No. 18-8029

In the Supreme Court of the United States

CHARLES RUSSELL RHINES,
Petitioner,

v.

DARIN YOUNG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Other Authorities

STATEMENT OF INTEREST[1]

This *amici curiae* brief is submitted on behalf of forty-seven law professors ("*Amici*"), who recommend that the Court grant Charles Rhines's petition for *certiorari*. A full list of *Amici* appears in the appendix accompanying this brief.

Amici have dedicated their careers to teaching and writing about Evidence and/or Criminal Procedure. *Amici* have an abiding interest in drawing a parallel between the split among courts in the wake of this Court's opinion in *Batson v. Kentucky* and the split among courts in the wake of this Court's opinion in *Pena-Rodriguez v. Colorado*. As discussed in the brief below, *Amici* contend that this Court should grant certiorari in this case for the same reasons it granted certiorari in *J.E.B. v. Alabama ex rel. T.B.*

SUMMARY OF THE ARGUMENT

In *Pena-Rodriguez v. Colorado*, 137 S.Ct. 885 (2017), this Court concluded that the Sixth Amendment right to a fair and impartial jury allows for jury impeachment in criminal cases where a juror clearly makes a statement during deliberations that his or her decision relied upon racial stereotypes or animus. The Court based this decision on the racial origin of the Fourteenth Amendment, and some

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person aside from *amici curiae* and their counsel made any monetary contribution toward the preparation or submission of this brief.

courts have accordingly interpreted *Pena-Rodriguez* as only allowing for jury impeachment in cases of racial bias, not in cases of other bias.

In *Batson v. Kentucky*, this Court used the racial origin of the Fourteenth Amendment to conclude that the Equal Protection Clause precludes parties from using peremptory challenges on prospective jurors based on their race. In the wake of *Batson*, courts split on the question of whether the Equal Protection Clause only prohibits the use of peremptory challenges based on race or whether the *Batson* ruling extends to peremptory challenges based on other factors such as religion and gender. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court granted certiorari in a case involving peremptory challenges based upon gender and ultimately found that the *Batson* doctrine extends beyond discrimination based on race.

This Court should grant *certiorari* in the present case to address the same type of split among courts that has developed in the wake of *Pena-Rodriguez*.

ARGUMENT

I. *Batson v. Kentucky* and the Split Among Courts Over Non-Race Based Discrimination

Parties historically have been able to exercise peremptory challenges on prospective jurors. *See Swain v. Alabama*, 380 U.S. 202 (1965). This Court has held that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and

without being subject to the court's control." *Id.* at 220. Therefore, when the Court decided *Swain*, it rejected the argument that the use of peremptory challenges on prospective African-American jurors could violate the Equal Protection Clause. *See id.* Instead, the Court concluded that accepting such an argument would mean that the peremptory challenge "would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards." *Id.* at 222.

Twenty-one years later, the Court overruled *Swain* in *Batson v. Kentucky*, 476 U.S. 79 (1986), holding that the Fourteenth Amendment's Equal Protection Clause "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89. The Court's conclusion relied on the Fourteenth Amendment's historical purpose of eradicating racial discrimination. It noted that *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1880), stated "that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race." *Batson*, 476 U.S. at 85. The Court reasoned that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Id.*

Given that the *Batson* decision was premised on the racial origin of the Fourteenth Amendment, and held that the use of peremptory challenges on African-American veniremen can violate the Equal

Protection Clause, a split among courts soon developed over whether the use of peremptory challenges on veniremen based on gender was also unconstitutional. *See, e.g., City of Mandan v. Fern*, 501 N.W.2d 739, 744 (N.D. 1993) ("There is a split in authority over whether *Batson* principles should apply to gender-based peremptory challenges."). Courts that refused to extend *Batson* to peremptory challenges based on gender concluded: (1) that *Batson* was narrowly focused on race due to "[t]he unique history of racial discrimination"; and (2) that extending *Batson* to other protected classes would frustrate the purpose of peremptory challenges by requiring, "on demand of counsel, an explanation for every strike." *United States v. Broussard*, 987 F.2d 215, 219 (5th Cir. 1993).

After this Court granted certiorari in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the respondent made similar arguments. Specifically, the respondent argued that "'gender discrimination in this country...has never reached the level of discrimination' against African-Americans, and therefore gender discrimination, unlike racial discrimination, is tolerable in the courtroom." *Id.* at 135. The Court rejected that argument, concluding that it "need not determine...whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that 'our Nation has had a long and unfortunate history of sex discrimination.'" *Id.* at 136. The Court also held that it did not need to "weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious

discrimination from the courtroom." *Id.* at 137. Instead, it concluded that "we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury." *Id.* The Court in *J.E.B.* ultimately held that *Batson* extends to the use of peremptory challenges based on gender. *Id.* Other courts have since extended *Batson* to cover peremptory challenges based on, *inter alia*, sexual orientation. *See, e.g., SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484-89 (9th Cir. 2014).

II. *Pena-Rodriguez v. Colorado* and the Split Among Courts Over Non-Race Based Discrimination

Jurors historically have not been allowed to impeach their verdicts. In *Tanner v. United States*, 483 U.S. 107, 117-20 (1987), this Court noted that the traditional rule that jurors are generally not allowed to impeach their verdicts is based on concerns about inhibiting jury deliberations and subjecting jurors to harassment. Therefore, when this Court decided *Tanner*, it concluded that allowing for jury impeachment regarding juror alcohol and drug abuse would open the door for verdicts being challenged on any number of grounds, up to days, weeks, or even months after they were rendered, destroying the finality of verdicts. *Id.* at 120-21.

Thirty years later, this Court created an exception to *Tanner* in *Pena-Rodriguez v. Colorado*, concluding that the Sixth Amendment right to a fair

and impartial jury allows for jury impeachment in cases "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." 137 S.Ct. 855, 869 (2017). In reaching this conclusion, the Court again relied on the Fourteenth Amendment's historical purpose of eradicating racial discrimination. The Court cited its prior opinion in *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), referencing the proposition that "'[t]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.'" *Pena-Rodriguez*, 137 S.Ct. at 867. The Court then held that "[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." *Id*. In creating an exception to *Tanner*, the Court cited to a number of Fourteenth Amendment cases, including *Batson*, to conclude that "[t]he duty to confront racial animus in the justice system is not the legislature's alone." *Id.*

Given that *Pena-Rodriguez's* holding that racial bias during deliberations permits jury impeachment was premised on the racial origin of the Fourteenth Amendment, it is understandable that it has led to an exacerbation of the existing split among courts over whether evidence of other bias during deliberations allows for jury impeachment. *See* Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the Pena-Rodriguez Exception Beyond Race*, 118 Colum. L. Rev. 1801 (2018). *Compare*

United States v. Greebel, 2018 WL 3900496 (E.D.N.Y. 2018) (finding that a judge could inquire into a jury's verdict based upon allegations of religious bias during deliberations); *Devoney v. State*, 717 So.2d 501, 504 (Fla. 1988) ("a juror who spreads sentiments of racial, ethnic, religious or gender bias, fatally infects the deliberation process in a unique and especially opprobrious way and the courts will be vigilant to root it out."); *State v. Athorn*, 216 A.2d 369 (N.J. 1966), *with United States v. St. Lawrence*, No. 7:16-cr-00259-CS (S.D.N.Y 2018) (*see* Brief and Special Appendix for Defendant-Appellant, 2018 WL 4603207, at *58) ("the district court refused to extend the finding of *Pena-Rodriguez* to religious animosity"); Koffler, 118 Colum. L. Rev. at 1832 n.167 (noting that Connecticut, Delaware, Georgia, Hawaii, Minnesota, and New York "have not expanded the initial exception to cover other types of bias beyond race.").

Moreover, in the present case, the respondent has argued that *Pena-Rodriguez* was narrowly focused on race and should not be extended to anti-gay comments by jurors because our history is "not replete with 'stark and unapologetic' anti-homosexual jury verdicts." *Rhines v. State*, Brief in Opposition to Petition for a Writ of Certiorari *at* 26. This was the same argument advanced by the respondent in *J.E.B. v. Alabama ex rel.* The Court should grant *certiorari* to address this argument just as it granted *certiorari* in *J.E.B.*

III. This Court Should Grant Certiorari For the Same Reasons it Granted Certiorari in *J.E.B. v. Alabama ex rel. T.B.*

There are striking similarities between *Batson* and *Pena-Rodriguez*:

(1) both *Batson* and *Pena-Rodriguez* created narrow constitutional exceptions to historical rules designed to protect the integrity of the jury process;

(2) both *Batson* and *Pena-Rodriguez* used the Fourteenth Amendment's racial origin to allow for constitutional challenges based on racial bias in connection with the jury process;

(3) in the aftermath of both *Batson* and *Pena-Rodriguez*, courts split regarding whether these cases' constitutional exceptions covered other bias in the jury process; and

(4) in the aftermath of both *Batson* and *Pena-Rodriguez*, courts and litigants argued that the constitutional exceptions created in these cases should not extend to other biases that were less historically pervasive than racial bias.

Therefore, for the same reasons that this Court granted *certiorari* in *J.E.B.*, the Court should grant *certiorari* in the present case. Moreover, this Court's opinion in *J.E.B.* explains why the *Pena-*

Rodriguez exception should be extended to cover anti-gay bias.

After granting *certiorari*, this Court in *J.E.B.* specifically rejected the respondent's argument that *Batson* should not be extended because "'gender discrimination in this country...has never reached the level of discrimination' against African-Americans." Instead, this Court: (1) found that it was "necessary only to acknowledge that 'our Nation has had a long and unfortunate history of sex discrimination;'" and (2) extended *Batson* because allowing a constitutional claim based on the gendered use of peremptory challenges would "provide substantial aid to a litigant's effort to secure a fair and impartial jury." *Id*. at 137.

This Court similarly has acknowledged the history of discrimination in this country based upon sexual orientation. *See, e.g., United States v. Windsor*, 570 U.S. 744, 754 (2013) (*quoting Windsor v. United States*, 699 F.3d 169, 191 (2d Cir. 2012)) ("[T]he Attorney General informed Congress that 'the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.'"). Moreover, extending *Pena-Rodriguez*'s exception to allow a constitutional claim based on anti-gay jury bias during deliberations would undoubtedly substantially aid a litigant's effort to secure a fair and impartial trial. Indeed, unlike the exception created in *Batson*, the exception created in *Pena-Rodriguez* was derived directly from the Sixth Amendment right to a fair and impartial jury. *See Pena-Rodriguez*, 137 S.Ct. at 869.

Therefore, this Court should grant *certiorari* in the current case.

CONCLUSION

The parallels between the aftermath of this Court's opinion in *Batson* and this Court's opinion in *Pena-Rodriguez* are striking. Both opinions dealt with racial prejudice in the jury process, and each left the question of whether other forms of bias in the jury process can entitle litigants to relief. For the same reasons that this Court granted *certiorari* in *J.E.B.* to resolve the split among courts in the wake of *Batson*, this Court should grant *certiorari* in the present case to resolve the split among courts in the wake of *Pena-Rodriguez*.

Respectfully submitted,

March 25, 2019

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