No. 19-138

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

BRIEF IN OPPOSITION

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RULES

RULES INVOLVED

Rule 51(d) of the Federal Rules of Civil Procedure provides:

> (d) Assigning Error: Plain Error.
>
> (1) Assigning Error. A party may assign as error:
>
> (A) an error in an instruction actually given, if that party properly objected; or
>
> (B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.
>
> (2) Plain Error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Rule 52(b) of the Federal Rules of Criminal Procedure provides: "(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT

Tamra Robinson was told by her manager that "you either don't know what you're doing, or you have a disability, or [you're] dyslexic." Taking that admonition seriously, Robinson, who had never before considered the possibility that she might have a disability,

decided to undergo testing for dyslexia. She sent her manager an evaluation, which concluded that Robinson had symptoms consistent with dyslexia. Robinson requested certain accommodations from the manager of human resources to deal with those symptoms. Her employer, First State Community Action Agency ("First State"), denied the requested accommodations and ignored the evaluation. Several weeks later, First State fired Robinson. App. 2.

Robinson brought this action under the Americans With Disabilities Act ("ADA"), alleging that she was disabled within the meaning of the ADA, that she had been denied the reasonable accommodation for her disability that is required by the ADA, and that she had been fired because of that disability. In the course of pre-trial litigation, Robinson made clear that she was asserting two distinct grounds for falling within the ADA definition of disabled. First, Robinson claimed that she in fact suffered from a disability that fell within the statutory definition. Second, Robinson asserted the First State officials regarded her as disabled; individuals regarded as disabled are disabled within the meaning of the ADA. Robinson was thus asserting four distinct claims: (1) that she had been fired because she was actually disabled, (2) that she had been fired because she was regarded as disabled, (3) that she was actually disabled and had been denied the requested reasonable accommodation, and (4) that she was regarded as disabled and had been denied the requested reasonable accommodation. The case ultimately turned on the fourth

claim, which we refer to as the "regarded-as reasonable accommodation" claim.

The parties filed motions for summary judgment in the summer of 2016. Although First State clearly understood that Robinson was asserting the regarded-as reasonable accommodation claim, it did not question the legal sufficiency of that claim. The Magistrate Judge who initially heard those summary judgment motions recommended that they be denied because there were genuine disputes of material fact. First State did not file objections to that Report and Recommendation.

In the fall of 2016, the trial judge decided that he would not permit Robinson to rely on the report which she claimed established that she was actually disabled. Pet. 3. At that point in time, First State still had not questioned the legal sufficiency of Robinson's regarded-as claims. Counsel for Robinson chose to go to trial without obtaining a new diagnosis, relying primarily on the regarded-as claims, and in the course of the trial abandoned the actually-disabled claims.

During the trial, Robinson proposed a jury instruction that set out the elements of her regarded-as reasonable accommodation claim. Counsel for First State affirmatively endorsed that instruction, which was based on the Third Circuit Model Jury Instructions. App. 12, 14.[1] The jury returned a mixed verdict on the

[1] Pet. 4 ("the parties ... jointly fashioned and agreed to the jury instructions on ... Robinson's 'regarded as' reasonable accommodation claim.").

two remaining (regarded-as) claims. The jury upheld Robinson's regarded-as reasonable accommodation claim but rejected her claim that she had been fired because she was regarded as disabled. First State filed a motion for a new trial on grounds not relevant here, which was denied. Notably, First State did not in that motion object to the jury instruction which it had earlier endorsed.

On appeal, First State raised an entirely new issue. The 2008 Americans With Disabilities Act Amendments Act ("ADAAA"), First State now pointed out, had amended the ADA to exclude reasonable accommodation claims by individuals who were merely regarded as disabled, and to limit accommodation claims to individuals who are actually disabled. App. 3. First State filed in the Court of Appeals a motion for summary action; when it was not granted, the parties filed briefs on the merits. First State acknowledged that it had not objected to the regarded-as reasonable accommodation jury instruction, as required by Federal Rule of Civil Procedure 51(a), but asked the Court of Appeals to overturn that instruction as plain error. The Third Circuit instructed the parties to file letter briefs on two issues, including whether First State had waived the ADAAA bar by its actions in the district court, and thus could not seek plain error review.

The Third Circuit held that First State had waived the ADAAA bar, and that any defect in the disputed instruction therefore could not be addressed as plain error. The Court of Appeals did not base its finding of waiver on the mere fact that First State had failed to object to the instruction. Rather, the Third Circuit

stressed that First State had "played along" with Robinson's legal theory for months, from the July 2016 summary judgment motions through the December 2016 trial and including its January 2017 new trial motion, and had affirmatively "invited" the District Court to use the very instruction to which it was objecting on appeal. App. 14. "This 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.

First State filed a petition for rehearing and rehearing *en banc*. The petition rested largely on arguments regarding the waiver issue which First State had not raised in its earlier letter brief on that issue. The Third Circuit denied the petition. App. 42-43.

REASONS FOR DENYING THE WRIT

I. THE FIRST QUESTION PRESENTED IS NOT PRESENTED

The petition describes the Third Circuit as having adopted two somewhat different *per se* rules. First, the petition asserts that the Court of Appeals held that the failure to object to a jury instruction in the district court is always a waiver, and thus bars plain error review. "Issues raised for the first time on appeal are waived." Pet. 6.[2] If that were what the Court below

[2] "[T]he Third Circuit impos[es] ... an absolute bar to be relieved from legal error because the error is first raised in the appellate court...." Pet. 7 (bold omitted); "[A] party that first raises

held, plain error review would be barred if a party merely failed to object to a jury instruction and then filed no post-trial motion. Second, the petition asserts that a waiver occurs if a party *both* fails to object to the instruction and, although filing a post-trial motion, omits the issue from that motion. "[T]he failure of an appellant to raise an objection at trial *and* to include such objection in post-trial briefing is per se waiver of plain error review." Pet. 5 (emphasis added). Neither of these characterizations of the decision below is correct.

The Third Circuit made clear that it was not basing its finding of waiver on the mere lack of an objection to the jury instruction, but was instead relying on what it correctly perceived as a months-long pattern of conduct by First State.

> First State ... contends that its failure to raise this argument is best understood as a failure to object to an erroneous jury instruction.... We disagree because, although First State focuses narrowly on how this error manifested in the jury instructions, it was more broadly a flaw in Robinson's theory of the case that dated back to summary judgment briefing, and First State at no time objected to that theory despite numerous opportunities to do so.

App. 9. The Court of Appeals identified six different instances in which First State had failed to assert the ADAAA exemption, running from the mid-summer

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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...." Pet. i (emphasis added).

2016 summary judgment motions through its January 2017 new trial motion.

(1) In response to First State's motion for summary judgment, and in her own motion, Robinson expressly asserted that to establish a reasonable accommodation claim she only needed to show that First State regarded her as disabled and denied her a reasonable accommodation. App. 10-11. "Instead of correcting [that] error of law, First State argued that there was no evidence First State treated Robinson as though she was disabled." App. 10-11.

(2) When the Magistrate Judge denied First State's motion for summary judgment on the ground that there was a question of material fact as to whether First State regarded Robinson as disabled, "First State filed no objections to the Report and Recommendation, failing again to argue that a plaintiff could no longer proceed under a 'regarded as' disability theory for reasonable accommodation claims." App. 11.

(3) "First State ... did nothing again at the beginning of trial." App. 14.

(4) At trial, Robinson proposed a jury instruction that specifically advised the jury it could hold First State liable if the defendant regarded Robinson as disabled and did not provide a reasonable accommodation. "At the charge conference ... , defense counsel voiced her support for Robinson's proposed jury instruction...." App. 12. "First State ... invited the District Court to use the ... test ... it now argues is incorrect." App. 14.

(5) First State filed a motion for new trial, "[b]ut did not raise the error in that post-trial briefing." App. 13.[3]

(6) "First State ... did [not] move for judgment as a matter of law on those grounds." App. 13.

In sum: "First State did not merely fail to object to an instructional error at a charging conference; it played along with a flawed theory of liability throughout the litigation and ultimately endorsed the specific instruction embodying that theory." App. 13-14. The *per se* legal standard which First State attributes to the Third Circuit in the first Question Presented simply is not the standard applied by the Court of Appeals.

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[3] In a letter brief in the Third Circuit, counsel for First State indicated it deliberately did not raise the jury instruction issue in its new trial motion, because that motion would only have resulted in a new trial, and First State preferred to ask the Court of Appeals to order judgment in its favor, which is what First State did on appeal. "Appellant did not ... mov[e] for a new trial ... because the proper remedy was not a new trial but relief from the judgment...." Letter of Tasha Marie Stevens, Oct. 4, 2018 p. 1. "[I]t would not have been the proper remedy to ask for a new trial based on the erroneous jury instruction in this case.... [T]his type of erroneous jury instruction would not be corrected by a new trial; it would require that Appellant be relieved from the judgment...." *Id.* p. 2. "Appellant had a reason for not pursuing this issue in the request for new trial; a new trial on this issue was not the proper remedy." *Id.* p. 3.

II. THE THIRD CIRCUIT DECISION DOES NOT CONFLICT WITH THE NINTH CIRCUIT DECISION IN *PEREZ*

The Third Circuit decision does not conflict with the Ninth Circuit opinion in *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997) (*en banc*). *Perez* was a criminal case which expressly turned on an interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure. 116 F.3d at 844 ("[The defendants] argue that we may review the error under Rule 52(b)...."), 845 (a waived right is not "an 'error' within the meaning of Rule 52(b)"). But this is a civil action, to which Rule 52 does not apply.

The Ninth Circuit assuredly did not understand its 1997 decision in *Perez* to apply to civil cases. To the contrary, only six years earlier, in another *en banc* opinion, that Circuit had emphasized that it did not recognize any plain error exception in civil cases, because of the exceptionless requirement in Rule 51 (as it was then worded) that a party must preserve in the trial court its objection to a jury instruction. "This court has enjoyed a reputation as the strictest enforcer of Rule 51; we have declared that there is no 'plain error' exception in civil cases in this circuit." *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991) (*en banc*). The Ninth Circuit reiterated that rule for civil cases only four years after *Perez*. *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 714 (9th Cir. 2001) ("This court has long enjoyed the 'reputation as the strictest enforcer of Rule 51,' as we have consistently declared that there is no 'plain error' exception in civil cases in this circuit.") (quoting *Hammer*). In 2003,

Judge Tashima, the author of *Perez*, joined an opinion which applied the Ninth Circuit rule rejecting in civil cases any plain error review of jury instructions to which no objection had been made. *Sussman v. Unum Provident Corp.*, 65 Fed. Appx. 123, 124 (9th Cir. 2003).

After the 2004 amendment to Rule 51 of the Federal Rules of Civil Procedure, adding Rule 51(d)(2), the Ninth Circuit will consider correcting plain error in a jury instruction if the appellant merely failed to object to an instruction. But even after that amendment, the Ninth Circuit remains in civil cases avowedly "the strictest enforcer of Rule 51." *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1015 (9th Cir. 2007) (quoting *Voohries-Larson*). Since its decision in *Perez*, in civil cases where an appellant itself had invited the error of which it complained on appeal, the Ninth Circuit has repeatedly declined to apply plain error review and has held that the appellant had waived the error. *Logtale, Ltd. v. Ikor, Inc.*, 738 Fed. Appx. 422, 424 (9th Cir. 2018) ("Defendants stipulated to the jury instructions and therefore affirmatively waived any objection."); *Lane v. Grant County*, 610 Fed. Appx. 698 (9th Cir. 2015) ("The County expressly consented to the elimination of [the] Instruction ... and therefore waived the right to appellate review of that decision. Fed. R. Civ. P. 51...."); *Peralta v. Dillard*, 744 F.3d 1076, 1084-85 (9th Cir. 2014), *cert. denied*, 574 U.S. 1073 (2015) ("Even if Peralta's argument had merit, we would reject it because he invited the error.... He can't now turn around and challenge the instruction containing some of the very text he proposed...."); *Goldberg v. Pacific Indemnity*

Co., 405 Fed. Appx. 177, 180 (9th Cir. 2010) ("Even if plaintiffs' argument had merit, they waived any objection to the form of the instruction by suggesting a substantially similar instruction at trial"); *Pretty On Top v. First Interstate Bank*, 197 Fed. Appx. 540, 542 (9th Cir. 2006) ("This claim is waived because ... the instruction Pretty On Top now challenges was, nearly verbatim, one of the instructions he himself proposed."); *Karn v. Hanson*, 197 Fed. Appx. 538, 540 (9th Cir. 2006) ("She waived her challenge to that instruction by requesting the use of a special verdict form that incorporated the same analytical structure.").

First State asserts that the Third Circuit's decision conflicts "with this [C]ourt's ruling in *United States v. Olano*, 507 U.S. 725 (1993)...." Pet. 6. But, as petitioner itself acknowledges, *Olano* states the standard "for analysis under plain error review in the criminal context...." Pet. 7. *Olano* was expressly an application of the Federal Rules of *Criminal* Procedure. "Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals limited power to correct errors that were forfeited because not timely raised in district court." 507 U.S. at 731. "[T]he authority created by Rule 52(b) is circumscribed." *Id*. at 732. It was in the context of explaining the meaning of Rule 52(b) that this Court drew the distinction between waiver and forfeiture.

> The first limitation on appellate authority under Rule 52(b) is that there indeed be an "error." Deviation from a legal rule is "error"

> unless the rule has been waived ... [A] defendant who knowingly and voluntarily pleads guilty ... cannot have his conviction vacated by court of appeals on the grounds that he ought to have had a trial. Because the right to trial is waivable, ... [when a] defendant ... [who] enters a valid guilty plea waives that right, his conviction without a trial is not "error."

Id. at 732-33.

Olano made clear that the extent to which an appellate court would review a non-preserved error would "depend on the right at stake." 507 U.S. at 733. The reluctance of the Court in *Olano* to preclude plain error review of an unpreserved error arose from the fact that a constitutional right was at stake, and from the serious consequences for a criminal defendant of a finding of waiver. The definition of waiver in *Olano* was taken from *Johnson v. Zerbst*, where it was immediately preceded by an admonition "[t]hat 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" 304 U.S. 458, 464 (1938) (footnotes omitted) (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) and *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 307 (1937)). The instant case does not involve the possible loss of fundamental constitutional rights.

First State objects that the Third Circuit decision disregards this Court's admonition 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.

Pet. 16 (quoting *Puckett v. United States*, 556 U.S. 129, 135-36 (2009)). But Rule 52(b) strikes the balance in criminal cases; the appropriate balance is different in civil cases, where the magnitude of the harm that could flow from an error is far less than in criminal cases, and where concerns of judicial efficiency can appropriately be given greater consideration.

The Third Circuit has correctly recognized that the circumstances constituting a waiver of a constitutional right by a criminal defendant are narrower than what would constitute a waiver in an ordinary civil action.

> At oral argument, the Grossbaums suggested that there could be no waiver unless they intended to waive the argument. Such an argument confuses two separate types of waiver. Certainly, for a criminal defendant to waive a constitutional right, that waiver must be intentional. See ... *Olano*.... Here, the Grossbaums have not waived a constitutional right, but have instead waived an argument by failing to raise that argument before the District Court.... A litigant can waive an argument by failing to raise the issue before the District Court, even if that litigant did not intend to concede the argument.

Grossbaum v. Genesis Genetics Inst., LLC, 489 Fed. Appx. 613, 617 n.5 (3d Cir. 2012).[4]

III. CERTIORARI SHOULD NOT BE GRANTED IN THIS CIVIL CASE TO ADDRESS WHAT CONSTITUTES A WAIVER IN A CRIMINAL CASE

The Court of Appeals in the instant case suggests that the First State's conduct constituted a waiver even under the *Olano* standard for criminal cases. App. 9 n.20. The real gravamen of the petition is not that the Third Circuit's standard in civil cases conflicts with the Ninth Circuit standard in civil cases, but that the two circuits apply different standards in criminal cases.

The petition objects in particular to several Third Circuit decisions in criminal cases, which petitioner asserts are inconsistent with the Ninth Circuit's decision in *Perez* and with this Court's decision in *Olano*. Pet. 12, 14. The petition criticizes *United States v. Console*, 13 F.3d 641, 660 (3d Cir. 1993), *cert. denied sub nom. Markoff v. United States*, 513 U.S. 812 (1994); *United*

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[4] The lower courts have not always articulated with clarity the standards they are applying when deciding whether to permit plain error review, and do not invariably distinguish between the waiver standards in civil and criminal cases. Whether an appellant has waived an issue, and is thus precluded from even plain error review, is a question that does not arise with great frequency in civil cases. If the Court wishes to address what constitutes in civil cases a waiver that bars plain error review, it should wait until that issue has percolated further.

States v. West Indies Transp., 127 F.3d 299, 311 (3d Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998); and *United States v. Ozcelik*, 527 F.3d 88, 97 n.6 (3d Cir. 2008), *cert. denied*, 555 U.S. 1153 (2009). This Court has already denied review in all of those cases; in each instance, the petition did not raise the *Olano* question now highlighted by petitioner.

Invited error is not a common problem in criminal appeals. There appear to be only a handful of cases in which it has arisen, and mattered,[5] in the quarter century since *Olano*. If the Court ultimately decides to grant review to address that question, it should do so, not a civil case, but in a criminal case, where the context of the issue will illustrate the ramifications and importance of this question in criminal litigation.

IV. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The highly idiosyncratic circumstances of this case make it a poor vehicle for addressing the questions presented.

(1) The central contention of the petition is that the Court of Appeals should not have made a finding of waiver without first specifically addressing (a) whether prior to the issuance of the jury instructions

[5] In some instances of invited error, the Court of Appeals also held that the asserted defect in the instructions was not plain error, so it did not matter whether the invited error constituted a waiver.

First State's counsel knew that the ADAAA barred Robinson's regarded-as reasonable accommodation claim, and (b) whether First State's counsel consciously intended to abandon that defense. ("[T]he Third Circuit ... 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.") Pet. 8 (emphasis added). "The Third Circuit *points to no ... expression or indication* that First State knew of the error...." Pet. 9 (emphasis added).[6] "The Court of Appeals ... *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." Pet. 5 (emphasis added).[7]

The fatal flaw in this objection is that First State repeatedly failed to ask the panel to do any of those things. In the Third Circuit, First State filed a motion for summary action, an opening brief, and a reply brief, all arguing that the jury instruction in question was plain error. But none of those documents discussed whether First State had waived this issue by its course of action in the District Court. In September 2018, the

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[6] "The Third Circuit did not identify facts to support that First State knew of the erroneous theory or instructions and intended to waive a challenge to it." Pet. 15-16.

[7] "[T]he court needed to find that First State knew of the misstatement of law in the jury instructions ... and intended to relinquish its right to [assert] any challenge to them.") Pet. 11.

Third Circuit asked counsel for the parties to file letter briefs addressing, *inter alia*, whether First State had waived this issue.[8] First State's letter brief, filed in October 2018, did not assert that a finding of waiver would require a finding about its knowledge and/or intent to waive the ADAAA defense, did not cite *United States v. Olano* (relied on throughout the petition), and did not mention the Third Circuit decision which First State now contends recognized such requirements, *Virgin Islands v. Rosa*, 399 F.3d 283 (3d Cir. 2003); see Pet. 13, 14. That letter brief argued, instead, that First State had done the right thing by raising this issue on appeal rather than in a motion for new trial.[9] So it is entirely understandable that the Third Circuit's April 1, 2019 opinion did not make findings about knowledge or deliberate acquiescence.

Two weeks *after* the panel opinion, First State filed a petition for rehearing and rehearing *en banc* that for the first time raised the issues that are the focus of the petition in this Court. "The court erred by finding that First State's failure to object to Robinson's erroneous theory of the case over the course of the litigation and during the trial was a waiver of that error without finding that First State had knowledge that Robinson's theory was erroneous and had affirmatively waived any objection thereto." Petition of Appellant for Rehearing and Rehearing En Banc, p. 3 (bold omitted). That petition for rehearing, presaging the arguments

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[8] Letter of Third Circuit to Counsel, September 27, 2018.

[9] Letter of Tasha Marie Stevens, October 4, 2018, pp. 1-3.

at the core of the petition in this Court, repeatedly relied on *Olano* and *Virgin Islands v. Rosa*. Petition for Rehearing, pp. 3-13. But that after-the-fact argument was insufficient to raise or preserve this issue in the Court of Appeals. First State waived in the Court of Appeals the issues which it now seeks to litigate about whether in the District Court it waived the merits of this dispute.

(2) The ADAAA exemption now invoked by First State could easily have been identified when this case was in the district court. First State did not do so because it made a tactical decision to instead focus its defense of this case in other directions.

In the Third Circuit, First State hinted that it had faced some difficulty in learning about the ADAAA exemption. "Unfortunately, *despite the Appellant's efforts*, it was not aware and unable to make the court aware of an exemption to the [ADA] that eliminated one of the Plaintiff's claims prior to the trial in this case." Letter of Tasha Marie Stevens, Oct. 4, 2018, p. 5 (emphasis added). But more than four months went by between July 2016, when Robinson first made clear she was asserting regarded-as claims,[10] and the trial in December of that year. A quick review of the text of the statute under which this action was brought would have revealed the exemption. First State told the appellate court that "[t]here was little case law on 'regarded as' disabled claims for

[10] Plaintiff's Opening Brief in Support of Motion for Summary Judgment, p. 8.

reasonable accommodation at the time of trial." *Id*. p. 5. But the exemption is apparent on the face of the statute. First State's argument that the jury instruction was plain error necessarily rests on an insistence that the existence of the exemption is crystal clear. Moreover, one of the lower court ADAAA cases cited by First State in the district court *did* refer to this exemption, as the Court of Appeals later noted. *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 188 n.17 (3d Cir. 2009);[11] see App. 8, n.17. First State cited page 193 of *Hohider* in one of its district court briefs in the summer of 2016.[12] Apparently the defense attorney who read page 193 did not notice footnote 17 on page 188 of that same opinion.

Rather than pursue legal research into the legal sufficiency of the regarded-as reasonable accommodation claim, counsel for First State evidently focused their efforts on developing a factual defense to the four claims[13] Robinson was advancing. The dismissal claims

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[11] "The ADAAA ... makes clear that "[a] covered entity under [Title I of the ADA] ... need not provide a reasonable accommodation ... to an individual who meets the definition of disability ... solely under [the 'regarded as' prong] of such section. [Pub. L. No. 101-325] § 6(a)(1), ... 42 U.S.C. § 12201(h)."

[12] Defendant First State Community Action Agency's Answering Brief In Opposition to Plaintiff's Motion for Summary Judgment, p. 12.

[13] Those claims were (1) that Robinson had been dismissed because she was actually disabled, (2) that Robinson was denied the reasonable accommodation required by her actual disability, (3) that Robinson had been dismissed because she was regarded as disabled, and (4) that Robinson was denied the reasonable

probably involved the greater financial exposure, because Robinson might win back pay, and with three other claims still going to trial, perhaps it did not seem worthwhile to engage in legal research that, even if it eliminated the regarded-as reasonable accommodation claim, was not going to avoid a trial. That evidentiary focus met with some success. First State ultimately persuaded the trial judge to exclude the expert report regarding Robinson's asserted disability and also convinced the jury to reject Robinson's claim that she had been dismissed because she was regarded as disabled. But it was this same tactical decision to focus on the evidence, rather than legal research, which led First State to overlook the ADAAA exemption until after the trial had concluded, when the regarded-as reasonable accommodation claim became of central importance.

(3) First State's delay in raising the ADAAA exemption materially prejudiced Robinson.

From the outset, Robinson's assertion that she was actually disabled rested on a report by Dr. Phyllis Parker. Although First State repeatedly objected to that report, counsel for Robinson had little reason to seek another diagnosis, because the claims based on actual disability effectively duplicated the regarded-as claims. The evidence that First State regarded Robinson as disabled was very strong (the jury ultimately concluded this), so obtaining a second diagnosis was highly unlikely to affect the outcome of the case;

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accommodation that was appropriate for the disability she was regarded as having.

Robinson could not recover twice for the dismissal or the denial of reasonable accommodation. In the fall of 2016, the trial judge decided to bar the Parker report, which effectively doomed the actually-disabled claims unless Robinson got a new report. But Robinson still had the legally unquestioned regarded-as claims, so there was little reason to do so; Robinson was able to proceed to trial on her two regarded-as claims. When First State raised the ADAAA exemption *after* trial, it was of course too late to go back and obtain a pre-trial second diagnosis of actual disability on which to base a reasonable accommodation claim.

On the other hand, had First State raised the ADAAA exemption *before* trial, counsel for Robinson would then have had a good reason (and sufficient time) to obtain another diagnosis, because the reasonable accommodation claim could have prevailed only if a jury found Robinson was actually disabled. And if First State had timely raised the ADAAA exemption, the need for a new diagnosis would have been particularly compelling once the district judge decided to bar the Parker report, because without a new diagnosis the reasonable accommodation claim could not have survived.

We do not suggest that counsel for First State avoided raising the ADAAA exemption for the purpose of prejudicing Robinson. But First State is now seeking to exploit the prejudice that occurred. The normal remedy for a defective jury instruction would be to vacate the judgment and order a new trial. But if this case were retried, Robinson could get a new diagnosis

report, could try her reasonable accommodation claim based on proof of an actual disability, and would likely prevail. In its letter brief, First State emphasized that it did not want a new trial.[14] Instead, First State asked the Court of Appeals to hold (on the record that resulted from its failure to raise the exemption in a timely manner) that the jury verdict should be reversed and that "judgment [should be] entered in its favor."[15]

(4) The circumstances of this case are quite unique. In the vast majority of cases in which an appellant has sought plain error review of an allegedly erroneous jury instruction, the failure to preserve an objection to that instruction involved events immediately surrounding the adoption of those instructions, typically on the very day when counsel and the court discussed what the instructions would be. In this case, First Robinson's failure to raise the ADAAA exemption had continued "[t]hroughout the history of this litigation, including in its early stages" (App. 10), from the summary judgment motions in the summer of 2016, through the December 2016 trial, and then the January 2017 new trial motion. A decision by this Court regarding whether plain error review is available in such an atypical case would be a poor use of this Court's limited resources, because such situations are unlikely to occur again. As counsel for First State

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[14] Letter Brief of Tasha Stevens, p. 1. The only relief afforded after a court of appeal finds that the jury instructions were erroneous is remand for a new trial. See, e.g., *Kingsley v. Hendrickson*, ___ U.S. ___, 135 S.Ct. 2466 (2015).

[15] Appellant's Motion for Summary Action, p. 5.

correctly observed in the Third Circuit, "[t]hese types of failures should be few and far between."[16]

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

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[16] Letter of Tasha Marie Stevens, Oct. 4, 2018, p. 5.