No. 09-583 MAR 30 2010

In The
Supreme Court of the United States

HENRIETTA BROWNING,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The government acknowledges the existence of a well-established inter-circuit conflict regarding the question presented. (Br. Opp. 6 ("the courts of appeals are divided about whether it is error for a district court to decline to issue an inference instruction"), 6-7 n.5 (contrasting rule in the Second, Third, Fourth, Fifth and Tenth Circuits with rule in the First, Sixth, Seventh, Eighth and Eleventh Circuits), 12 (noting "disagreement among the courts of appeals")). Respondents argue only that the instant case does not present an appropriate vehicle for resolving that question.

(1) The requested jury instruction in this case stated that

> if you find that the defendants' explanation about why they took adverse action against a plaintiff is not worthy of belief, you *may* infer a discriminatory or retaliatory motive from that fact.

(Pet. App. 4a) (emphasis added). Respondents assert that this requested instruction was not "a complete and correct statement of the law." (Br. Opp. 6). The government argues that the instruction was defective because, although it properly used the permissive term "may" (rather than "must"), it failed to also contain "language about jurors' not being 'required' to draw such an inference." (Br. Opp. 8). In the proceedings below the government never objected to the instruction on this basis.

The language of proposed instruction is typical of the instructions commonly requested, and in several circuits held mandatory, regarding inferences of discrimination. In *Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001), the Fifth Circuit overturned a jury verdict because the trial judge had refused to give the following instruction.

> If the Plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you *may* presume that the employer was motivated by age discrimination.

256 F.3d at 359 (emphasis added). In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998), the improperly denied instruction was similar.

> If you find that the Defendant employer's reasons for non-renewal of Plaintiff's employment are false or not credible, you *may* infer that discrimination was the real reason and you *may* find for plaintiff.

(Brief of Appellant, *Smith v. Borough of Wilkinsburg*, No. 97-3133 (3d Cir.) at 13, available at 1997 WL 33552033) (emphasis added). Even the circuits which have refused to require a permissive inference instruction have approved the form of instruction requested in this case.[1] None of these instructions

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[1] In *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994), the court commented,

> Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the

(Continued on following page)

included the special admonition now advocated by the government.

It is not the case, as the government suggests, that all circuits "agree" that a permissive inference instruction is improper unless it includes an express admonition that an inference of discrimination is "not required." (Br. Opp. 6-7). The decisions described in the previous paragraph are all to the contrary. The government is unable to identify a single case in which a proposed jury instruction was ever disapproved, or even challenged, because it lacked the admonition now urged by respondent. In *Ratliff* the EEOC expressly approved the form of the instruction proposed by the plaintiff in that case.[2]

> employer's explanation for its decisions, it *may* infer that the employer is trying to cover up age discrimination. This is a correct statement of the law....

43 F.3d at 343 (emphasis added).

In *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1235 (11th Cir. 2004), the Court "acknowledge[d] that Conroy's pretext instruction is ... a correct statement of law." That proposed instruction stated that "[d]isbelief of the defendant's explanation *may* be enough to infer discrimination or retaliation." (Initial Brief of Plaintiff-Appellant, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.) at 9 (emphasis added), available at 2003 WL 23739368.)

[2] Brief of the Equal Employment Opportunity Commission as *Amicus Curiae*, *Ratliff v. City of Gainesville*, No. 99-41472 (5th Cir.) at 14 ("Ratliff's proposed jury instruction accurately states an important principle of proof in disparate treatment cases").

In the proceedings below the United States never objected on this ground to the instruction requested by petitioner. Respondents' new objection is not limited to the circumstances of this particular case, but attacks the correctness of the most common form of permissive inference instruction. If the government believes that the permissive inference instructions now in use are improper without an express warning that an inference of discrimination is "not required," this case is an excellent vehicle for resolving that objection.

The type of instruction requested in this and other cases is correct even without the additional language now urged by the government. The plain meaning of the word "may" is itself clearly permissive; the jurors would of course understand that an inference they "may" draw was not an inference they were required to make. The jury instructions that were actually given in this case included several instructions regarding what the jury "may" do,[3] language which was clearly different from other instructions from the court delineating things the jury "must" or "should" do.[4] The government did not object to any of these instructions using the term "may," even though none of them included the additional (and redundant) admonition that the jury was "not required" to do any of the permitted things. If a

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[3] Tr. 602, 603.

[4] E.g., tr. 602, 604.

similarly worded requested permissive inference instruction had been given, the jury would assuredly have understood that it was not required to draw the permitted inference.

The United States suggests that any instruction using the term "may" would be improperly "one-sided" if it lacked an express admonition that the inference or other jury action is "not required." (Br. Opp. 8). The principle suggested by this argument would wreak havoc with the jury instructions in use throughout the federal district courts; jury instructions given in most if not all civil and criminal trials use the word "may" without the additional "not required" admonition now insisted upon by respondents. In the Ninth Circuit, for example, there are a number of Model Jury Instructions for criminal cases that utilize the term "may" (without any "not required" caveat) in instructions favorable to the prosecution.[5] The United States cannot seriously be suggesting that district judges should now refuse to

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[5] For example, Model Jury Instruction (Criminal) 4.3 states:

> You have heard evidence of other [crimes] ... engaged in by the defendant. You *may* consider that evidence ... as it bears on the defendant's [*e.g.*, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident]....

(Emphasis added; see Model Jury Instruction (Criminal) 4.6 (jury "may" consider criminal record in deciding believability of witness); Model Jury Instruction (Criminal) 5.1 (defendant "may" be convicted of aiding and abetting even though he did not personally commit the crime)).

give such common instructions on the ground that they are "one-sided."

(2) The government asserts that the petition failed to contend that the denial of the requested instruction was in any way prejudicial. (Br. Opp. 10). That is not correct. The petition argued at length that

> in the absence of [the requested] instruction juries are likely to ... mistakenly assum[e] that something more than proof of the falsity of an employer's explanation is required to support an inference of discrimination.

(Pet. 21; see Pet. 21-30). The petition specifically contended that "this problem can be avoided only by an instruction from the court, not by mere argument of counsel." (Pet. 25). In the absence of such an instruction, we urged, there would be no way to know whether the jury might have erroneously returned a verdict for the defendant because

> the jury disbelieved the defendant's explanation but concluded, incorrectly, that such a disbelief was not enough to sustain [the plaintiff's] burden of proving ... discrimination.

(Pet. 28) (quoting Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae, Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *24-*25). The EEOC insists that "[c]ounsel's arguments are not

an adequate substitute for a complete and accurate statement of the law by the judge."[6]

The government in this case takes a contrary view, expressly disagreeing with the position of the EEOC. The United States contends that, at the least, a jury need not be given a permissive inference instruction so long as the trial judge allows counsel for plaintiff to attempt to persuade the jury that the falsity of a defendant's explanation is the type of evidence which could warrant an inference of discrimination. In the court below the government argued that judges should never give a permissive inference instruction, and ought instead require counsel to raise the issue in closing argument.[7]

The contention advanced by respondents is not a case-specific harmless error argument; rather, it goes to the heart of the conflict among the courts of appeals. A central issue which divides the circuits is whether mere argument of counsel can be a sufficient substitute for, or is preferable to, an authoritative statement of the law from the trial judge.

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[6] Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae, Conroy v. Abraham Chevrolet-Tampa, Inc.*, No. 03-11405-GG (11th Cir.), 2003 WL 23744565 at *24-*25.

[7] "Permissive inferences should be left to counsel to argue and should not become the responsibility of the trial court." Appellees' Answering Brief, *Browning v. United States of America*, No. 07-35557 (9th Cir.) at 37, available at 2007 WL 4755536.

Respondents assert that lower courts have "consistently" agreed that a *Reeves* jury instruction is unnecessary so long as counsel for the plaintiff is simply permitted to argue to the jury that the falsity of a defendant's explanation is the type of evidence that would warrant an inference of discrimination. (Br. Opp. 11). That is not correct. The Tenth Circuit, for example, insists that a jury instruction is required precisely because argument of counsel is insufficient.

> The dissent relies considerably on the arguments of counsel to take the place of instructions by the judge on this issue. However, the issue is not the mere fact that an inference of discrimination is possible. Rather, the permissibility of an inference of discrimination from pretext alone is a matter of law.... While counsel may be relied on to ... suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. That is particularly true where, as here, the law goes to the heart of the matter.... It is unreasonable, we think, to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefits of such arguments.

Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 n.5 (10th Cir. 2002); see *Ratliff v. City of Gainesville*, 256 F.3d 355, 361 n.7 (5th Cir. 2001) ("jurors ... need some instruction in the permissibility of drawing th[e] inference").

The circuits which refuse to require a permissive inference instruction, on the other hand, agree with the government's contention that arguments of counsel are an adequate substitute for a jury instruction regarding this area of the law. (Br. Opp. 11). Indeed, the Eighth Circuit goes even further, holding that argument of counsel is preferable to a jury instruction. "[T]he judge may and usually should leave the subject to the argument of counsel." *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). The brief in opposition argument highlights the conflict on this pivotal issue. The circumstances of the instant appeal are typical of the cases in which this issue arises; in no instance to our knowledge has a trial judge forbidden counsel for plaintiff to argue to the jury that the falsity of a defendant's evidence would warrant an inference of discrimination. In this regard as well the instant case is an excellent vehicle for resolving the question presented.

The court below erred in holding that argument of counsel renders unnecessary an otherwise mandatory jury instruction. (App. 10a). This Court has repeatedly noted that where an otherwise mandatory instruction has been denied, "arguments of counsel cannot substitute for instructions by the court." *Carter v. Kentucky*, 450 U.S. 288, 303 (1981) (argument of defense counsel no substitute for instruction on presumption of innocence); *Taylor v. Kentucky*, 436 U.S. 478, 420 (1978) (argument of counsel no substitute for instruction that inference of guilt may not be drawn from failure of defendant to testify in criminal case).

"[U]nder any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and ... his lightest word or intimation is received with great deference." *Starr v. United States*, 153 U.S. 614, 626 (1894). The argument of counsel cannot have the same effect. The government notes that in this case – as in most if not all cases – plaintiff's counsel was permitted to "argue" to the jury that proof of the falsity of a defendant's explanation is the type of evidence that would permit an inference (Br. Opp. 10-11); unlike an instruction from the court, however, such an argument of counsel was not a view that the jury was obligated to accept.

(3) The brief in opposition raises for the first time a new objection to the disputed instruction. The requested instruction was unwarranted in this case, the government now argues, because there was insufficient evidence that the defendant's explanations were untrue. (Br. Opp. 8-11). This fact-bound contention was not advanced in the lower courts and cannot be raised at the eleventh hour in this Court as a reason to deny review.

In the court of appeals petitioner emphatically argued in support of the disputed instruction that "[t]here was ample evidence at trial that defendants' explanations ... were not worthy of credence."[8]

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[8] Plaintiff-Appellant's Opening Brief at 45.

> There was ample evidence from which the jury could have found the shifting and inconsistent reasons given for taking action against Browning were unworthy of credence. There was evidence that Browning did not have the performance deficiencies defendants claimed.[9]

Petitioner's appellate brief included a lengthy and detailed summary of the evidence substantiating her contention that the defendant's "grounds for her demotion were false."[10] In the Ninth Circuit the government conspicuously did not dispute either petitioner's summary of that record evidence or her assertion that that evidence was entirely sufficient to support a jury finding that the proffered explanations were untrue. Similarly, in opposing the requested instruction in the trial court, the government never denied that there was sufficient evidence to warrant a jury finding that the defendant's explanations were untrue.

In this Court, however, the government objects that the petition was defective because it did not reiterate the same summary and characterization of the record which petitioner had made, and which the government had not disputed, in the Ninth Circuit. To the contrary, the framing of the petition was entirely appropriate. The petition contains no "argu[ment] that there was a sufficient evidentiary predicate to

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[9] *Id.* at 45-46.

[10] *Id.* at 14; see *id.* at 6-15, 44-47.

justify the district court's including an inference instruction" (Br. Opp. 9) because in the courts below the government had not disputed the existence of that predicate. The petition does not describe the "evidence of pretext" (Br. Opp. 9) because in the court below the government had not disputed the sufficiency of that evidence.

The contents of certiorari petitions would be substantially and pointlessly complicated if petitioners were required to address, and to detail the evidence related to, issues that clearly were not in dispute in the lower courts. The United States would undoubtedly and properly object if its own petitions were on that basis treated as defective. In the instant case petitioner had no reason to anticipate that the government in this Court would change its position and for the first time in the litigation contend that there was insufficient evidence to support a jury finding that its proffered explanations were untrue.

The government suggests that the evidence at trial "did not establish an evidentiary predicate that would have justified the instruction [petitioner] requested." (Br. Opp. 11). Having failed in either the district court or the court of appeals to raise that objection to the proposed jury instruction, however, respondent cannot rely on this argument for the first time in this Court. Had the government chosen to advance this contention in the lower courts, those courts would have been in a position to address that possible justification for the denial of the disputed instruction. The government cannot deliberately

decline to raise such an issue in the lower courts and then oppose review on the ground that its own inaction has resulted in an unresolved fact-bound dispute.

There is, moreover, ample record evidence in this case to support a jury finding that the defendants' explanations for demoting petitioner were false. The trial judge concluded that there was sufficient evidence of pretext to support a jury verdict.[11] The varying justifications asserted by respondents' witnesses for the demotion of the petitioner were repeatedly contradicted by the testimony of petitioner and others. There was also substantial evidence that respondents had taken no action against employees who had the very performance deficiencies with which petitioner was charged. There is no realistic possibility that the lower courts on remand would find plaintiff's evidence insufficient. As a practical matter a resolution of the question presented in favor of petitioner is essentially certain to result in the new trial which petitioner seeks.

[11] Tr. 578 ("a rational juror could conclude that the plaintiff's race was a motivating factor in ... her having been ... demoted").

CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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