No. 18-6306

In the Supreme Court of the United States

AMY HEBERT, *Petitioner*,

v.

JAMES ROGERS, Warden, Louisiana Correctional Institute for Women, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PROMISE OF JUSTICE INITIATIVE

In Support of Petitioner

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STATEMENT OF INTEREST[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a non-profit professional association of counsel devoted to promoting excellence in the practice of criminal law and protecting and defending the rights of the accused.

LACDL was formed in 1985, and it is the state's only professional association of counsel devoted exclusively to criminal defense. It consists of private criminal defense lawyers, public defenders, law professors, and judges. LACDL works with and on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. The organization is dedicated to advancing the proper, efficient, and just administration of justice, and serves to assist the courts, legislature, and law enforcement agencies in accomplishing their legitimate functions consistent with the rule of law and the protection of individual rights guaranteed by the Louisiana and United States Constitutions.

LACDL files numerous *amicus* briefs each year, seeking to provide the courts with the perspective of the organization in cases that present issues of broad importance to criminal defendants, criminal defense

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[1] Pursuant to this Court's Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

lawyers, and the criminal justice system as a whole. In this case, LACDL has a significant interest in ensuring that qualified jurors do not suffer gender discrimination at the hands of the prosecution. Petitioner's case provides a stark example of how peremptory challenges can be used to discriminate against female prospective jurors. The courts below have failed to grapple meaningfully with this discrimination, and LACDL believes this Court should review the matter.

The Promise of Justice Initiative (PJI) is a non-profit organization founded in New Orleans, Louisiana, to address issues of injustice. PJI, amongst other work, drafts policy papers and files amicus briefs in the state and federal courts, including this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has long sought to remedy the scourge of gender discrimination in jury selection. Drawing on its seminal ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986)—which addressed racial discrimination—the Court announced in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 (1994): "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative inabilities of men and women." *J.E.B.* observed that women had been exempted from jury service at common law because they "were thought to be too fragile and

virginal to withstand the polluted courtroom atmosphere." *Id.* at 132. The historical and systematic exclusion of women from juries could not "be squared with the constitutional concept of a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

The discriminatory exclusion of women from juries violates the criminal defendant's rights under the Sixth Amendment, *see Taylor*, 419 U.S. at 537, and the Fourteenth Amendment. *J.E.B.*, 511 U.S. at 130-31. It harms not only individual defendants, but also the excluded female veniremembers and the community more broadly. *See J.E.B.*, 511 U.S. at 140. Gender discrimination in jury selection is on par with racial discrimination in jury selection, and its elimination remains a constitutional priority. Accordingly, a *J.E.B.* claim is governed by the *Batson* framework. *Id.* at 144-45.

This case surfaces several critical issues with the application of and prosecutorial response to *Batson/J.E.B.* claims lodged by criminal defendants. First, the judiciary's failure to enforce meaningfully *J.E.B.* disadvantages women, who continue to experience persistent discrimination in public life. Second, the Fifth Circuit's opinion creates an incentive for prosecutors who seek to discriminate on the basis of gender or race to charge murder cases capitally because it signals the court's readiness to rely on prospective jurors' death penalty views to uphold peremptory strikes *even when the State specifically concedes that those views played no role in its peremptory decision-making process*. Third, Louisiana defense lawyers confront a troubling reality when they attempt to enforce this Court's jury-

selection rulings: because of how they are implemented, *J.E.B.* and *Batson* provide no functional protection against prosecutorial discrimination in parishes in which the venire's demographics ensure some gender- or race-diversity on the jury. By the sheer force of the number of women citizens in the general population, it is highly likely that petit juries in most jurisdictions will include some women; where the inclusion of some women provides them cover, prosecutors exploit free reign to discriminate against individual women on the basis of their gender.[2] For these reasons, this Court should grant certiorari and reverse the Fifth Circuit's decision.

ARGUMENT

I. THIS CASE HIGHLIGHTS THE NEED FOR THE COURT TO EMPHASIZE THAT WOMEN HAVE A RIGHT TO PARTICIPATE FULLY IN CIVIC LIFE

Jury duty is not a stale civic obligation; "[c]ommunity participation in the administration of the criminal law" is part of "our democratic heritage" and "critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S. at 530. Along with voting, "the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Women have the same right, honor, and privilege to be a part of the administration of criminal justice as men. This Court has "repeatedly

[2] The same is true with respect to racial discrimination in parishes with a high proportion of Black citizens.

recognized" that the government violates "the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Although this Court has articulated clearly that the Constitution does not tolerate invidious governmental discrimination on the basis of gender, its embrace of this principle has not cemented equality for women. Discrimination persists. When it comes to jury service, women face disproportionate exclusion in capital cases. *See infra* Part II(C). More broadly, women remain underrepresented in every level and branch of government. *See, e.g.*, Anna Brown, *Despite gains, women remain underrepresented among U.S. political and business leaders*, PEW RESEARCH CENTER, Mar. 20, 2017, http://www.pewresearch.org/fact-tank/2017/03/20/despite-gains-women-remain-underrepresented-among-u-s-political-and-business-leaders/. This underrepresentation exists in large part as a result of biases against women and an expectation that their focus should be on their families rather than their careers or public service. *See* Richard L. Fox & Jennifer L. Lawless, *Why Are Women Still Not Running for Public Office?*, BROOKINGS INST., May 19, 2008, *available at* https://www.brookings.edu/research/why-are-women-still-not-running-for-public-office/ (finding that women are less likely than men to be recruited to run for office and "are less likely than men to have the freedom to reconcile work and family obligations with

a political career"). The gender pay disparity continues. *See* Nikki Graf et al., *The narrowing, but persistent, gender gap in pay*, PEW RESEARCH CENTER, Apr. 9, 2018, *available at* http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/. Efforts to elevate women within the legal profession are unfinished at best. Only one-third of judges in state and federal courts around the country are women, *see, e.g.*, NATIONAL ASSOCIATION OF WOMEN JUDGES, *2018 U.S. State Court Women Judges*, https://www.nawj.org/statistics/2018-us-state-court-women-judges; Debra Cassens Weiss, *The percentage of women in the federal judiciary is the same as men with these names*, A.B.A. J., Apr. 26, 2018, http://www.abajournal.com/news/article/the_percentage_of_women_in_the_federal_judiciary_is_the_same_as_men_with_th/; fewer than 20% of equity partners at big law firms are women, *see, e.g.*, Elizabeth Olson, *"A Bleak Picture" for Women Trying to Rise at Law Firms*, N.Y. TIMES, July 24, 2017, *available at* https://www.nytimes.com/2017/07/24/business/dealbook/women-law-firm-partners.html; and fewer than 20% of elected prosecutors are women. *See* Jamiles Lartey, *White men make up 79% of elected prosecutors in U.S., study says*, THE GUARDIAN, July 7, 2015, *available at:* https://www.theguardian.com/law/2015/jul/07/us-elected-prosecutors-white-men-criminal-justice-system. While some women have succeeded in attaining important public positions, discrimination remains an undeniable truth.

Of course, this Court is not charged with curing the widespread and persistent discrimination that

women experience in civil society. However, it must ensure that the constitutional provisions guaranteeing women equal protection are enforced against government actors to address gender discrimination. In this case, the Fifth Circuit's ruling disserves women in two key ways: (1) it treats female jurors as interchangeable, disregarding their individual rights and potential contributions; and (2) it overlooks the constitutional principle that prosecutorial discrimination against one person on the basis of her gender is enough to warrant relief. It cannot be accepted that women have been spared from discrimination because the State was compelled to accept that some (even many) would serve on Petitioner's jury. This Court has stood against gender discrimination time after time, and this case calls on it to do so again. When the tools it has provided litigants to expose gender discrimination in jury selection—tools like comparative juror analysis and the requirement of contemporaneous reason-giving—have been blunted, this Court should sharpen them again.

II. THE FIFTH CIRCUIT'S OPINION PROVIDES A TROUBLING INCENTIVE FOR PROSECUTORS WHO ARE OF A MIND TO DISCRIMINATE AGAINST JURORS ON THE BASIS OF RACE OR GENDER TO SEEK THE DEATH PENALTY BECAUSE PROSPECTIVE JURORS' VIEWS ON CAPITAL PUNISHMENT BECOME AN EASY PRETEXTUAL BASIS WHEN THE DEFENSE RAISES *BATSON* OR *J.E.B.* OBJECTIONS

A. Under this Court's *Batson/J.E.B.* Jurisprudence, Courts Are Not Permitted to Rely on Reasons for the Differential Treatment of Prospective Jurors that the Prosecution Failed to Raise or Explicitly Disclaimed

A central tenet of this Court's *Batson* jurisprudence is that, at *Batson*'s second step, proponents of the challenged peremptory strike must provide their reasons for striking the excluded juror in question. The foundational opinion in *Miller-El v. Dretke* made clear that "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." 545 U.S. 231, 252 (2005) [hereinafter *Miller-El II*]. Reviewing courts then must focus on these reasons in determining whether the prosecution unconstitutionally discriminated on the basis of race or gender; there is no basis for a court to later supplement or substitute the State's professed justifications for a strike. *See,*

e.g., *id.* ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have shown up as false.").[3]

This tenet holds when the defense team relies on comparative juror analysis—an argument that the State at trial treated similarly-situated jurors of a race or gender other than the excluded jurors differently—to support its claim that the prosecution intentionally discriminated. *See Miller-El II*, 545 U.S. at 241, 252 (explaining the value of these side-by-side comparisons). Prosecutors are free to challenge the persuasive force of such an analysis by referring to relevant differences that distinguish stricken jurors from those the State did not strike. However, they cannot do so by invoking differences that are wholly unrelated to the prosecution's stated justifications for the strike. These differences were inconsequential, and a prosecutor's claim that two jurors cannot be fruitfully compared because they did not give exactly identical answers to every *voir dire* question is makeweight. *See id.* at 247 n.6 (noting that giving effect to these claims "would leave *Batson* inoperable [because] potential jurors are not products of a set of cookie cutters").

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[3] *See also People v. Gutierrez*, 395 P.3d 186, 193 (Cal. 2017) ("What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual."); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 521 (Tex. 2008).

At the same time that prosecutors cannot supply new justifications for strikes in light of comparative juror analysis, courts cannot justify the State's differential treatment of similarly-situated jurors by taking hold of differences that the State never invoked or, as in this case, that it explicitly disavowed. *See, e.g.*, *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) ("[S]peculation, however, does not aid our inquiry into the reasons the prosecutor actually harbored for the [] strike. *Batson* is concerned with uncovering purposeful discrimination, and where a prosecutor makes his explanation for a strike a matter of record, our review is focused solely upon the reasons given"). The judicial inquiry is into the possibility of intentional discrimination. Reasons for peremptory strikes given after-the-fact—by a prosecutor or a court—"reek[] of afterthought" and hold no weight in light of the "pretextual timing." *Miller-El II*, 545 U.S. at 246.

B. The Fifth Circuit's Decision Below Relies on Prospective Jurors' Death Penalty Views—Views That The Prosecution Affirmatively Explained Did Not Factor Into Its Peremptory Strikes

In denying Petitioner's *J.E.B.* claim below, the Fifth Circuit relied upon prospective jurors' death penalty views. The key male juror whom Petitioner compares to excluded female jurors is Timmy Guidry (referred to as T.G. in the Fifth Circuit's opinion). When the Fifth Circuit analyzed Petitioner's comparative juror analysis, it emphasized that Mr.

Guidry held a view on the death penalty that was more favorable to the prosecution:

> T.G. indicated that he was neutral on the death penalty. From among the women that Hebert identified as victims of gender discrimination, F.R. and A.O. were the only ones who were neutral on the death penalty. All the other women favored life over death. Thus, T.G. is not a valid comparator to those women.

Hebert v. Rogers, 890 F.3d 213, 224 (5th Cir. 2018); Pet. App. at B6. If this Court only gave that excerpt a passing glance, the State's decisions to strike female jurors like Mary McFarland and Janet Loupe while keeping Timmy Guidry would seem plausibly non-discriminatory.

However, what makes this case particularly remarkable is that while the Fifth Circuit relied on Mr. Guidry's death penalty views to justify the State's strike, it *ignored completely* the prosecutor's explanation that its approach to selecting jurors was focused on seating individuals favorable to the State on the insanity defense, *not the death penalty*. In the State's words, "[t]he primary focus in *voir dire* was not on a particular juror's views regarding the death penalty, but on whether a particular juror's view of insanity as a defense fit more with the prosecution's way of thinking rather than the defense." Petition for Certiorari at 20, *Hebert v. Rogers*, No. 18-6306 (citing State's Response to Petitioner's Objections at 10). Indeed, the State conceded that it had decided to "accept[] some jurors with reservations about the

death penalty," so long as the prosecution was convinced they would convict. *Id.* at 20-21 (citing Appellate Brief of Warden-Appellee at 18).

Given its failure to heed the prosecution's statements, one way of understanding the Fifth Circuit's decision is that it found that the State's repeatedly-advanced rationale for striking jurors lacked credibility. Rather than deciding the State's lack of credibility supported the defense's position that the purported reasons for striking female jurors were pretextual, the Fifth Circuit supplied what it thought were appropriate and sensible justifications that adequately accounted for the State's differential treatment of male jurors.[4] If these circumstances do not reflect a profound misapplication of *Batson/J.E.B.*, none do. The Fifth Circuit invented reasons to justify peremptory strikes and explain away Petitioner's comparative juror analysis. The Constitution surely does not authorize this tack.

C. This Court's Jurisprudence Underscores How Capital Cases Heighten the Risk of Discrimination in Jury Selection

This Court's *Batson/J.E.B.* jurisprudence underscores that capital prosecutions heighten the risk that prosecutors will illegally discriminate in jury selection. Several cases reveal how prosecutors rely on prospective jurors' views about the death penalty as a

[4] To be clear, Petitioner nowhere asserts that the State's purported rationale for striking female jurors is credible. The point is that a comparative juror analysis reveals this rationale to be pretextual.

pretense to cover an invidious intent to discriminate on the basis of race or gender. In *Miller-El II*, prosecutor Paul Macaluso claimed that he struck prospective juror Joe Warren because of "inconsistent responses" on the death penalty. 545 U.S. at 248. The "plausibility" of this explanation was "severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's." *Id.* In *Foster v. Chatman*, prosecutor Stephen Lanier claimed that one of the main reasons he struck prospective juror Eddie Hood was that he "was slow in responding to questions about the death penalty" and belonged to a church the prosecution felt discouraged the death penalty. 136 S. Ct .1737, 1751 (2016). But, Hood said multiple times in *voir dire* that he could impose the death penalty, and "the record persuade[d]" the Court "that Hood's race . . . was Lanier's true motivation." *Id.* at 1753. In *Snyder v. Louisiana*, the Court held that the prosecution discriminated against prospective juror Jeffrey Brooks, and thus it found no need to delve into the additional claim that the State unconstitutionally struck prospective juror Elaine Scott. 552 U.S. 472, 478 (2008). Although it did not make a specific finding about Ms. Scott's exclusion, it remains that the prosecutor whom this Court found to have discriminated intentionally against one juror on the basis of his race also struck another juror of that race, purportedly because of her views on capital punishment. *Id.* at 490-91 (Thomas, J., dissenting) (identifying the basis for juror Scott's removal).

Even before the parties utilize peremptory strikes, capital prosecutions implicate the demographic dynamics of the qualified jury pool.

Death-qualification serves to exclude disproportionately otherwise-qualified female jurors and jurors of color from capital juries. A recent study done in Louisiana quantified death qualification's stark racialized impact: "On average, fully 35.2%—more than one-third—of the black potential jurors in the venire were excluded on the basis of their opposition to the death penalty. By contrast, only 17.0% of the total white jury pool was struck." Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 137 (2016). Earlier studies had also established that a higher percentage of women (compared to men) and African-Americans (compared to whites) are removed because of their views on capital punishment. *See, e.g.*, Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984); Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 BEHAV. SCI. & L. 57, 65 (2007) (finding that attitudes toward the death penalty are significantly related to gender and other characteristics). Recent surveys confirm that there is a wide gap between male and female support for the death penalty. *See* Mark Berman, *American support for the death penalty inches up, poll finds*, WASH. POST, June 11, 2018, *available at:* https://www.washingtonpost.com/national/2018/06/11/american-support-for-the-death-penalty-inches-up-poll-finds/?utm_term=.3888a3783eea ("More men

support the death penalty (61 percent) than do women (46 percent)." (citing recent Pew Research poll available at http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/)).

Against the already-concerning backdrop of death-qualification, the Fifth Circuit's decision provides an additional and disturbing incentive for prosecutors "who are of a mind to discriminate" to seek the death penalty. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (internal citation omitted). Jurors' views on the death penalty transform into an easy pretextual basis for prosecutors who peremptorily strike individuals because of their race or gender. Consider its potency in this case—one the prosecution realized in jury selection (if not sooner) likely would not end in a death sentence. The prosecution pressed forward with capital charges, reaping the exclusionary benefits of both death-qualification and its free pass to exclude female prospective jurors. Even when the State proclaimed that it did not base its jury-selection strategy on obtaining a death verdict, the court stepped in, shielding the peremptory strikes from a constitutional challenge with the impenetrable armor of the death penalty rationale for exclusion.

III. THIS CASE PRESENTS THIS COURT WITH AN OPPORTUNITY TO MAKE CLEAR THAT EVEN IF A VENIRE ENSURES THAT PEOPLE OF A CERTAIN RACE OR GENDER WILL SERVE ON THE JURY, IT IS NEVERTHELESS UNCONSTITUTIONAL TO DISCRIMINATE

A. Louisiana Defense Lawyers Know from Experience that It Is Difficult to Prevail on *Batson* Claims in Jurisdictions in which More Racial Minorities Reside

Lurking beneath the lower courts' unwillingness to seriously entertain Petitioner's *J.E.B.* claim is one crucial fact: "The final jury included 10 women and two men . . . ." *Hebert*, 890 F.3d at 218; Pet. App. at B2. With numbers like that, judges and prosecutors raise an eyebrow when a defendant claims the State intentionally struck female prospective jurors. In fact, the Fifth Circuit took the position that, given the jury pool, "the State's strikes against qualified women is [sic] hardly surprising or alarming." *Id.* at 221; Pet. App. at B5. Petitioner's proceedings thus reflect a common scene in Louisiana: it is almost impossible for defendants to prevail on *Batson* claims in jurisdictions with substantial populations of racial minorities.

Demographics in some Louisiana parishes ensure that at least some minority jurors will serve, and this fact is often used to defeat *Batson* challenges in the trial court. Never mind this Court's holding that

"the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 552 U.S. at 478 (quoting *United States v. Vasquez–Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). In case after case, courts find that the presence of minorities on a jury effectively ends the discrimination inquiry, as if the *Batson* line was meant to protect a race's right to token representation as opposed to the individual juror's right to serve free from racial discrimination. Consider a case from St. James Parish, which has a population that is nearly half African-American and half white. There, "the fact that the State accepted three African–Americans who eventually served on the jury provides added support for the trial court's conclusion that race was not the motivating factor behind the State's peremptory challenges." *State v. Juniors*, 915 So. 2d 291, 320 (La. 2005). In a case from Orleans Parish, where African-Americans comprise roughly 60% of the population, one state court observed that "[t]he composition of the venire, of which African–Americans made up more than half its number, does not provide any support [to the *Batson* claim] either. Nor can the defendant look to the composition of the final jury as indicative of prosecutors' racist intentions." *State v. McElveen*, 73 So. 3d 1033, 1074 (La. App. 4 Cir. 2011). Of course, none of these or the many other similar opinions hold outright that the prosecution automatically prevails if a minority juror ends up serving on the jury.[5] Yet, the

[5] But sometimes they imply as much. *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *State v. Draughn*, 950 So. 2d 583, 604 (La. 2007) ("The trial judge was aware that the state had several unused peremptory challenges and did not utilize them to remove the minority juror. Unlike *Johnson*, all of the

spirit of these rulings is unmistakable. Where the venire virtually guarantees the inclusion of minority jurors, the prosecution has a license to strike jurors of that race at will. Trial lawyers, too, face this reality in the trial courts in which they raise *Batson* objections regularly.

B. Louisiana Makes it More Difficult to Prevail on *Batson/J.E.B.* Claims in Capital Cases Because the State Has Permitted Non-Unanimous Juries in Life-Without-Parole and Other Hard-Labor Non-Capital Cases

In a special Louisiana twist—that compounds the problems identified with incentivizing capital prosecutions explored earlier, *see supra* Part II(C)—it has been more difficult for defendants to prevail on a *Batson/J.E.B.* claim in a death penalty case than a non-capital case. Until just this month, Louisiana law permitted non-unanimous jury verdicts in non-capital cases.[6] *See* La. C.Cr.P. art. 782(A) ("Cases in which punishment is necessarily confinement at hard labor

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prospective African American jurors were not stricken from the pool of prospective jurors.").

[6] On November 6, 2018, Louisiana's citizens adopted a constitutional amendment to require that all jury verdicts be handed down by unanimous juries. This amendment will go into effect for prosecutions of offenses alleged to have occurred on or after January 1, 2019. *See* Kevin McGill & Rebecca Santana, *Louisiana Votes to End Non-Unanimous Jury Verdicts*, U.S. NEWS, Nov. 6, 2018, *available at*: https://www.usnews.com/news/best-states/louisiana/articles/2018-11-06/louisiana-decides-future-of-non-unanimous-jury-verdicts.

shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."). Capital cases, on the other hand, require unanimity. *See id.* ("Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict."). Drawing on the anomalous and seemingly-unconstitutional non-unanimity provision,[7] state courts have held that the presence of a minority juror on a capital jury provides stronger evidence that the prosecution did not intentionally discriminate because capital cases require unanimity. *See State v. Tart*, 672 So.2d 116, 141 (La. 1996) ("Although the mere presence of African–American jurors does not necessarily defeat a *Batson* claim, the unanimity requirement of a capital case sentencing recommendation may be considered."). This remarkable aspect of Louisiana caselaw is disconcerting. This rule artificially raises the burden of persuasion on capital defendants, and enables prosecutors to more breezily defeat a *Batson/J.E.B.* claim by strategically permitting one minority on to the jury.

[7] At least one pending case has asked this Court to strike the non-unanimity provision as a violation of the Sixth Amendment guarantee of jury unanimity. *See* Petition for Certiorari, *Ramos v. Louisiana*, No. 18-5924. It is not clear that the constitutional amendment moots the issue because the new law will apply only to prosecutions of crimes committed on or after January 1, 2019.

C. The Composition of Petitioner's Jury in this Case Does Not Defeat the Compelling Evidence of Gender Discrimination in the Record

The challenge of prevailing on a *Batson/J.E.B.* claim in a jurisdiction populated with significant numbers of people within the group suffering discrimination is even more vexing for those seeking to vindicate the rights of prospective jurors who are women. Women comprise over half of the state's population. Establishing gender discrimination against women in jury selection is extraordinarily difficult given that it is very difficult for the prosecution to select an all-male jury. Nevertheless, gender discrimination still occurs. This case substantiates that truth. Even though 10 of the seated jurors were women, the prosecution used 12 peremptory strikes against women. *See* Petition for Certiorari at 23. Moreover, the State failed to treat similarly-situated men the same way it treated the women it struck. *See id.* at 12-19. This case has the hallmarks of a prosecutorial intent to illegally discriminate. *See generally Miller-El II.*

A fundamental flaw with the Fifth Circuit's opinion is that it treats female jurors as if they are fungible. On its logic, the State's strikes created no harm because several women ultimately served. Indeed, the court found that the prosecution's rampant striking of female prospective jurors was "hardly surprising" given that 23 of the 33 individuals "randomly selected" from the larger venire were women. Pet. App. at B5, B2. This Court, however, has left no doubt that one right the State violates when it

unconstitutionally discriminates against a prospective juror on the basis of race or gender *is that prospective juror's individual right*:

> the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race [or gender], a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race [or gender].

Powers, 499 U.S. at 409. The State's inability to discriminate or decision not to discriminate against some female jurors does not sanitize its discriminatory strikes. Again, "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, *supra*, at 478. This Court should recognize that this case presents an important opportunity to reaffirm that discrimination on the basis of gender or race is unconstitutional even in jurisdictions with diverse populations, and that such discrimination on the basis of gender or race is unconstitutional even if some jurors of that gender or race ultimately serve.

CONCLUSION

This case is important, not only to Petitioner, but to all defendants who seek to vindicate the rights of jurors against whom the State has discriminated. This Court should grant the petition.

Respectfully submitted,

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