a reasonable accommodation to someone that was not legally entitled to it in spite of appeal seriously affects the fairness, integrity and public reputation of judicial proceedings.

This Court has "repeated cautioned that 'any unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice…and that the creation of an unjustified exception to the Rule would be even less appropriate." *Puckett v. United States*, 556 U.S. 129, 135-6 (citations omitted). It has consistently rejected per se approaches and variations to plain error review as being flawed. *See United States v. Young*, 470 U.S. 1 at 17, n. 14 (1985); *See United States v. Marcus*, 560 U.S. 258, 266 (2010). In both criminal or civil proceedings, the Third Circuit's application of the rule automatically

disqualifies every party 1) that first raises its challenge to appellate court, and 2) that jointly recommends a jury instruction from a plain error challenge even if they did not know of its erroneous nature. This Court should reject these per se rules in favor of maintaining the balance preserved by the framework established in *Olano*.

Respectfully submitted,

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