No. 17-9572

IN THE

Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF OF FORMER JUSTICE DEPARTMENT OFFICIALS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES (continued)

Page(s)

FEDERAL STATUTES

FEDERAL RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici are former officials in the United States Department of Justice, identified in the appendix, who maintain an active interest in the fair and effective functioning of the justice system. In particular, *amici* are deeply committed to maintaining the public trust in the justice system necessary to its effective administration, including the perception that all persons—and particularly criminal defendants—will be treated equally in the eyes of the law. *Amici* share the conviction that to foster this perception of equal treatment, all actors in the justice system must do their utmost to treat all persons fairly. It is also, of course, the right thing to do. And in cases where there is evidence that could cast doubt on whether a litigant has been treated fairly, *amici* believe is critical that courts take great care to examine this evidence and assure the public that the principle of fairness is upheld in practice.

This is particularly important in the context of peremptory challenges where racial bias is exploited, or seen to be exploited, by prosecutors, who are public servants charged with promoting fairness and justice, and whose conduct is thus particularly important in establishing public trust in the system. Without the perception of equal treatment for all participants in the legal system, the convictions of criminal defendants obtained by the Department of Justice—and in-

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[1] Counsel for all parties have consented to the filing of this brief. In accordance with Rule 37.6, *amici* confirm that no party or counsel for any party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

deed all outcomes in our justice system, whether in state or federal court—may lack legitimacy in the eyes of the public. A belief among the public that justice is not fair and evenhanded undermines both the mission of the Department of Justice and the rule of law itself.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The promise of "equal justice under law" is foundational to our justice system. Preventing racial discrimination in jury selection is essential to preserving both the principle of equal justice under law and public confidence that it is being upheld. In particular, this Court's precedent mandates, contrary to the decision below, that evidence of a prosecutor's prior history of racial discrimination is critical context that—in connection with evidence of discrimination intrinsic to the voir dire proceeding—is sufficient to provide an "undeniable explanation" that the prosecutor's proffered reasons for striking African American jurors are pretext. *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005).

I. As this Court first recognized in 1879, just after the Fourteenth Amendment was ratified, prohibiting African-Americans from serving on a jury undermines the very protections a jury system is intended to provide. *Strauder v. W. Virginia*, 100 U.S. 303, 308 (1879). Such discrimination denies a fair trial to the accused by depriving him of a jury that is fairly representative of his own community. And it denies justice to crime victims who happen to be members of disfavored minorities. For those reasons, the Court held that the prohibition on racial discrimination in

jury selection is at the core of the Fourteenth Amendment.

This Court has repeatedly reaffirmed that bedrock principle in the nearly 140 years since. In particular, this Court has recognized that racial discrimination in the context of peremptory challenges, while more subtle than the discriminatory state statute struck down in *Strauder*, is just as inimical to the right to a fair trial by a jury of one's peers. *Batson v. Kentucky*, 476 U.S. 79 (1986). Because discriminatory peremptory challenges are difficult to detect and prevent, this Court has made clear that courts must evaluate such claims in light of "all of the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

In its post-*Batson* jurisprudence, this Court has held that the prosecution's prior pattern of racial discrimination is powerful evidence that peremptory strikes of African American jurors in a particular case may be discriminatory. *Miller-El*, 545 U.S. at 253, 266. That evidence is present here, and the lower courts should have considered it. Since 1996, petitioner has been tried six times by the same District Attorney in connection with a multiple homicide in Winona, Mississippi. In the five trials for which information about the race of jurors struck by the prosecution is available, the prosecutor used peremptory challenges on all but one potential African American juror, a total of 41 potential African American jurors in all. *See* Pet. Br. 2, 32. Over the course of the six trials, the Mississippi courts twice held that the prosecutor had violated *Batson*, in two different trials. The Mississippi Supreme Court described the evidence as "as strong a prima facie case of racial dis-

crimination as [it] ha[d] ever seen" in this context. *Flowers v. Mississippi*, 947 So.2d 910, 935 (2007); *see* Pet. Br. 9. Under *Miller-El*, this history of adjudicated racial discrimination in peremptory challenges is critically relevant to evaluating whether the prosecutor again discriminated in the jury selection procedure at issue here.

II. In case after case, this Court has recognized that the necessity of protecting the jury system from racial discrimination is "essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends." *Foster v. Chatman*, 136 S. Ct. 1737, 1760 (2016) (Alito, J., concurring); *see also Miller-El*, 545 U.S. at 238 ("[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality' and undermines public confidence in adjudication." (citations omitted)). As this Court has repeatedly and consistently articulated, the use of peremptory challenges to effectuate racial discrimination is uniquely pernicious to public confidence in the integrity of the judicial system (i) because it undermines the bedrock guarantee of fairness that the jury system is intended to provide; (ii) because of the long history in which it has been used to tip the scales of justice; (iii) because when it occurs, it undermines confidence in the outcomes of the justice system; and (iv) because excluding individuals from jury service based on immutable characteristics is fundamentally inconsistent with our pluralistic, democratic society.

As former Justice Department officials, we understand from firsthand experience the critical importance of evenhandedly administering the justice

system, and of public confidence in the integrity of the justice system. Law enforcement simply cannot function without public legitimacy. When prosecutors discriminate in jury selection, they violate their oath to do justice and undermine the criminal justice system as a whole.

ARGUMENT

I. Racial Discrimination In Jury Selection Undermines The Very Protections That A Jury Is Intended To Ensure.

A. Since The Ratification Of The Fourteenth Amendment, The Court And Congress Have Understood Preventing Racial Discrimination In The Jury System To Be Critical To Providing Equality Under The Law

1. Since the Founding, the right to trial by jury has been "considered a fundamental safeguard of individual liberty." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017); *see The Federalist No. 83*, at 451 (A. Hamilton) (B. Warner ed. 1818). The Framers, like the "founders of the English law" in which the jury trial right originated, understood that the jury would provide critical protection against "oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155-156 n.23 (1968) In particular, the jury was intended to guard against "unfounded criminal charges brought to eliminate enemies" and other arbitrary misuses of the criminal justice system. *Id.* at 156.

The jury's ability to safeguard liberty is founded on its composition. *Strauder v. W. Virginia*, 100 U.S.

303, 308 (1879) ("the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure"). Juries are thought to ensure defendants a fair trial precisely *because* they are composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Ibid*. When the truth of the prosecutor's accusations against a defendant must be "'confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion,'" the defendant and the community can be confident that the conviction is not simply the result of "overzealous" or "biased" government action. *Duncan*, 391 U.S. at 151-152 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 349-350 (Cooley ed. 1899)).

But just as a representative jury of one's peers serves as a powerful check on government oppression, an unrepresentative jury can be an equally powerful instrument of that very oppression. Juries determine in the first instance "the way in which law should be enforced and justice administered" with respect to individual defendants. *Duncan*, 391 U.S. at 155. When particular communities or minority groups are excluded from jury selection, there is a danger that instead of serving as a check on arbitrary government action, the jury will simply reinforce it. "By compromising the representative quality of the jury, discriminatory selection procedures make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Batson v. Kentucky*, 476 U.S. 79, 86-87 n.8 (1986) (quoting *Akins v. Texas,* 325 U.S.

398, 408 (1945) (Murphy, J., dissenting)). A jury composed of representative members of the community, "indifferently chosen," is thus critical to ensuring the equal protection of the laws to both defendants and crime victims. *Strauder*, 100 U.S. at 308.

2. The framers of the Fourteenth Amendment well understood that eliminating racial discrimination in jury selection was critical to ensuring African Americans' civil and legal equality.

The debates preceding the ratification of both the Thirteenth and Fourteenth Amendments were influenced by arguments that participation on juries was necessary to ensure that African Americans would enjoy equal protection of the law—both the protection that the law provides against crime (in particular, the lynchings and other racially motivated violence that followed the end of the Civil War), and the protection of a fair trial when accused of a crime. James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 916-917 (2004). As this Court has recounted, "[i]n the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). Particularly in the South, "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." *Ibid.* (quoting Forman, *supra*).

Both Congress and this Court responded with measures designed to ensure that juries would be im-

partial and selected free of racial discrimination. In 1869, Congress exercised its plenary authority over the District of Columbia to prohibit racial limitations on jury service, as well as the right to hold offices. *An Act for the further Security of equal Rights in the District of Columbia*, ch. 3, 16 Stat. 3 (Mar. 18, 1869). In 1871, using its authority under the Fourteenth Amendment, Congress enacted the Ku Klux Klan Act, which rendered persons who had conspired to deny the civil rights of African Americans ineligible to sit on juries. Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, §5, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1985 (2000)). And in 1875, Congress banned racial discrimination in jury service in state courts in Section 4 of the Civil Rights Act of 1875. Civil Rights Act of 1875, ch. 114, §4, 18 Stat. 335, 336-337; *see Ex parte Virginia*, 100 U.S. 339 (1879). These statutes, all enacted in the years immediately after the Fourteenth Amendment's ratification, demonstrate that the import of a jury system free from racial discrimination was well understood at the time.

This Court first held that the Fourteenth Amendment prohibits racial discrimination in jury selection in 1879, striking down a West Virginia statute that disallowed African-Americans from serving on juries. *Strauder*, 100 U.S. at 308. The Court explained that racial discrimination in jury selection denies African Americans "a very essential part of the protection such a mode of trial is intended to secure," as it exposed African-American defendants to the danger that their cases would be tried by racially prejudiced juries. *Id*. The Court viewed the proposition that racial discrimination in the jury system denied the equal protection of the laws promised by the Fourteenth Amendment as self-evident: "how can it be

maintained that compelling [an African American] to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded [everyone] of his race, because of color alone . . . is not a denial to him of equal protection?" *Id*. at 309.

In the nearly 140 years since, "this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct." *Powers v. Ohio*, 499 U.S. 400, 404 (1991); *see also Pena-Rodriguez*, 137 S. Ct. at 867. The Court has repeatedly struck down laws and policies that systematically exclude minorities from juries. *See, e.g., Neal v. Delaware*, 103 U.S. 370 (1880) (practice of excluding African Americans as unqualified on other grounds); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (per curiam); *Avery v. Georgia*, 345 U.S. 559 (1953) (use of differently colored tickets to ensure that only the names of white individuals would be selected to serve on a jury); *Hernandez v. Texas*, 347 U.S. 475 (1954) (practice of excluding persons of Mexican descent); *Castaneda v. Partida*, 430 U.S. 482 (1977) (same, in grand jury selection).

B. To Give Full Effect To The Prohibition On Racial Discrimination In Jury Selection, Courts Must Rigorously Scrutinize Peremptory Challenges, Particularly Where There Is Evidence of Similar Prior Discrimination by the Same Prosecutor

In *Batson v. Kentucky*, this Court addressed the problem of discriminatory peremptory challenges, holding that "there can be no dispute[] that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." 476 U.S. 79, 96 (1986) (citation omitted).

In the late nineteenth and twentieth centuries, after the Court had struck down statutes or policies excluding racial minorities from juries, "[s]tate officials then turned to somewhat more subtle ways of keeping blacks off jury venires." *Id*. at 103 (Marshall, J., concurring). Because prosecutors enjoyed a "historical privilege of peremptory challenge free of judicial control," *id*. at 91, peremptory challenges provided a ready means of ensuring an all-white or nearly all-white jury. "Misuse of the peremptory challenge to exclude black jurors" therefore became "both common and flagrant." *Id*. at 103-104 (Marshall, J., concurring) (describing an "instruction book used by the prosecutor's office in Dallas County, Texas" that "explicitly advised prosecutors that they conduct jury selection so as to eliminate 'any member of a minority group,'" as well as statistics showing disproportionate use of peremptory challenges to strike black jurors). The Court accordingly held that peremptory challenges are subject to equal protection principles, and

that when a defendant establishes that a prosecutor used peremptory challenges to exclude minority jurors, his conviction must be reversed. *Id*. at 100.

In recent decades, the Court has made clear that trial judges must be vigilant in "ferreting out" the misuse of peremptory challenges to mask racial discrimination in jury selection. *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). Because discriminatory intent can easily be obscured by the many discretionary factors that could legitimately influence peremptory challenges, it is critical that the trial court consider "all requisite circumstances" in determining whether a defendant has established intentional discrimination in the use of peremptory challenges. *Id.* at 240 (quoting *Batson*, 476 U.S. at 96); *see also Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) ("We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'") (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)).

The relevant circumstances that must be considered include both evidence intrinsic to the voir dire proceeding and evidence that is extrinsic to the proceeding. Thus, the prosecutor's conduct during jury selection is relevant: for instance, the number and percent of African American jurors stricken by the prosecution, a comparison of African American jurors stricken from the panel and white jurors permitted to serve, and any other conduct during the jury selection procedure. Extrinsic evidence is also relevant: in particular, the prosecution's policies and practices of discrimination outside the specific set of jurors under consideration in the given trial. *Miller-El*, 545 U.S.

at 240-41, 253-55, 265.

In *Miller-El*, for instance, the Court gave great weight to the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected." *Id*. at 253. The Court explained that "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much . . . ." *Id*. at 240. "[S]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure [that purposeful discrimination occurred] unless it looks beyond the case at hand." *Id.* at 240, 253. Thus, a prosecutor's history of racially discriminatory strikes in or around the time of the relevant case provides critical context in assessing a prosecutor's proffered neutral reasons for peremptorily striking minority jurors.

That context is unquestionably present here. In Petitioner's first two trials, the prosecutor struck all but one potential African-American juror, and that juror was seated only because the trial judge concluded that the peremptory strike was racially motivated. Pet. 3. In the third trial, the prosecutor used all 15 peremptory strikes against African-Americans, leading the Mississippi Supreme Court, in overturning the conviction, to comment that "[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers v. Mississippi*, 947 So.2d 910, 935 (2007) ("The prosecutor exercised all fifteen of his peremptory strikes on African–Americans, and the lone African–American who ulti-

mately sat on Flowers' jury was seated after the State ran out of peremptory challenges. Such a result cannot be considered 'happenstance.'"). After two subsequent trials before racially mixed juries ended in mistrials, the prosecutor struck five of six potential African American jurors in the trial at issue here, resulting in a jury of 11 whites and one African American. To be sure, the history of racially motivated peremptory challenges by the prosecutor in prosecuting petitioner's case does not in itself establish that the challenges under review here were discriminatory. But the prosecutor's historical practice is unquestionably relevant to that question, and the Mississippi Supreme Court was wrong to disregard it.[2]

[2] In its initial opinion affirming Mr. Flowers' conviction after his sixth trial, the Mississippi Supreme Court wholly failed to consider the history of prior *Batson* violations by the same prosecutor in Mr. Flowers' case. *See Flowers v. Mississippi*, 158 So.3d 1009 (2014). After this Court vacated that decision for further consideration in light of *Foster v. Chatman*, the Mississippi Supreme Court re-adopted its same analysis, dismissing the evidence of prior *Batson* violations with the conclusory assertion that it "does not alter [its] analysis." *Flowers v. Mississippi*, 240 So.3d 1082, 1124 (2017). The Mississippi Supreme Court's failure to meaningfully consider the totality of the circumstances is plainly contrary to this Court's decision in *Miller-El*. *See* Pet. Br. 21-23, 33-39.

II. Racial Discrimination in Jury Selection Fundamentally Undermines Public Confidence in the Justice System

A. Racial Discrimination in Jury Selection Harms Not Only Defendants, But The Justice System As A Whole

1. There is no question that racial discrimination in jury selection impedes individual defendants' right to a fair trial. But the Court has also long recognized that prohibiting such discrimination "is essential to … preserve the public confidence upon which our system of criminal justice depends." *Foster*, 136 S. Ct. at 1760 (Alito, J. concurring). Racial bias in the jury system threatens "systemic injury to the administration of justice" because it is a "recurring" problem that "implicates unique historical, constitutional, and institutional concerns." *Pena-Rodriguez*, 137 S. Ct. at 868.

First, a fairly constituted jury, representative of the defendant's community, is the very characteristic that enables a jury to perform its constitutional function of ensuring a fair trial. *See supra* Part I.A.

Second, precisely because of the power of jury composition, prosecutors historically have used racial discrimination in jury selection to administer the criminal justice system in a fundamentally unfair way. All-white juries have been used both to exonerate white defendants accused of racially motivated crimes against African Americans and to convict innocent African Americans of crimes they did not commit. *Pena-Rodriguez*, 137 S. Ct. at 868; *see, e.g.*, James Foreman, Jr., *Juries and Race in the Nine-*

teenth Century, 113 Yale L.J. 895 (2004). That history demonstrates the close connection between jury selection and the justice system's outcomes, and creates both a special sensitivity and a special need for vigilance on this issue.

Third, because of this history, discrimination in jury selection undermines public acceptance that justice is being done. "One of the goals of our jury system is 'to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.'" *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (quoting *Powers v. Ohio*, 499 U.S. 400, 413, (1991)). Thus, "[t]he verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset." *Powers*, 499 U.S. at 413.

Finally, representative juries serve a broader public purpose by demonstrating that all of the communities and individuals within "the heterogeneous population of our Nation" are viewed as qualified to take part in the administration of criminal justice. *Batson*, 476 U.S. at 99. "[T]he admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society," *Ballard v. United States*, 329 U.S. 187, 195 (1946), and establishes "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994). Discrimination in jury selection thus creates a divide between those empowered to take part in the criminal justice system through jury service, and

those who are viewed as unqualified to do so—but who are governed by that very system. That is intolerable in our democratic, pluralistic society.

Juries tainted by racial bias are therefore harmful not only to the defendant or the jurors, but also to the "entire community," because they "undermine public confidence in the fairness of our system of justice" as a whole. *Batson*, 476 U.S. at 87. "Selection procedures that purposefully exclude African–Americans from juries undermine that public confidence—as well they should. 'The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.'" *McCollum*, 505 U.S. at 49 (quoting *Powers*, 499 U.S. at 412). For this reason, this Court has repeatedly recognized that "[a] constitutional rule that racial bias in the justice system must be addressed . . . is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Pena-Rodriguez*, 137 S. Ct. at 869; *see also Powers*, 499 U.S. at 411 (discriminating racially in jury selection "damages both the fact and the perception" that juries can guard against wrongful exercise of state power).

2. These concerns about public confidence in the judicial system are particularly pressing because empirical research confirms that many Americans question the system's fairness. For example, a 1999 survey conducted by the American Bar Association revealed that nearly half of the Americans surveyed indicated that the U.S. judicial system does not provide equal justice for African Americans. *See* Mattie Johnstone & Joshua M. Zachariah, *Peremptory Chal-*

lenges and Racial Discrimination: The Effects of Miller-El v. Cockrell, 17 Geo. J. Legal Ethics 863, 863 n.1 (2004); Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, ch. 3, Perceptions of Systemic Racial Bias, Cato Institute (December 7, 2016) ("Fully 58% of Americans say the criminal justice system fails to treat all individuals equally, including 45% who believe the system gives preference to white Americans….").[3] A majority of African Americans themselves—68% in a recent study—perceive the justice system as treating African Americans unequally. *See, e.g.,* Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair,* Pew Research Center (Aug. 12, 2014).[4] Similarly, a survey conducted at the request of the Georgia Supreme Court indicated that "African-Americans and Hispanics were much more likely to indicate that people like themselves received 'somewhat worse' or 'far worse' treatment by the courts," with "[t]he level of disappointment with treatment by the courts among African-American Georgians" particularly strong. George W. Dougherty, et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and Its Progeny*, 37 Ga. L. Rev. 1021, 1028 (Spr. 2003).[5]

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[3] https://www.cato.org/policing-in-america/chapter-3/perceptions-systemic-racial-bias.

[4] http://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-blacks-view-the-criminal-justice-system-as-unfair/.

[5] The authors of the Georgia study found, however, that African Americans who had served on juries had better perceptions of the court system than those who had not, suggesting that inclusion in jury service fosters public perceptions of fairness. *Id.* at 1033-34.

The public response in the aftermath of certain widely-reported cases also provides more dramatic evidence that jury composition can affect the public's perception of the fairness of verdicts in racially charged cases. Popular anger and unrest has followed acquittals of white police officers by all-white juries for beating or killing African American motorists in Los Angeles in the Rodney King case, and in Miami in a series of cases in the 1980s. *See, e.g.*, Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 4 Afr.-Am. L. & Policy Rep. 17, 18-19, 23 (Fall 1999). But a subsequent acquittal of a white police officer in a similar case in Miami by a racially diverse jury did not spark protests.[6] *Id.* at 19.

B. *Amici*'s Experience in the Justice Department Has Convinced Us that Racial Discrimination and the Appearance of Racial Discrimination in the Jury System Undermine the Justice System

As former officials in the Department of Justice, we witnessed firsthand that public confidence in the integrity of the jury system is essential to the system's operation as a whole. The vital work of law enforcement professionals—from police investigators to prosecutors and policymakers—depends on belief in

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[6] In a widely-celebrated example from Mississippi of how a jury composed without racial discrimination can improve confidence in the justice system, the 1994 conviction by a racially diverse jury of Byron de la Beckwith of killing civil rights activist Medgar Evers came exactly 30 years after two all-white juries refused to convict Beckwith for the same crime, despite his having publicly bragged about perpetrating it. *See, e.g., id.* at 18.

the fairness of the justice system's procedures and the evenhandedness of its operation. Without that legitimacy, the public will be less likely to cooperate with law enforcement and to accept the accuracy and fairness of criminal verdicts. *Cf. Miller-El*, 545 U.S. at 238 ("[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication.") (internal quotation marks and citations omitted).

It is therefore critical that those administering the justice system uphold the promise of equal justice under law, and also that they be perceived as doing so. Prosecutors in particular must honor the principle that "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict," and they must at all times "respect the constitutional and legal rights of all persons, including suspects and defendants." ABA, Criminal Justice Standards for the Prosecution Function 3-1.2(b) (4th Ed.). In our tenure in the Department, we were privileged to work with dedicated professionals who upheld these standards and acted with the highest integrity.

But when there is reason to believe that a prosecutor is exploiting racial bias and division in an attempt to obtain a conviction, the courts must take strong action. That the bias is exploited by, or seen to be exploited by, prosecutors—public servants who have been charged with promoting fairness and justice—makes this type of discrimination especially damaging to acceptance of the rule of law. Left unaddressed, discrimination in jury selection threatens to leave the public with the belief that it is governed

by men, not laws. Requiring all prosecutors comply with *Batson* is necessary "to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Pena-Rodriguez*, 137 S. Ct. at 868. The Mississippi Supreme Court's cavalier disregard of the history in this case—in which the prosecutor was twice adjudicated to have violated *Batson* in his previous attempts to secure a conviction of this very defendant—cannot be squared with this critical principle.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioner's brief, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Donald B. Ayer served for 10 years in the Department of Justice, including as Deputy Attorney General from 1989 to 1990, Principal Deputy Solicitor General from 1986 to 1988, United States Attorney for the Eastern District of California from 1981 to 1986, and Assistant United States Attorney for the Northern District of California from 1977 to 1979.

James M. Cole served as Deputy Attorney General from 2011 to 2015. He also served in various roles in the Department of Justice over the 13 years from 1979 to 1992, including Deputy Chief of the Criminal Division's Public Integrity Section.

Gary G. Grindler served in the Department of Justice Department from 1995 to 2000 and from 2009 to 2013, including as Acting Deputy Attorney General, Deputy Assistant Attorney General in both the Civil and Criminal Divisions, and Principal Deputy Associate Attorney General and Counselor to the Attorney General. He previously served as an Assistant U.S. Attorney in both the Southern District of New York and the Northern District of Georgia.

Peter D. Keisler served in the Department of Justice from 2002 to 2007, including as Acting Attorney General of the United States, Assistant Attorney General for the Civil Division, and as Principal Deputy Associate Attorney General and Acting Associate Attorney General.

David W. Ogden served as Deputy Attorney General of the United States from 2009 to 2010 and as Assistant Attorney General for the Civil Division, United States Department of Justice, from 1999 to

2001. He also served as Chief of Staff to Attorney General Janet Reno, Counselor to the Attorney General, Associate Deputy Attorney General, and Deputy General Counsel of the Department of Defense.

Sally Q. Yates served in the United States Department of Justice as Acting Attorney General, Deputy Attorney General, and United States Attorney for the Northern District of Georgia. She also served as Assistant U.S. Attorney and First Assistant U.S. Attorney for the Northern District of Georgia.