No. 20-808

IN THE

Supreme Court of the United States

JOHNNY DUANE MILES,

Petitioner,

v.

THE PEOPLE OF CALIFORNIA,

Respondent.

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

BRIEF FOR FORMER STATE AND FEDERAL COURT JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are eight former state and federal court judges and justices who believe that ending racial discrimination in jury selection is critical to the integrity of our judicial system and whose interest is in ensuring *Batson* remains a useful tool in accomplishing that end.

Susan Block retired from the bench after 25 years of judicial service. She served, from 1979 to 1995, as an associate circuit judge, and from 1995 through 2003, as a circuit judge in St. Louis County Circuit Court. She also served as the Administrative Judge of St. Louis County Family Court, from which she retired in December 2003. Judge Block is currently an attorney with Paule, Camazine & Blumenthal P.C.

LaDoris H. Cordell is a former judge of the Superior Court in Santa Clara County, California. Judge Cordell served as a municipal court judge from 1982 to 1988. She was then elected to the Superior Court in 1988 and served in that position until 2001 and as presiding judge of the appellate department in 1993. Since retiring from the bench, Judge Cordell has served as a vice provost at Stanford University, a Palo Alto city councilmember, and as the Independent Police Auditor for San Jose.

Oliver E. Diaz, Jr. is a former presiding justice on the Supreme Court of Mississippi. Justice Diaz served in the Mississippi House of Representatives for seven years from 1988 to 1994. He was then elected to the

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Mississippi Court of Appeals in November 1994 and served in that position until March 2000, at which time he was appointed to the Supreme Court of Mississippi. Justice Diaz retired from the Supreme Court of Mississippi in January 2009.

Shira A. Scheindlin is a former federal judge on the U.S. District Court for the Southern District of New York, where she served for 22 years. She also served as a magistrate judge in the Eastern District of New York. Prior to her judicial service, Judge Scheindlin served as a federal prosecutor. Upon her retirement from the bench in 2016, she joined Stroock & Stroock & Lavan LLP as counsel to the firm and serves as an arbitrator and mediator through JAMS.

Kevin H. Sharp is a former federal judge on the U.S. District Court for the Middle District of Tennessee, where he served from 2011 to 2017 and as Chief Judge from 2014 to 2017. Judge Sharp is currently the Nashville Managing Partner of Sanford Heisler Sharp, LLP.

Gary Saul Stein is a former associate justice of the Supreme Court of New Jersey. He served on New Jersey's Supreme Court for 17 years from 1985 to 2002. Upon retirement from the bench, he joined Pashman Stein Walder Hayden P.C. where he is currently Counsel to the firm.

Marsha Ternus was the chief justice of the Supreme Court of Iowa. Justice Ternus was appointed to the Court in 1993 by Governor Terry Branstad. In 2006, she became the first woman to serve as the chief justice in the history of the Supreme Court of Iowa. She served on the bench until 2010.

Michael A. Wolff is a former chief justice of the Supreme Court of Missouri. He served on the Supreme Court between 1998 and 2011, and as Chief Justice from 2005 to 2007. After his retirement from the bench, he returned to the faculty of Saint Louis University and became dean of the law school in 2013, serving until 2017.

SUMMARY OF ARGUMENT

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Supreme Court set forth a three-part test for "ferreting out" racial discrimination in the jury selection process. *Miller-El* v. *Dretke*, 545 U.S. 231, 238 (2005) ("*Miller-El II*"). If the defendant establishes a prima facie case of discrimination, the burden shifts to the prosecutor to provide "a 'clear and reasonably specific' explanation of his 'legitimate reasons'" for exercising his peremptory strike. *Batson*, 476 U.S. at 98, n.20. The burden then shifts back to the defendant to demonstrate that the prosecutor's reasons were pretextual. *Id.* at 100.

As this Court recognized in *Miller-El II*, one of the most "powerful" ways a defendant can demonstrate pretext is through a side-by-side comparison of venire panelists who were struck and panelists who were selected for the jury, commonly known as comparative juror analysis. 545 U.S. at 241. "When illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons" for exercising a peremptory strike "as best he can and stand or fall on the plausibility of the reasons he gives." *Id.* at 252. Comparative juror analysis has proven to be the most effective tool for enforcing *Batson* and identifying race discrimination in juror selection over the last two decades.

The same cannot be said in California. The state's highest court, in *Miles* and in numerous cases over the past decade, has stripped comparative juror analysis of its power, in clear contravention of Supreme Court precedent. California subverts comparative juror analysis in two related ways. First, it allows courts to consider any potential reason that the prosecutor may have struck only one of two similarly-situated jurors, beyond the actually proffered reasons. Second, it considers only comparator jurors who share all relevant characteristics, a requirement this Court has never observed or applied. These burdensome and unworkable standards are irreconcilable with this Court's *Batson* jurisprudence. The California Supreme Court has rendered it nearly impossible for judges, whether at trial or applying *Batson*'s deferential review on appeal, to prevent racially-motivated jury selection. The devastating effect of this regime is readily apparent in the present capital case and in the fact that the California Supreme Court has never reversed in reliance on a comparative juror analysis since *Miller-El II*, some fifteen years ago.

As this Court recognized in *Miller-El II*, "the 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." 545 U.S. at 238 (internal quotation marks omitted). In light of California's continuing and detrimental subversion of *Batson* safeguards against discriminatory jury selection, the Court should grant the petition for a writ of certiorari.

ARGUMENT

I. RACIAL DISCRIMINATION IS A SERIOUS PROBLEM IN JURY SELECTION

A. Racial Discrimination Continues To Plague Jury Selection Today

Thirty-four years after the Supreme Court's decision in *Batson*, race discrimination in jury selection still threatens the integrity of criminal trials and our promise of equal justice under the law. *See, e.g.*, *Miller-El II*, 545 U.S. at 268-269 (Breyer, J., concurring) (citing several "studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem"); *State* v. *Saintcalle*, 309 P.3d 326, 329 (Wash. 2013) (en banc) ("Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection."), *abrogated by City of Seattle* v. *Erickson*, 398 P.3d 1124 (Wash. 2017). Studies confirm the courts' observations that racial discrimination persists in juror selection. *See, e.g.*, Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 5 (Aug. 2010), https://bit.ly/3svQ4Rx (conducting an eight-state study and concluding that "[r]acially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases."); Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1624-1625 & n.178 (2018) (surveying empirical studies of *Batson*'s efficacy between 1982 and 2017 and finding "that prosecutors disproportionately use peremptory strikes to exclude [B]lack jurors" and that "racial exclusion remains central to the selection of criminal juries"); Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The*

Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case, 97 Iowa L. Rev. 1425, 1427 n.1 (2012) (collecting articles discussing the continued prevalence of race discrimination in jury selection).

The problem is exacerbated by the prevalence of prosecutorial training that attempts to evade scrutiny under *Batson.* District attorneys' offices in jurisdictions across the country have been exposed for giving instruction on how to disguise racially-based peremptory strikes. *See Miller-El II*, 545 U.S. at 263-264 (explaining that "for decades … prosecutors in the Dallas County office had followed a specific policy of systematically excluding [B]lacks from juries" pursuant to "'a formal policy to exclude minorities from jury service'"); *Wilson* v. *Beard*, 426 F.3d 653, 658 (3d Cir. 2005) (describing a video recorded by the District Attorney in Philadelphia teaching prosecutors how to evade *Batson* challenges when striking Black jurors and quoting the District Attorney as stating, "my advice would be in that situation is when you do have a [B]lack jur[or], you question them at length. And on this little sheet that you have, mark something down that you can articulate [at a] later time if something happens"); *see also* Semel, et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* 44-52 (June 2020) (surveying district attorney training materials from 15 counties in California between 1990 and 2019, which "all but ensures the continuation of the pernicious legacy of racial discrimination in jury selection"), https://bit.ly/2LlY6f1.

B. California Perpetuates Invidious Racial Discrimination In Jury Selection

Discrimination in jury selection plagues courts "nationwide," *Saintcalle*, 309 P.3d at 334, and California is no exception. In fact, judges and scholars alike have recognized that race discrimination is a serious problem in California jury selection. *See*, *e.g.*, *People* v. *Hardy*, 5 Cal. 5th 56, 124 (2018) (Liu, J., dissenting) (observing that decades after *Batson* "[r]acial discrimination against [B]lack jurors has not disappeared here or elsewhere"). "[P]rosecutors across California use peremptory strikes to disproportionately remove African-American and Latinx citizens," leading to a "serious *Batson* problem" in a state that "lacks an effective judicial mechanism (or the judicial will) to address it." Semel et al., *Whitewashing the Jury Box* at 13, 15; *see also* Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, 23 Int'l J. Comp. & Applied Crim. Just. 55, 74 (1999) (finding that African Americans are disproportionately excluded throughout the jury selection process in California courts).

Despite the known prevalence of discrimination, however, *Batson* is rarely enforced in California state courts. Both substantial disparities in strikes and the misapplication of this Court's precedent underscore the problem. One recent study of nearly 700 California *Batson* cases concluded that prosecutors frequently provide reasons for removing Black and Latinx prospective jurors that rely on racial and ethnic stereotypes. Semel et al., *Whitewashing the Jury Box* at 13-22. For example, in approximately 35% of cases California prosecutors struck prospective jurors based on a juror's close relationship with people who had been

stopped, arrested, or convicted of a crime, a reason the Washington Supreme Court has labeled "presumptively invalid" because of its association with discriminatory jury selection. *Id.* at 14-15 (citing Wash. S. Ct. Gen. R. 37). Troublingly, the report noted that the "state supreme court and courts of appeal rarely find that these strikes were unconstitutionally race-based." *Id.* at 15. While the Ninth Circuit found *Batson* errors in 15% of the appeals from California district courts between 1993 and 2019, the California Supreme Court did so in only 2.1% of cases during the same period. *Id.* In the last 30 years, the California Supreme Court has reviewed 142 challenges and found a *Batson* violation only three times. *See id.* at vii. But more troublingly, the California Supreme Court has, and continues to, routinely reject *Batson* challenges by misapplying Supreme Court precedent, a practice that has required this Court's correction before. *See Johnson* v. *California*, 545 U.S. 162, 173 (2005) (finding "that California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by *Batson*").

Once again, California has adopted an approach inconsistent with this Court's precedent—an approach that allows invidious discrimination in jury selection to go unchecked and that warrants correction. Here, at the trial of a Black defendant charged with the rape and murder of a white victim, the prosecutor used three of his first six peremptory strikes to remove *every* Black juror in the jury box not excused for cause. Pet.App.19. The trial court denied the defense's objection, though noting that the prosecutor was "treading on thin ice in this area." Pet.App.31. The prosecutor then successfully exercised another peremptory strike against yet another Black prospective juror. Pet.App.20. Ultimately, Mr. Miles was tried and con-

victed by a jury that included *no* Black member. Pet.App.148. On appeal, the California Supreme Court conducted its comparative juror analysis in a manner that rationalized the prosecutor's pretextual justifications and contravened this Court's guidance in *Miller-El II* and its progeny, as explained below.

II. CALIFORNIA COURTS VIOLATE SUPREME COURT PRECEDENT IN TWO WAYS, EVISCERATING COMPARATIVE JUROR ANALYSIS IN PRACTICE

A. California Courts Engage In Impermissible Judicial Speculation

Comparative juror analysis is a crucial tool for uncovering racial discrimination in jury selection. It goes beyond statistical inquiry and enables the court to uncover motive by testing a prosecutor's reasons for distinguishing between like jurors. One of the core disputes in this case is whether the California Supreme Court has impermissibly weakened comparative juror analysis by allowing a reviewing court considering a *Batson* challenge to look beyond the prosecutor's proffered justification for a strike at the time of trial and instead substitute the court's own post hoc conjecture. *See* Pet.App.60 (citing *People* v. *Vines*, 51 Cal. 4th 830, 851-852 (2011)). According to the California high court, the trial court may consider any possible reasons, even those not proffered by the prosecutor and, if it identifies a race-neutral rationale, may conclude on that basis that no *Batson* error exists. Pet.App.38. This is in direct conflict with *Miller-El II* and its progeny and calls for reversal.

As this Court has repeatedly instructed, where "a prosecutor's proffered reason for striking a [B]lack panelist applies just as well to an otherwise-similar

non-[B]lack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Miller-El II*, 545 U.S. at 241; *see also Foster* v. *Chatman*, 136 S. Ct. 1737, 1750 (2016) (concluding that "explanations given by the prosecution" to strike a Black juror were undercut by "willingly accept[ing] white jurors with the same traits"). A "*Batson* challenge does not call for a mere exercise in thinking up any rational basis," *Miller-El II*, 545 U.S. at 252, and instead mandates that a prosecutor "give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising [peremptory] challenges." *Batson*, 476 U.S. at 98 n.20. Only the justifications presented by the trial attorney at the time are relevant because the entire exercise is intended to assess whether the proffered reasons for the strike are pretext for racial discrimination. *Miller-El II*, 545 U.S. at 251-252 ("*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of *that reason*" (emphasis added)). "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 been shown up as false." *Id.* at 252.

In *Miles*, the California Supreme Court rejected the well-established principles in *Miller-El II* and relied on its own conjecture when analyzing a Black venire member, Mr. Greene, and Juror No. 1. Both had identified themselves as "a leader rather than a follower," the prosecutor's proffered basis for striking Mr. Greene. Pet.App.57, 59. The court rejected the defendant's assertion that the comparison supported an inference of pretext and speculated instead that "the prosecutor could reasonably have found Juror No. 1's response to be less concerning in context than [Mr.

Greene's] response." *Id.* at 59. But the prosecutor never raised the "context" of Mr. Greene's response. The court arrived at this rationale independently, finding in its own review that Juror No. 1 had previously served on a jury, while Mr. Greene had no such experience. *Id.* On this basis, the court hypothesized that the prosecutor "could have concluded that Juror No. 1's statement that she liked to make her 'own decisions' did not call into question her openness to considering other opinions before returning a verdict" given this prior experience and separately that Mr. Greene's similar responses "could" have caused "concern about his openness to considering other opinions" as "he had not previously served on a jury or worked with a group of people to make a decision." *Id.* at 59-60. Thus, *Miles* employs precisely the judicial speculation that this Court has repeatedly proscribed. The California Supreme Court's "substitution" of its post hoc reasoning "does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions." *Miller-El II*, 545 U.S. at 252.

The California Supreme Court attempts to avoid this precedent by limiting *Miller-El II*'s application to the excluded juror, thereby allowing—indeed requiring—a reviewing court to consider the "'reasons not stated on the record for accepting *other* jurors.'" Pet.App.37-38. This distinction is incompatible with the purpose of comparative juror analysis and flatly proscribed by *Miller-El II*. 545 U.S. at 244-245. As long as the court can substitute its own speculative race-neutral justification for the prosecutor's treatment of one of the two comparator jurors, the prosecutor's strike is safe from judicial scrutiny whether or not it is pretextual.

B. California Courts Impermissibly Discount The Probative Value Of Comparative Juror Analysis If The Comparator Is Not Virtually Identical

1. The Supreme Court endorses and conducts comparative juror analysis centered on a single issue

The Supreme Court has stated that side-by-side comparisons of how a prosecutor's proffered reason for striking a Black venire member applies to a non-Black juror can be "powerful" evidence "tending to prove purposeful discrimination." *Miller El II*, 545 U.S. at 241. Review of this Court's recent cases reveals that when conducting comparative juror analysis, the Court addresses prosecutors' justifications separately, considering each explanation across jurors as a single issue.

For example, in *Miller-El II*, the prosecutor proffered two reasons for striking a Black prospective juror, Mr. Warren: He expressed uncertainty about the death penalty and had a relative who had been convicted of a petty crime. 545 U.S. at 250 n.8. In concluding that the plausibility of the stated explanation was "severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's," the Court compared his statement about the death penalty with similar statements by three white members of the venire whom the prosecution accepted. *Id.* at 248. The Court did not also consider whether those three comparators shared the second justification for the strike. And when the Court turned to the second reason, considering whether Mr. Warren's relative's criminal history was "comparable to those of relatives of other panel members not struck by prosecu-

tors," it did not also look to those comparators' statements about the death penalty. *Id.* at 250 n.8.

The Court concluded that this comparative analysis exposed the pretextual nature of the prosecution's proffered reasons without requiring a comparator that provided a perfect match on *both* grounds. The dissent would have adopted the position requiring a match of all proffered reasons as between comparators, 545 U.S. at 291 (Thomas, J., dissenting) ("'[s]imilarly situated' does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them"), but this view has never prevailed, *see, e.g.*, *Snyder* v. *Louisiana*, 552 U.S. 472, 479-484 (2008) (finding one of prosecutor's two proffered reason for striking a Black juror "implausib[le]" given acceptance of similarly situated white jurors and concluding *Batson* was violated without consideration of the second reason).

Similarly, in *Foster*, the prosecutor offered a "laundry list of reasons" for striking Black prospective juror, Ms. Garrett, and the Court analyzed each proffered reason individually. 136 S. Ct. at 1748. While the prosecutor said he struck Ms. Garrett because she was divorced, he accepted three of the four divorced prospective white jurors. *Id.* at 1750. He said Ms. Garrett was too young, but he declined to strike eight white jurors of similar age or younger. *Id.* at 1750-1751. He said Ms. Garrett was "less than truthful" because she claimed not to be familiar with the victim's neighborhood despite having attended a nearby high school, but an accepted white juror had also claimed unfamiliarity while both living and working nearby. *Id.* at 1751. The Court concluded that each of these comparisons provided "compelling" evidence of purposeful discrimination without requiring that Ms. Garrett be compared to a

white juror who was young, divorced, *and* untruthful (in the prosecutor's view). *See id.* at 1751-1754.

Finally, in *Flowers* v. *Mississippi*, the Court conducted a comparative juror analysis considering two stated reasons for striking Ms. Wright, a Black prospective juror: (1) She knew several defense witnesses, and (2) she and the defendant's father shared an employer. 139 S. Ct. 2228, 2249 (2019). However, three accepted white prospective jurors also had connections to witnesses. *Id.* And the Court noted that there was no evidence Ms. Wright had worked with the father, while an accepted white prospective juror knew several members of the defendant's family. *Id.* The Court found a *Batson* violation without requiring a comparator with both a connection to many witnesses and to the defendant's family.

These cases illustrate the Court's methodical approach to comparative juror analysis, which considers the prosecutor's stated reasons for striking a venire member severally. The presence of a single comparator juror who shares all relevant characteristics is not required. "Although a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent." *Flowers*, 139 S. Ct. at 2249 (citing *Miller-El II*, 545 U.S. at 247 n.6).

2. California's practice of requiring substantial similarity between comparator jurors conflicts with Supreme Court precedent

The California Supreme Court has repeatedly rejected the exact type of comparisons this Court performs and endorses. Instead, California demands a higher level of uniformity from comparator jurors when conducting its analysis, akin to that proposed in Justice Thomas' *Miller-El II* dissent. *See e.g.*, *People* v. *Lenix*, 44 Cal. 4th 602, 624 (2008) (acknowledging the Supreme Court's observation that "potential jurors are not products of a set of cookie cutters," which *Miller-El II* noted in rejecting a *per se* rule requiring comparator jurors be identical, but then disregarding the merits of such a rule).

The present case is just the latest in a steady stream of examples. Here, briefly, the prosecutor provided three justifications for striking Black prospective juror Mr. Greene: (1) He liked his own opinion over other people's opinions (as examined *supra* at 9-11); (2) he stated that "[i]f I have any feeling that [the defendant] might not have done it, hes [*sic*] innocent," indicating an inability to apply the reasonable doubt standard; and (3) he indicated that he was not upset by the O.J. Simpson verdict. Pet.App.185-188.

When considering each of the three reasons, the *Miles* majority focused on how the comparator jurors did not share Mr. Greene's answers across all dimensions. While Juror No. 1 had similarly stated "I like to make my own decisions," she was upset with the Simpson verdict and did not suggest she might rely on her feelings in reaching a verdict. Pet.App.59-60. Meanwhile seated Juror No. 6 and Alternate Juror No. 5

were not upset by the Simpson verdict, but they "were dissimilar from [Mr. Greene] in regard to the prosecutor's other two stated reasons." *Id.* at 70-71. As stated succinctly in dissent, the majority's approach in *Miles* suggested that "significant weight cannot be assigned to comparative juror analysis unless an accepted juror matches the struck juror with respect to all of the prosecutor's stated concerns," an approach "the high court has expressly rejected." *Id.* at 164-165 (citing *Miller-El II*, 545 U.S. at 247 n.6).

This unwarranted "matching" requirement is not an invention of *Miles*. For example, in *People* v. *Hardy*, the majority dismissed summarily the defendant's comparative juror analysis, acknowledging only that "[s]ome unexcused jurors shared some of the traits the prosecutor cited" to strike a Black potential juror, but "[t]here will always be some similarities" and parties with a limited number of challenges "generally cannot excuse every potential juror who has any trait that is at all problematic." 5 Cal. 5th at 83. Additional examples are not hard to find. *See, e.g.*, *People* v. *Watson*, 43 Cal. 4th 652, 675 (2008) (discounting comparative juror analysis where no comparator juror had "the combined characteristics of being a witness to a crime *and* expressing anti-law-enforcement sentiments") (emphasis in original); *People* v. *Jurado*, 38 Cal. 4th 72, 105 (2006) (applying same flawed analysis to reject a comparison between a struck juror and seated juror).

California's repeated rejection of the proper comparative juror analysis is irreconcilable with this Court's binding precedent. Even a brief examination of the cases described above reveals a pattern in which the California courts impose an unduly restrictive requirement on this otherwise robust tool, thereby compromising the courts' ability to "ensure race neutrality

in jury selection" and imperiling a "visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution." *Powers* v. *Ohio*, 499 U.S. 400, 416 (1991).

C. California's Interpretation Of Binding Juror Selection Precedent Unduly Burdens Judges Tasked With Conducting Comparative Juror Analysis

California's requirement that comparators match on *all* dimensions of a prosecutor's proffered justifications effectively eviscerates comparative juror analysis and unduly burdens the trial and appellate judges tasked with enforcing *Batson*. At its core, comparative juror analysis reflects the Court's recognition that the insidious racial bias in jury selection is easily veiled in pretext and, when "immune from constitutional scrutiny," poses serious harm to equal protection principles. *Batson*, 476 U.S. at 92-93. But there are circumstances in which the true animus underlying a peremptory challenge need not be difficult to divine. "If the State asserts that it struck a [B]lack juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects." *Reed* v. *Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) (citing *Miller-El II*, 545 U.S. at 241). Courts can readily adjudicate *Batson* challenges using comparative juror analysis when they can assess the justifications proffered by the prosecutors and consider whether the prosecutors are applying each justification consistently across the venire.

California's practice of accepting post hoc speculation to deny a *Batson* challenge based on the trial rec-

ord, however, renders *Batson* toothless by leaving judges with no avenue to examine and safeguard against discriminatory peremptories. *Batson* was "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process" by asking prosecutors "a simple question." *Johnson*, 545 U.S. at 172. This Court has intervened when the requisite simple question has not been asked of the prosecution at all. *See id.* at 165-166. Intervention is likewise needed where the prosecutor's explanations (or lack thereof) are later superseded by the sort of "judicial speculation" this Court has deemed "needless and imperfect." *Id.* at 172-173; *see also id.* at 172 ("[I]t does not matter that the prosecutor might have had good reasons ...[;] [w]hat matters is the real reason[.]" (quoting *Paulino* v. *Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004))).

The California high court ignores this precedent. In *Miles*, the court resolves an imagined incongruity between *Miller-El II*'s direction to examine only the reasons offered by the prosecution, and subsequent dicta from *Snyder* that "all of the circumstances that bear upon the issue of racial animosity must be consulted," to conclude that "a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors" than the excused juror. Pet.App.36 (quoting *People* v. *O'Malley*, 62 Cal. 4th 944, 977 (2016)). Taken to its logical conclusion, this approach permits judges to consider any conceivable race-neutral rationale for the prosecutor's actions before ruling on a *Batson* challenge. But this is neither a correct nor viable interpretation of *Snyder*. Indeed, under this approach, cases like *Miller-El II*, *Snyder*, *Foster*, and *Flowers*—in which there was no indication that any single comparator matched on all dimen-

sions—would have likely turned out differently, leaving unconscionable instances of racially-motivated juror selection unchecked.

The California approach to comparative juror analysis makes it nearly impossible for judges to prevent such outcomes. The chances that any venire member matches even a majority of the proffered race-neutral justifications for a strike is virtually nil. For example, if one venire member of sixty answered a dozen multiple choice questions with only four possible answers and each person answered randomly, the likelihood that any two prospective jurors would have identical answers would be approximately 1 in 9,479, or less than the probability of being struck by lightning. Bellin & Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1104-1105 (2011). Faced with more than a dozen questions, open-ended answers subject to argument and interpretation, and written questionnaires (the *Miles* questionnaire included 130 questions), the odds that members of the venire will match across multiple dimensions decrease even further. Pet.App.41.

Perhaps it is for this reason that prosecutors in California are trained to give all possible reasons for each strike. Semel et al., *Whitewashing the Jury Box* at 49, 51 (citing training materials from several California counties). San Francisco, for instance, trains its prosecutors to "develop multiple reasons, [because] any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons." *Id.* Thus, the California court's approach serves as more of a cloak for unconstitutional discriminatory strikes than as a screen for them.

Finally, based on our experience, the *Miles* court's approach poses a tremendous burden upon the jury selection process, already a major obstacle to trying cases expeditiously. Comparative juror analysis is an effective tool because it is concrete and limited: The judge compares a single answer that one prospective juror gave with a single answer that another gave, consistent with the prosecutor's justification for a strike. The California Supreme Court's version does the opposite. It untethers the analysis from the prosecutor's stated reason and asks the trial judge to render judgment on something that is impossible to assess. The number of possible reasons for striking a juror is nearly inexhaustible and there is no way to divine what motivated an individual prosecutor. Then, by requiring comparator jurors be sufficiently similar across multiple dimensions, California's version of the analysis becomes all the more untenable. It is especially problematic in the *Batson* context, where an appellate court's deferential review makes it unlikely a finding of no discriminatory intent will ever be reversed. Indeed, the California Supreme Court has *never* reversed a decision based on comparative juror analysis since *Miller-El II* while the U.S. Supreme Court has *always* reversed on that basis.

III. Meaningfully Rooting Out Jury Discrimination Is Essential To The Integrity Of The Criminal Justice System

"[R]acial discrimination in jury selection [is] perhaps the greatest embarrassment in the administration of our criminal justice system[.]" *Wilkerson* v. *Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari). Defendants have a right to be tried by a jury representative of the community; prospective jurors have a right to sit on the jury.

But the harm of race discrimination in jury selection extends well beyond those directly affected: It puts at stake the integrity of the criminal justice system. *See Buck* v. *Davis*, 137 S. Ct. 759, 778 (2017) ("'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" (quoting *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979))); *Miller-El II*, 545 U.S. at 238 (Discrimination "'casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial[.]'").

To preserve confidence in our criminal justice system, we must eradicate not only actual discrimination, but even its mere appearance. *See Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *see also* Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research*, 2 Soc. Issues & Pol'y Rev. 65, 80 (2008) ("[P]eople's satisfaction with a [judicial] decision is strongly related to their perceptions of the fairness of the procedures used to reach it."); *Hardy*, 5 Cal. 5th at 124-125 (Liu, J., dissenting) ("[I]t is a troubling reality, rooted in history and social context, that our [B]lack citizens are generally more skeptical about the fairness of our criminal justice system than other citizens."). And because "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation … or that the 'deck has been stacked' in favor of one side," race discrimination, whether it be actual or apparent, has no place in jury selection. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (quoting *Powers*, 499 U.S. at 413). Race discrimination, particularly in capital cases, "'poisons public confidence' in the judicial process."

Buck, 137 S. Ct. at 778. Without course correction, the public would be discouraged from participating in the process, which is "critical to public confidence in the fairness of the criminal justice system." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975).

The Court's intervention here is crucial because the protection against race discrimination must be enforced uniformly across the country. California jurisprudence should not be permitted to upend a Constitutional imperative so consequential in cases, like here, where the government seeks to end the defendant's life. The California Supreme Court's decision "is an affront to justice[.]" *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) (rejecting "argu[ment] that a fair trial includes the right to discriminate against a group of citizens based upon their race"). Without a faithful application of *Batson* and *Miller-El II*'s comparative juror analysis, racial discrimination in jury selection is effectively unchecked. Accordingly, we urge the Court to reaffirm its holdings in *Batson* and its progeny, and to grant the petition to correct California jurisprudence that undermines the right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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