No. 20-5085

IN THE

Supreme Court of the United States

JOE EDWARD JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Cited Authorities

Statutes and Other Authorities

Page

INTEREST OF AMICUS CURIAE[1]

California Attorneys for Criminal Justice (CACJ) is a non-profit corporation founded in 1972. It is one of the largest statewide organizations of criminal defense lawyers and allied professionals in the country. One of the principal purposes of CACJ, as set forth in its by-laws, is to defend the rights of individuals guaranteed by the United States Constitution. CACJ has appeared before this Court and before the California Supreme Court to address constitutional questions raised by governmental jury selection practices that appear to be based on improper considerations of race or ethnicity.

CACJ is concerned that too many citizens, including African-Americans facing criminal charges, perceive that they do not receive equal treatment before the law and that juries are still unrepresentative. Beyond representation of their individual clients, amicus is committed to ensuring that criminal trials, and especially death penalty proceedings, are conducted in an atmosphere free of racial prejudice. To accomplish this goal, allegations of racially based discrimination by representatives of the government must be reviewed scrupulously by the trial and reviewing courts to assure just and reliable outcomes for individuals facing the ultimate penalty, to safeguard the democratic right of all citizens to be fairly considered for jury service, and to promote public confidence in the criminal justice system.

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1. Counsel of record for both parties received timely notice of amicus's intent to file this brief and consented. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than amicus and their counsel.

The question presented in this case is critically important to reaffirm the principles this Court has established to protect the integrity of the trial process and the administration of justice in a multi-racial society.

SUMMARY OF ARGUMENT

More than thirty years ago, this Court rejected the heavy burden of proof that had too often crippled claims of racial discrimination in jury selection. *Batson v. Kentucky*, 476 U.S. 79, 92 (1986) (holding that a defendant need not show pervasive, systematic discrimination but can "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose"). In the decades since, the Court has not wavered on *Batson*'s guarantees: it has "vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers v. Mississippi*, 588 U.S. ----, ----, 139 S. Ct. 2228, 2241 (2019); *see Johnson v. California*, 545 U.S. 162, 168 (2005) (affirming *Batson*'s low threshold by concluding "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case").

But the California Supreme Court has not so vigorously enforced *Batson*'s principles. Since 2005, when this Court overturned California's "more likely than not" standard and reinforced that only an "*inference* of discriminatory purpose" is required for a prima facie case under *Batson*, *id.* at 168–69 (emphasis added), California's highest court has not departed from its higher prima facie threshold. And though its language mirrors this Court's, its holdings do not. In the decades since *Johnson*, California's highest court has not once found the exclusion

of a Black prospective juror to violate *Batson*'s guarantee of racially neutral jury selection. *People v. Rhoades*, 453 P.3d 89, 139 (Cal. 2019) (Liu, J., dissenting) (citing *People v. Snow*, 746 P.2d 452 (Cal. 1987)).

This is not because California has eliminated racial discrimination during jury selection; quite the opposite. Recently published empirical research conducted through the University of California, Berkeley School of Law shows that state prosecutors' offices have tailored their training manuals to exploit doctrinal loopholes, effectively encouraging prosecutors to use racial stereotypes and proxies to strike jurors. *See Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (2020), *available at* https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf ("*Whitewashing*"). The manuals then recommend strategies to bypass any *Batson* inquiry into racial discrimination—including by keeping at least one or two Black jurors in the jury box and by burying race-driven reasoning in more benign explanations for excusals, so that California courts can glean race-neutral explanations from the record. What results is disproportionately few Black jurors in California's jury boxes.

That is exactly what happened in this case. The trial prosecutor at Joe Edward Johnson's penalty retrial conducted a background check on a Black juror without learning anything else about him. After seating two Black jurors in the box, he proceeded to excuse every subsequent Black venireperson until defense counsel raised a *Batson* challenge. The California Supreme Court majority nevertheless held that these tactics failed

to raise even an inference of racial discrimination. And Johnson's case is not unusual: it is but one example of how the state's highest court has raised the prima facie threshold beyond reach and invited prosecutors to skirt the *Batson* inquiry. California has now effectively adopted a higher threshold for a *Batson* prima facie case than this Court set forth more than fifteen years ago, in *Johnson v. California*. Amicus therefore urges the Court to grant review and correct, once again, the California Supreme Court's application of *Batson*.

STATEMENT

Joe Edward Johnson, a Black man, was convicted of murdering a white man and raping a white woman. Pet. Cert. 11. The California Supreme Court reversed Johnson's rape conviction and death sentence, but the murder conviction remained. *People v. Johnson,* 764 P.2d 1087 (Cal. 1989). Only the penalty phase was retried. *People v. Johnson*, 453 P.3d 38, 45 (Cal. 2019).

During *voir dire* in the retrial, the prosecutor referenced a background check he had run on one prospective juror—a Black man—before questioning. The background check revealed two misdemeanor convictions that were not reflected in that juror's questionnaire.[2] *People v. Johnson*, 453 P.3d at 59. Defense counsel,

2. The prosecutor requested that this juror be examined for misconduct and dismissed for lying, but later withdrew his request. *People v. Johnson*, 453 P.3d at 59–60. This juror was eventually removed with a peremptory challenge resulting in an additional *Batson* motion, not presently at issue. *Id.* at 61. Defense counsel did, however, raise the background check as contributing to the inference of discriminatory purpose in the instant *Batson* challenge. *Id.* at 63–64.

suspicious of the prosecutor's motives, asked "if [the prosecutor] just checked all the Black prospective jurors with respect to any criminal record," pointing out that the juror had "indicate[d] on his [questionnaire] that he is Black." *Id.* at 79 (Liu, J., dissenting). The prosecutor replied, "I don't think I am obliged to answer that inquiry," but admitted he had only run background checks on jurors that "spark[ed his] interest." *Id.* at 59–60. Despite the prosecutor's refusal to answer, defense counsel persisted, seeking further explanation under *People v. Wheeler*. *See* 583 P.2d 748 (Cal. 1978) (California's forerunner to *Batson*). The trial court ultimately did not require the prosecutor to identify which jurors were the subjects of a background check. *People v. Johnson*, 453 P.3d at 60.

The prosecutor later allowed two other Black jurors to be seated on the jury. But, once a third Black prospective juror joined the jury box, the prosecutor employed a peremptory strike to excuse the additional Black juror, keeping only the original two Black jurors on the panel. He proceeded to do the same with two more Black prospective jurors as they were seated. After the prosecutor completed three rounds of excusing the "third" Black juror, defense counsel moved to challenge the peremptory strikes as discriminatory under *Batson*. At the time, "the prosecutor had used 15 peremptory strikes to remove three of the five black jurors (60 percent) and 12 of the 35 nonblack jurors (34 percent) in the jury box." *Id.* at 77 (Liu, J., dissenting).[3]

3. In the end, "the prosecutor used 21 percent of his strikes (4/19) to remove African American jurors—which was 62 percent higher than their representation in the relevant pool (7/54)." *Id.* at 85–86 (Cuéller, J., dissenting).

Despite evidence supporting an inference of discrimination, *id.* at 80 (Liu, J., dissenting); *id.* at 88–89 (Cuéllar, J., dissenting), the trial court determined that striking "three out of five [Black jurors] with two remaining in the jury box being passed" did not establish a prima facie case under the first stage of *Batson* because it did not "'statistically . . . show[] a pattern of intent to exclude or minimize' the presence of African-American jurors." *Id.* at 61 (quoting the trial court). The California Supreme Court agreed, concluding "that the statistics alone did not give rise to an inference of discrimination,"[4] *id.* at 64 n.7—with two notable dissents. As Justice Liu's dissent notes, the California Supreme Court should have applied the "inference of a discriminatory purpose" standard affirmed in *Johnson v. California*, 545 U.S. 162 (2005), and found error in the trial court's use of the improperly strict "strong likelihood" standard. Justice Liu further explained that California's highest court has failed to apply the proper standard in several other first-stage *Batson* cases. *Id.* at 80 (Liu, J., dissenting).

4. Based on this conclusion, the court did not examine "obvious race-neutral reasons" for strikes but did briefly assemble nondiscriminatory reasons for three of the four Black jurors' excusals. *Id.* at 64 n.7.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT MISAPPLIES THIS COURT'S DECISION IN *JOHNSON V. CALIFORNIA*, CREATING AN UNCONSTITUTIONAL HURDLE THIS COURT ONCE REJECTED.

In *People v. Wheeler*, the California Supreme Court established the nation's first three-step procedure to reduce peremptory strikes based on "group bias"—a belief that "certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." 583 P.2d at 761. The party arguing that group bias had infected jury selection could make a prima facie case by showing "a strong likelihood" that prospective jurors were "challenged because of their group association" rather than because of a more specific, permissible bias that cuts across segments of society. *Id.* at 764 (citing, for example, jurors with relatives on the police force).

Nearly a decade later, this Court wove threads of *Wheeler* into the now-familiar *Batson* framework. At the same time, it drew a distinction that has since vexed California's *Batson/Wheeler* jurisprudence. Where *Wheeler* demanded a "strong likelihood" of discrimination at the first stage, *Batson* required a defendant to raise only an "inference of discriminatory purpose" in the prosecutor's pattern of strikes to establish a prima face case of racial discrimination. *Batson*, 476 U.S. at 96–97. The State may then rebut the prima facie case by offering a race-neutral explanation for its strikes. *Id.* at 97–98. Finally, the trial court decides whether the defendant has shown purposeful discrimination. *Id.* at 98.

The years after *Batson* saw the California Supreme Court attempt to meld its standard in *Wheeler*—a "strong likelihood" of discrimination—with this Court's lower stage-one threshold in *Batson*. *See, e.g.*, *People v. Box*, 5 P.3d 130, 152 n.7 (Cal. 2000) ("[I]n California, a 'strong likelihood' means a 'reasonable inference.'"). But the standards were incompatible. As a result, California's state and federal courts diverged in their applications of *Batson* at stage one. *Compare Wade v. Terhune*, 202 F.3d 1190, 1192 (9th Cir. 2000) (holding that the "strong likelihood" standard "does not satisfy the constitutional requirement laid down in *Batson*"), *with People v. Bernard*, 32 Cal. Rptr. 2d 486, 490 (Cal. Ct. App. 1994) (characterizing the differences between the two tests and rejecting the "reduction" of California's standard to the federal "reasonable inference" test).

What emerged in California was a jurisprudence wholly inconsistent with *Batson*. Case after case raised—in the California Supreme Court's words—"an inference of impropriety," yet the court dismissed each as insufficient at stage one. *See People v. Howard*, 824 P.2d 1315, 1326 (Cal. 1992) (holding no "conclusive" inference at stage one despite "removal of all members of a certain group"); *People v. Sanders*, 797 P.2d 561, 576 (Cal. 1990) (explaining that the defendant had "failed to demonstrate a strong likelihood" of discrimination even though the prosecution's removal of all Hispanic jurors "may give rise to an inference of impropriety"). As late as 2003, the state's highest court reasoned that "*Batson* permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." *People v. Jay Shawn Johnson*, 71 P.3d 270, 279 (Cal. 2003).

This Court disagreed. Reversing the California Supreme Court's decision in *People v. Jay Shawn Johnson*, the Court held that California's "strong likelihood" standard is an "inappropriate yardstick by which to measure the sufficiency of a prima facie case." *Johnson v. California*, 545 U.S. at 168. It reiterated that a defendant need only produce evidence that would support an *inference* of discrimination. *Id.* at 170. And it explained that *Batson* is not designed to be onerous at stage one. Instead, the stage-one threshold is low because "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," avoiding "needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* at 172.

In the fifteen years since *Johnson*, California courts have consistently declined to ask that question of prosecutors. The state's highest court has reviewed 42 first-stage *Batson* cases in which the trial court, applying the outdated "strong likelihood" standard, found no prima facie case of discrimination. Even reviewing de novo and under the more lenient "reasonable inference" standard, the California Supreme Court did not reverse a single case. *People v. Johnson*, 453 P.3d at 80 (Liu, J., dissenting); *see People v. Harris*, 306 P.3d 1195, 1242 (Cal. 2013) (Liu, J., concurring) (noting that the California Supreme Court had found a *Batson* violation only once in more than 100 cases over the last 20 years).[5] Taking cues from the

5. The California Supreme Court's only *Batson* reversal in nearly two decades—*People v. Gutierrez*—was at the third stage of the *Batson/Wheeler* analysis. 395 P.3d 186, 198 (Cal. 2017). In *Gutierrez*, the California Supreme Court held that the trial court had erred in uncritically accepting the prosecutor's explanation

highest court, the state's courts of appeal fare no better. From 2006 to 2018, no published court of appeal opinion concluded that a trial court erred at *Batson* stage one.[6]

These data points highlight what the case law—and this case in particular—already reflects: although the California Supreme Court now recites the language of *Batson* and *Johnson v. California*, it continues to misapply it.

First, California courts find no inference of discrimination from disproportionate strikes of Black jurors, even where those jurors share a race with the defendant and the jury is otherwise populated with members of the victim's racial or other group. In this case, for instance, the defendant is Black and the victim white. The prosecutor seated two Black jurors and proceeded to excuse every subsequent Black juror, maintaining exactly two Black jurors on the panel until defense counsel raised a *Batson* challenge. After the *Batson* challenge, the prosecutor allowed one additional Black juror to be seated. Instead of treating this stark pattern of excusals—abated only after the threat of a *Batson* motion—as evidence to support a prima facie case, the California Supreme Court considered the comparative excusal rates of the Black

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when that explanation conflicted with reason and the record. *Id.* at 203. Because the trial court found that the defendants satisfied their prima facie case, however, the state supreme court had no occasion to review stage one on appeal.

6. In that time, the California Courts of Appeal decided 683 cases involving *Batson* challenges. The courts reversed or remanded in only 21 cases (3 percent), of which fewer than five cases addressed *Batson* at stage one. *See Whitewashing* at 24.

jurors and non-Black jurors *after* the *Batson* challenge, when the jury was empaneled. *People v. Johnson*, 453 P.3d at 62 (considering the excusal rate of Black jurors "[a]t the close of regular jury selection" and "[a]t the close of alternate jury selection"); *see also People v. Reed*, 416 P.3d 68, 78 (2018) (considering ratio of excused jurors in context of strikes made after *Batson/Wheeler* motion); *People v. Garcia*, 258 P.3d 751, 780 (Cal. 2011) (same). At that point, the court majority decided, the excusal rate for Black jurors "barely" exceeded the ratio of Black jurors in the venire. *People v. Johnson*, 453 P.3d at 62. But the final ratios are not the pertinent ones if the prosecutor has successfully removed jurors with race-based strikes before the *Batson* challenge. *See Fernandez v. Roe*, 286 F.3d 1073, 1079 (9th Cir. 2002) (noting that "the lone Hispanic juror's presence on the jury" is "less helpful" to the State "in light of the trial judge's explicit warning to the prosecutor that any additional challenges against Hispanics would trigger a *prima facie* finding of discrimination").

This case is only the most recent in a spate of its kind. In another recent death penalty decision, the California Supreme Court found no prima facie case of discrimination even after it recognized that the prosecution's removal of four out of eight Black prospective jurors was likely "substantially disproportionate to the representation of African-Americans in the jury pool." *Rhoades*, 453 P.3d at 120. In a preceding case, the court found no inference of discrimination arising from the prosecutor's removal of five out of six Black jurors in the capital trial of a Black defendant. *Reed*, 416 P.3d at 81. And before that, the court similarly found no inference of discrimination where the prosecutor excused two of the three Black jurors in the capital retrial of a Black defendant accused of raping

and murdering a young white woman. *Harris*, 306 P.3d at 1221–22. Together, these cases belie the California Supreme Court's insistence that case-specific statistics are "especially relevant" in identifying an inference of discrimination in jury selection. *People v. Johnson*, 453 P.3d at 64; *Reed*, 416 P.3d at 78; *see also Powers v. Ohio*, 499 U.S. 400, 416 (1991) ("Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred.").

Second, instead of focusing its stage-one inquiry on the inference of discrimination, California courts routinely and erroneously "rely on judicial speculation to resolve plausible claims of discrimination." *See Johnson v. California*, 545 U.S. at 173. This is a practice the California Supreme Court employed before the decision in *Johnson v. California* and has continued to employ since. *See Howard*, 824 P.2d at 1326 (theorizing, pre-*Johnson v. California*, that one juror's "professional training" and another's "apparent uncertainty about the death penalty 'suggest[ed] grounds upon which the prosecutor might reasonably have challenged' the jurors in question"); *Rhoades*, 453 P.3d at 121 (examining two prospective jurors' questionnaires and, post-*Johnson v. California*, explaining that "the record reveals readily apparent reasons for the strikes that dispel the inference of bias"); *see also People v. Johnson*, 453 P.3d at 65 n.7 (inferring that courts may "resort to examining the record for obvious race-neutral reasons for the prosecutor's peremptory strikes" to "necessarily dispel any inference of bias" (quoting *Reed*, 416 P.3d at 78)).

But "it is not the proper role of courts to posit reasons that the prosecutor might or might not have had." *Rhoades*, 453 P.3d at 139 (Liu, J., dissenting). That a court can find race-neutral reasons for a prosecutor's strikes does not mean that it should. Indeed, the *Batson* framework is designed to avoid this very practice—to "produce actual answers" and not hypothesized ones—when the court identifies "suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. at 172. Yet the California Supreme Court searches the record for evidence that would obviate the need to ask the questions *Batson* demands at stage two. "The court then relies on those *hypothesized* reasons to conclude that there was no need for the prosecutors to state their *actual* reasons." *Rhoades*, 453 P.3d at 142 (Liu, J., dissenting). Where the record contains no evidence but race for a juror's excusal, however, the court performs no similar inquiry and instead fails to identify race as the driver of the strike. *See People v. Johnson*, 453 P.3d at 64 n.7; *cf. id.* at 88 (Cuéllar, J., dissenting) ("[W]hat's obvious is the lack of a compelling or even modestly convincing reason—other than her race—for excusing Lois G.").

By raising the threshold at stage one and searching the record to avoid stage two, the California Supreme Court sidesteps *Batson* altogether. Under California's framework, the trial prosecutor is rarely required to proffer race-neutral reasons for his peremptory strikes, the defendant rarely permitted to demonstrate that the explanations are pretextual, and the court rarely asked to serve the gatekeeping function this Court directed in *Batson*.

II. CALIFORNIA'S ELEVATED THRESHOLD AT *BATSON* STAGE ONE ENCOURAGES PROSECUTORS TO SYSTEMATIZE STEREOTYPING AND CONCEAL RACE-BASED PEREMPTORY STRIKES.

By prematurely cutting off the three-stage *Batson* framework before stage two, the California Supreme Court allows prosecutors to escape accountability for strikes that are rooted in race. Prosecutors in the state—absolved of the responsibility to explain suspicious strikes at stage two—have tailored their training manuals to mirror the doctrinal loopholes of California's *Batson* jurisprudence.[7] These materials enable race-driven jury selection in two ways: first, by training and encouraging prosecutors to rely heavily on group stereotyping; and second, by offering selection strategies that conceal race-driven strikes and exploit California's unattainable standard at stage one of *Batson*. The upshot is a jury selection process that circumvents this Court's rulings and whose "use of race- and gender-based stereotypes . . . seems better organized and more systematized than ever before." *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring).

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7. Fifteen county district attorney offices produced their training materials in response to a California Public Records Act request by the American Civil Liberties Union of Northern California. Cal. Gov. Code. § 6250 *et seq.* The materials were made publicly available by the Berkeley Law Death Penalty Clinic. *California District Attorney Jury Selection Training Materials*, Berkeley Law, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/california-district-attorney-training-materials/ (last visited August 12, 2020).

A. California Prosecutors Are Trained to Strike Jurors Based on Group Stereotyping and Race-Correlated Justifications.

Throughout California, prosecutors' training materials teach assistant district attorneys to strike or keep jurors based on attributes that stereotypically or statistically relate to one race or another. The materials include explicit lists detailing "good" and "bad" juror attributes, as well as implicit directives to keep jurors that resemble the prosecutors, who are overwhelmingly white. Selecting jurors using these tactics leads to disproportionate strikes of Black and Latinx jurors.

The characteristics listed as "ideal" or "good" for juries are stereotypically or statistically associated with white jurors. *See, e.g.*, San Diego County District Attorney Training Materials at 111 ("GOOD PEOPLE's" traits include "middle class, middle aged homeowners," having a "steady job," and "persons with traditional lifestyles"); *id*. at 106–07 (jury should include those who "have a stake in the community," "[r]espect the communities[']institutions and procedures," and are "homeowners");[8] Orange County District Attorney Training Materials at 3 ("Good" jurors include those "educated," "stable," and "attached to [the] community");[9] *id*. at 1 (jurors should "Have a Stake in the Community," be able to "Work

8. San Diego County District Attorney, *01-CPRA 19-67 1990-1994*, https://drive.google.com/file/d/1_j4F0FB9n8jFwE3Q5D3lA2v8O0CDCZTc/view (last accessed Aug. 13, 2020).

9. Orange County District Attorney, *Voir Dire Part I (Balleste – 09-23-14)*, https://drive.google.com/file/d/1xvq-TSmc5XkeYLJGfR-JHzs7y9Vakmzy/view (last accessed Aug. 13, 2020).

Together," be "Mature," and "Respect the System").[10] *See Whitewashing* at 16–20, 45–46 (explaining that these metrics overrepresent individuals within prosecutors' "in-group," which is predominantly white, and underrepresent Black and Latinx jurors).

In contrast, the materials' list for "bad" jurors overrepresent characteristics stereotypically or statistically used to describe African Americans and Latinx persons. *See, e.g.*, Ventura County District Attorney Training Materials at 1 (advising prosecutors to be "very cautious about . . . people who are marginalized by societal norms");[11] Santa Clara County District Attorney Training Materials at 51–52 ("What are Valid Neutral Justifications for Challenging a Juror?" "Negative experiences a juror or someone close to the juror has had with law enforcement . . . ."); *id.* at 53 ("Juror holds belief that the justice system is unfair"); *id.* at 57 ("Juror has life experiences or characteristics that might make the juror overly sympathetic to, or biased towards, a person in the defendant's position"); *id.* at 58 (juror and defendant have "characteristics in common"); *id.* at 76 ("Juror (or close relative of juror) employed in a profession whose members make 'bad prosecution jurors'" such as "postal workers");[12] San Diego County District Attorney Training

10. Orange County District Attorney, *Jury Selection – Trial Advocacy (Glazier – 01-10-13)*, https://drive.google.com/file/d/1Cbz4IKDXW4THPmnduJsyniP-qloaQN3h/view (last accessed Aug. 13, 2020).

11. Ventura County District Attorney, *Voir Dire Concepts*, https://drive.google.com/file/d/1WwPKLH_5ftWfkp2DUPAXQZIr7KCJBU6b/view (last accessed Aug. 13, 2020)

12. Santa Clara County District Attorney, *Inquisitive Prosecutor's Guide*, https://drive.google.com/file/d/1F-pgKV_

Materials, *supra* n.8, at 112 ("BAD PEOPLE" are those who have, or whose family member had, "previous arrests or convictions . . . for the same/similar offense" or have "occupations sympathetic to defendants"). *See also Whitewashing* at 16–20, 45–46 (explaining how these metrics overrepresent Black and Latinx individuals).

The training materials likewise perpetuate discriminatory strikes by encouraging "in-group preference" when California prosecutors are overwhelmingly white. "[I]n-group preference" is "favoritism toward groups to which one belongs." *Whitewashing* at 32. "Both conscious and implicit bias in favor of in-groups . . . [develop] because positive emotions such as admiration, sympathy, and trust are reserved for the ingroup." *Id.* at 46 (internal quotations omitted). Prosecutors' training manuals foster intentional use of "in-group preferences" by instructing prosecutors to choose jurors with similar characteristics to themselves. *See, e.g.*, San Diego District Attorney Training Materials, *supra* n.8, at 111–12 (encouraging selection of jurors that are "THE TYPE OF PERSON YOU FEEL COMFORTABLE WITH"); *id.* at 5 ("[One] GOAL [is to select] mainstream-type people."); Orange County District Attorney Training Materials at 10 (promoting selection of "[n]ormal, regular people" that the prosecutor "[w]ould have lunch with").[13]

PdtEntngWtJrpVc7CDJ1_HOI0/view (last accessed Aug. 13, 2020).

13. Orange County District Attorney, *Jury Selection (Ferrentino – 10-03-2018)*, https://drive.google.com/file/d/19wk9FhvHhvbFFv4d-mnBcDT5OZ-pIgQC/view (last accessed Aug. 13, 2020).

Those characteristics, however, lean markedly non-Black or non-Latinx. Prosecutors are majority white. Although only 38.5 percent of California's population is white, 69.8 percent of prosecutors are white. *Whitewashing* at 46 (citing statistics from 2015). Moreover, by their very occupation, prosecutors are well-educated and stably employed and have strong community ties. *Id.* This in-group preference is also evident in how the training materials categorize "good" juror traits, which largely represent prosecutors, and "bad" juror traits, which do not. *See id.* at 32 ("[P]eople automatically associate the in-group, or 'us,' with positive characteristics, and the out-group, or 'them,' with negative characteristics.").

Consequently, the training materials "embrace[] in-group favoritism towards White jurors both explicitly through the typology of [the] 'ideal juror'" and "implicitly by validating trust and respect for those in the [white] in-group." *Id.* at 46.

Amicus CACJ notes that it appeared on brief before the Court in *Dickerson v. United States,* 530 U.S. 428 (2000), to bring to the Court's attention information about the impact that then-existing training had on the interrogation practices of a number of California-based police departments, including training about questioning "outside of *Miranda*" using approaches that were the subject of materials prepared by some California prosecutors. Suffice it to say that prosecutorial training practices can be at the root of efforts to circumvent protections put in place by this Court's rulings. CACJ persisted in addressing the practice of questioning "outside of *Miranda*," which has since been curbed.

B. California Prosecutors Are Trained to Side-Step *Batson* Motions Through Doctrinal Loopholes.

California prosecutors are trained to employ specific strategies to thwart inquiry into racially motivated peremptory strikes. For instance, training materials list tactics that have previously succeeded in California state courts to defeat *Batson* challenges, including, in particular, offering multiple justifications for a strike against a member of a cognizable group and maintaining at least one or two members of that cognizable group on the jury. *See, e.g.*, San Francisco County District Attorney Training Materials at 23 ("Do not base any challenge against a member of a cognizable group on a single reason . . . . If you develop multiple reasons, any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons."); *id.* ("If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons."); *id.* at 34 ("[A]lways kick off your most hateful juror earliest on in the process, before your opponent has built up enough steam to make a successful *Wheeler* challenge . . . ."); *id.* at 46–48 (listing California District Attorneys' Association ("CDAA")'s strategies for avoiding Batson challenges);[14] Orange County District Attorney Training Materials at 3 (calling stage one of *Batson/Wheeler* "[e]ssentially a numbers game");[15] *id.*

14. San Francisco District Attorney, *Mr. Wheeler Goes to Washington*, https://drive.google.com/file/d/1KFcz7LjY0-ERYRo2s-7ikcDA7mP5EFtw/view (last accessed Aug. 13, 2020).

15. Orange County District Attorney, *Batson-Wheeler (Mestman - 08-16-18)*, https://drive.google.com/file/d/1R8_KzMSChuqCeerRq8d8lwAG1xiTvjpu/view (last accessed Aug. 13, 2020).

at 14 (advising prosecutors to "[g]ive multiple reasons for each challenge . . . [b]ut be careful, if one reason is pre-textual, then inference that others are pre-textual as well"); *id.* ("Keep a member of a cognizable group" in the jury); Ventura County District Attorney Training Materials at 11 ("[T]here is strength in quantity.");[16] San Diego County District Attorney Training Materials, *supra* n.8, at 174 (stating a preference for keeping at least one member of the cognizable group on the jury); Chris C. Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 Berkeley La Raza L.J. 18, 31 (2008) (explaining CDAA advises that prosecutors "keep on the jury one or more members of each cognizable group from which you are challenging persons" to "create a record that will justify any challenges you make"). Thus, prosecutors are instructed to both maintain a racial quota and conceal any appearance of racial bias in achieving it so that they may avoid the "simple question" and "direct answer" this Court contemplated in *Johnson v. California*. 545 U.S. at 172.

These tactics are sourced directly from the California Supreme Court, which cites a jury's minimum-minority composition as evidence of a prosecutor's good faith. *See, e.g., People v. Lomax*, 234 P.3d 377, 414 (Cal. 2010) ("Acceptance of a panel containing African-American jurors 'strongly suggests that race was not a motive' in the challenges of an African-American panelist." (quoting *People v. Lenix*, 187 P.3d 946, 966 (Cal. 2008))). The court said as much in this case when it credited the trial prosecutor for approving a jury that included Black jurors. *See People v. Johnson*, 453 P.3d at 63 ("We have previously held that the prosecutor's acceptance of a jury panel

16. Ventura County District Attorney, *Voir Dire 091218*, https://drive.google.com/file/d/1ceeg25ToQ_8A62V73niA8thqEYrUqWIY/view (last accessed Aug. 13, 2020).

including multiple African-American prospective jurors, while not conclusive, was an indication of the prosecutor's good faith in exercising his peremptories . . . ." (internal quotation marks and citations omitted)).

The training materials also include laundry lists of court-approved "race neutral" justifications for avoiding court inquiry into racial bias. *See, e.g.*, San Diego District Attorney Training Materials, *supra* n.8, at 215 (listing reasons courts uphold challenges); Ventura County District Attorney Training Materials, *supra* n.11, at 11–12 (same); Orange County District Attorney Training Materials at 14 ("Question jurors fully and carefully so as to elicit race-neutral justifications for every challenge");[17] Los Angeles County District Attorney Training Materials at 27–37 (same).[18]

Although this Court has criticized the use of "a laundry list of reasons," *Foster v. Chatman*, 136 S. Ct. 1737, 1748–49 (2016), the California Supreme Court rewards the practice. The state's highest court searches the record for race-neutral reasons—the more the better—to justify a trial prosecutor's strikes. *See Howard*, 824 P.2d at 1326 ("Betty T.'s professional training and Katie B.'s apparent uncertainty about the death penalty 'suggest[ed] grounds upon which the prosecutor might reasonably have challenged' the jurors in question"); *Rhoades*, 453 P.3d at

17. Orange County District Attorney, *Batson-Wheeler Update, Internal Job Stress & PTSD*, https://drive.google.com/file/d/161jdhjA9-ALLGLL8Mjv_HxLZFD_D87uV/view (last accessed Aug. 13, 2020).

18. Los Angeles County District Attorney, *Wheeler/Batson 2016*, https://drive.google.com/file/d/1dVCX1yUl-Z3r-daXGNNfmCbYadc9WImc/view (last accessed Aug. 13, 2020).

121 ("And, finally, the record discloses readily apparent, race-neutral grounds for a prosecutor to use peremptory challenges against each of the four prospective jurors at issue."). The court majority claims not to have searched the record in this case, but it recognized that it could. *See People v. Johnson*, 453 P.3d at 65 n.7 ("Because we have concluded that defendant failed to raise an inference of discrimination, we need not resort to examining the record for obvious race-neutral reasons for the prosecutor's peremptory strikes that would 'necessarily dispel any inference of bias[.]'" (quoting *Reed*, 416 P.3d at 78)).

Not only are these lists contrary to this Court's rulings, they conceal explicit discrimination and make it easier to justify strikes based on stereotyping and race-correlated instinct. *Whitewashing* at 50. "The training materials' reliance on ready-made, race-neutral, and judicially approved reasons should leave no doubt that California courts will not put an end to prosecutors' long-standing practice of using peremptory challenges to remove Black prospective jurors," *id.* at 52, and alone warrants review of this case.

CONCLUSION

The California Supreme Court last found a *Batson* error at the first stage in 1987, more than thirty years ago. *Whitewashing* at 53. In that time, it has traveled "a one way road" that "improperly elevated the standard" beyond what this Court has "deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for this strike." *Rhoades*, 453 P.3d at 139 (Liu, J., dissenting). And prosecutors have adapted accordingly.

It is past time for course correction. The Court should grant certiorari to determine whether California's highest court properly applies stage one of *Batson* to require only an inference of discrimination, as this Court has consistently instructed.

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