

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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