No. 07-367

In The
Supreme Court of the United States

MARALYN S. JAMES,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Under *Burlington Northern & Santa Fe Rwy. Co v. White*, 126 S.Ct. 2405 (2006), whether a retaliatory act is unlawful depends on whether that action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 126 S.Ct. at 2415. This is a classic mixed question of fact and law, involving the application of a legal standard to a given set of facts.[1] The issue presented is *who* should resolve that question.

The courts of appeals clearly disagree about this recurring problem. Six circuits hold that the question framed by *Burlington Northern* should be determined by a court; when the question is presented on appeal, the appellate court decides whether the retaliatory act would have deterred a reasonable worker. (Pet. 6-11). Four circuits hold that this mixed question of law and fact should be decided by a jury, subject to the usual caveat that the possible deterrent effect of the asserted retaliation must be an issue about which reasonable jurors could disagree. (Pet. 11-14).

Respondent does not actually deny that the courts of appeals follow these distinct standards. Respondent contends, however, that there is not really a conflict, because all circuits agree that a case cannot go to trial unless "there is a legally sufficient basis upon which a jury may base a verdict." (Br.

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[1] *See Pullman Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982).

Opp. 3, 11). But the courts of appeals are in clear disagreement about what would constitute a "legally sufficient basis" to support a verdict. In six circuits there is only a legally sufficient basis if the *court* concludes that the alleged retaliatory act would have deterred protected activity. In four other circuits there is a legally sufficient basis if a *jury* could reasonably conclude that the alleged act would have deterred such activity.

"Legally sufficient basis" is not a concrete standard applied by the lower courts in defining the role of a jury. To the contrary, this phrase does not actually appear in any of the 26 appellate decisions, summarized in the petition, that apply *Burlington Northern*. Respondent is merely asserting that each of the various circuits insists that its own standard is the correct one, i.e. the standard which properly defines "legally sufficient." But it could be said with equal force, and irrelevance, that all of the conflicting decisions which led to the grant of certiorari in *Burlington Northern* – or, indeed, in any other civil case – agreed that there had to be a legally sufficient basis for any jury verdict. That truism does not mean that there is not a conflict as to what constitutes a legally sufficient basis. After all, *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education*, 347 U.S. 483 (1954), agreed that there had to be a constitutionally sufficient basis for any race-based action; those decisions, nevertheless, were wholly inconsistent.

Respondent insists that in the Sixth Circuit a case will be permitted to go to trial if there is an issue of "material fact" or "a legitimate factual issue." (Br. Opp. 6-7). That is true only in the sense that a dispute about a question of historical fact – e.g., whether the plaintiff was actually fired – would be for the jury in the Sixth or any other circuit. But whether a retaliatory act would have deterred protected activity is not a question of historical fact, it is a mixed question of law and fact. Respondent does not claim that any Sixth Circuit decision has ever permitted a jury to resolve that issue.

For example, respondent asserts that in *Watson v. City of Cleveland*, 202 Fed. Appx. 844 (6th Cir. 2006), the Sixth Circuit merely barred a trial of the plaintiff's retaliation claim because "there was no disputed issue of fact." (Br. Opp. 7). But in *Watson* there emphatically was a dispute about whether the adverse actions complained of – actions the defendant admitted taking – would have dissuaded a reasonable worker from engaging in protected activity. The Sixth Circuit did not suggest that that mixed question of law and fact was undisputed; rather, the court of appeals recognized the existence of that very dispute and resolved that issue itself. 202 Fed. Appx. at 853 ("these actions would not dissuade a reasonable employee from invoking the protections of Title VII.")

Respondent insists that in *Jordan v. City of Cleveland*, 464 F.3d 584 (6th Cir. 2006), "[t]here is no mistaking that the basis for the court's decision [upholding the retaliation claim] was the presence of

a legitimate factual dispute that mandated referral to the jury for a determination." (Br. Opp. 7). To the contrary, the Sixth Circuit's discussion of the retaliation claim does not mention either the existence of any factual dispute or the possibility of referring anything to the jury for determination. The nature of the assertedly retaliatory acts in *Jordan* simply was not in dispute. The court of appeals emphatically did not hold that a jury should decide whether those undisputed actions met the *Burlington Northern* standard. The case had been tried prior to this Court's decision in *Burlington Northern*.[2] Rather than "refer [the case] to a jury for determination" under the *Burlington Northern* standard, the Sixth Circuit itself applied that standard.

Respondent describes *Michael v. Caterpillar Financial Service Corp.*, 496 F.3d 584 (6th Cir. 2007), as upholding summary judgment regarding several retaliation claims because "[t]he Court found on two of the claims of adverse employment action that there were no genuine issues of material fact." (Op. Cert. 6). To the contrary, nothing in the relevant portion of the court's opinion makes any reference whatever to the presence or absence of "genuine issues of material fact." The opinion simply holds that one of the asserted retaliatory acts "does not

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[2] Although the date of the trial is not set out in the opinion, it was appealed in 2004 (it bears the docket numbers 04-3389 and 04-3436) and was argued in April 2006, two months before this Court's decision.

amount to a materially adverse action" and that other alleged reprisals did not "constitute materially adverse actions." 496 F.3d at 594.

The recent[3] Sixth Circuit decision in *Jones v. Johanns*, 2007 WL 2694017 (6th Cir., Sept. 14, 2007), illustrates that circuit's consistent view of the law. The plaintiff in that case contended that a series of written reprimands, allegedly issued in reprisal for having complained about discrimination to certain federal officials, were actionable under *Burlington Northern*. Rather than refer that question to a jury, or assess whether a reasonable jury could find the reprimands would deter protected activity, the Sixth Circuit – as occurred in the instant case[4] – simply decided that question itself:

> *We conclude* that these letters did not constitute a materially adverse action under the *Burlington Northern* standard. . . . Under these circumstances, *we do not find* that these letters would dissuade a reasonable employee from making or supporting a charge of discrimination.

2007 WL 2694017 at *6 (Emphasis added).

Respondent correctly observes that in the Second, Third, Tenth, and District of Columbia Circuits the

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[3] *Jones* was decided on September 14, 2007, the day on which the petition for writ of certiorari was filed in the instant case.

[4] Judge Cook was a member of the panels in both cases.

courts of appeals permit juries to apply the *Burlington Northern* standard only when a reasonable jury could find that the asserted retaliation would deter protected activity. (Br. Opp. 8-10). That, however, is the normal rule for when any issue – including a question of historical fact – should be left to the jury. That traditional and modest limitation is entirely different from the holding in the Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits that only judges – and never juries – are to decide whether a retaliatory act would have deterred protected activity.

While the inter-circuit conflict in this case arises with regard to the application of the *Burlington Northern* standard, it reflects a more far reaching disagreement among the lower courts regarding whether in civil cases judges or juries should resolve mixed questions of law and fact. The Sixth Circuit adheres to the view that such mixed questions should be decided by the courts not by juries. "We have held that mixed questions of fact and law are treated as questions of law." *Prokos v. City of Athens*, 118 Fed. Appx. 921, 925 (6th Cir. 2004). The Ninth Circuit has taken the same approach.[5] The Second[6] and Federal

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[5] *Thrifty Oil Co. v. Bank of America National Trust and Savings Ass'n*, 310 F.3d 1188, 1194 (9th Cir. 2002) ("Where, as here, the case turns on a mixed question of fact and law and the only disputes relate to the legal significance of undisputed facts, the controversy collapses into a question of law.").

[6] *Richardson v. New York State Dept. of Correctional Service*, 180 F.3d 426, 437 (2d Cir. 1999) ("The question [at issue] may . . . be characterized as a mixed question of law and fact

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Circuits[7] have concluded that such mixed questions should be decided by juries. The Tenth Circuit holds that courts "often" but not invariably decide mixed questions of fact and law.[8] In addition to the disagreement in the instant case about whether judges or juries should apply the *Burlington Northern* standard, there are inter-circuit conflicts about whether courts or juries should decide other specific mixed questions of fact and law, such as the mixed question posed by an assertion of qualified immunity.[9]

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because it involves the application of a legal standard to a particular set of facts. . . . Such mixed questions are especially well-suited for jury determination and summary judgment may be granted only when reasonable minds could not differ on the issue.").

[7] *Eli Lilly and Co. v. Aradigm Corp.*, 376 F.3d 1352, 1362 (Fed. Cir. 2004) ("When we review the denial of a post-verdict motion for judgment as a matter of law on a mixed question of law and fact given to a jury without a special verdict form detailing the underlying questions of fact, we must sustain the jury's conclusion unless the jury was not presented with substantial evidence to support any set of implicit findings sufficient under the law to arrive at its conclusion.").

[8] *Weaver v. Chavez*, 458 F.3d 1096, 1101 (10th Cir. 2006) ("even when a question lends itself to jury resolution, the court is often still called on to resolve a mixed question of law and fact."); *Otis Elevator Co. v. Midland Red Oak Realty, Inc.*, 483 F.3d 1095, 1011 (10th Cir. 2007) ("Interpretation of an ambiguous contract is a mixed question of law and fact and should be determined by the jury.").

[9] *Curley v. Klem*, 499 F.3d 199, 208 (3d Cir. 2007) ("The fundamental challenge lies in the nature of the questions that compose the test. Since they are mixed questions of law and fact, one is left to ask who should answer them. . . . [A] disparity of

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The decisions of this Court have left the lower courts understandably uncertain as to the role of the trier of fact in resolving mixed questions of law and fact. In *Pullman Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982), the Court noted – and expressly did not resolve – a longstanding (and continuing) inter-circuit conflict regarding whether in the case of a bench trial the findings of a trial judge on a mixed question of law and fact are subject to limited "clear error" review under Rule 52 of the Federal Rules of Civil Procedure.[10] In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721-22 (1999), the Court held that the particular mixed question at issue in that case had properly been submitted to the jury, but expressly did "not attempt a precise demarcation of the respective provinces of judge and jury in determining [an inverse condemnation claim]." *Ornelas v. United States*, 517 U.S. 690, 701 (1996), held that in a federal criminal case the trial judge's determination of a mixed question of law and fact is subject only to deferential review. But in *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court concluded

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opinion exists among our sister circuits as to whether a judge or jury should make the ultimate immunity determination.").

[10] "We need not . . . address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact – *i.e.*, questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard. . . . There is substantial authority in the Circuits on both sides of this question."

that state court determinations of such mixed questions are subject to independent review – not the more limited review of factual determinations – in a subsequent federal habeas proceeding. In *United States v. Gaudin*, 515 U.S. 506 (1995), the Court emphatically insisted that in a criminal case the Sixth Amendment entitles the defendant to a jury determination of a mixed question of law and fact, but suggested that in immigration cases appellate courts could decide *nisi prius* mixed questions of law and fact. 515 U.S. at 522. On several occasions this Court has held that whether an individual is a seaman within the meaning of the Jones Act is a mixed question of law and fact that should ordinarily be resolved by a jury.[11] The lower courts have been

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[11] *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 554 (1997) ("The seaman inquiry is a mixed question of law and fact, and it often will be inappropriate to take the question from the jury. Nevertheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion."); *Chandris v. Latsis*, 515 U.S. 347, 369 (1995) ("the question of who is a member of a crew, and therefore who is a seaman, is a mixed question of law and fact. . . . [I]t is the court's duty to define the appropriate standard. . . . On the other hand, [i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a member of a crew, it is a question for the jury."); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991) ("the question of who is a member of a crew, and therefore who is a seaman, is better characterized as a mixed question of law and fact. . . . The jury finds the facts and, in these cases, applies the legal standard. . . . If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a member

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unable to glean from these decisions any clear guidance regarding how and by whom mixed questions of law and fact are to be decided.

This case presents an excellent vehicle for resolving the dispute about the administration of *Burlington Northern*, and addressing the broader question of whether juries or judges should resolve mixed questions of law and fact in civil litigation. The court below, proceeding in a manner well established in the Sixth Circuit and five other circuits, made its own determination of the mixed question in the instant case. (Pet. App. 9). In the litigation below respondent expressly urged that the appellate court should itself make that determination, and never argued that a jury – if permitted to resolve the issue – could not reasonably conclude that such deterrence would occur. Petitioner contended, to the contrary, that the jury verdict should be upheld because it was sufficiently supported by the evidence.[12]

The application of *Burlington Northern* presents a compelling illustration of why mixed questions of law and fact should, at least ordinarily, be treated as matters to be resolved by a jury. The controlling issue

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of a crew, it is a question for the jury. . . . In many cases this will be true.").

[12] Appellee's Letter Brief Re: Application of *Burlington Northern v. White, James v. Metropolitan Government of Nashville and Davidson County*, No. 04-5874 (6th Cir.), 14 ("This jury received the same instructions as the jury in *Burlington Northern*. There is ample evidence to support the jury's verdict.").

under *Burlington Northern* – whether a particular retaliatory act would deter a reasonable employee from engaging in protected activity – is a question which juries are particularly qualified to resolve. In determining that issue, the members of a jury can draw on a wide range of work experiences in assessing the importance and potential chilling effect of the retaliatory act in question, and in understanding the immediate possible harm and broader employment ramifications of the employer's conduct. Predicting how reasonable individuals would act in response to an act or threat of retaliation is closely analogous to the determinations juries make every day in tort actions about how reasonable people would act to avoid possible injury to others. If ever there was a situation in which a mixed question of law and fact should ordinarily be resolved by a properly instructed jury, this surely is that case.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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