No. _____

In The Supreme Court of the United States

ANTHONY M. LEE,

Petitioner,

v.

HEATH PARSHALL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The United States

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition brings to the Court an issue for which there is substantial need for clear direction: a trial court's obligation to obtain for litigants a jury free from bias; in this instance, racial and other biases in a 42 U.S.C. § 1983 suit. Through trial by jury, society pursues impartial justice. Through *voir dire*, jury trials pursue impartial jurors. The former, of course, hinging on the latter. The arc of the American story is wedded to this principle: impartial adjudication of disputes requires impartial adjudicators.

The questions presented are:

1. Whether the district court's refusal to probe potential jurors for bias or prejudice was an abuse of discretion under Rule 47(a).

2. Whether the district court's questioning of the jurors was insufficient under the Due Process Clause.

PARTIES TO THE PROCEEDINGS

Anthony M. Lee, petitioner on review, was the plaintiff-appellant below.

Heath Parshall, respondent on review, was the defendant-appellee below.

RELATED PROCEEDINGS

United States Court of Appeals for the Seventh Circuit:

Lee v. Parshall, No. 19-2381 (7th Cir. Jul. 7, 2020), *reh'g denied* (Aug. 5, 2020).

United States District Court for the Western District of Wisconsin:

Lee v. Parshall, No. 16-cv-524 (W.D. Wis. Jun. 19, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Anthony M. Lee respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is unreported. App. 1. The Seventh Circuit's denial of the petition for *en banc* review is unreported. *Id.*, at App. 24.

JURISDICTION

The Seventh Circuit entered judgment on July 7, 2020. Mr. Lee's timely petition for rehearing *en banc* was denied on August 5, 2020. App. 24. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Seventh Amendment to the United States Constitution provides, in relevant part, "In Suits at common law, where the value in controversy shall

exceed twenty dollars, the right of trial by jury shall be preserved[.]"

The Due Process Clause of the Fifth Amendment provides, in relevant part, "nor be deprived of life, liberty, or property, without due process of law[.]"

Rule 47(a) of the Federal Rules of Civil Procedure provides, in relevant part, "If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper."

Rule 47(b) of the Federal Rules of Civil Procedure provides, in relevant part, "The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870."

STATEMENT

1. Petitioner Anthony M. Lee ("Mr. Lee"), a 24-year-old African-American man, was arrested by Respondent Heath Parshall ("Officer Parshall"), a white police officer, in the City of La Crosse, Wisconsin. Mr. Lee and a white companion arrived at an apartment to buy marijuana from some college students. The college students were also white. An altercation over pizza ensued. Mr. Lee's white companion stabbed one of the white college students in the cheek. Shortly thereafter, Mr. Lee and the white companion hurried out of the apartment. Officer Parshall found them together but

chose to violently arrest Mr. Lee, while his white companion ran away.

Officer Parshall, who is a former cage fighter, dwarfs Mr. Lee. During the arrest, Officer Parshall battered Mr. Lee in his left eye with a taser, causing permanent injury to Mr. Lee's eye and vision. Mr. Lee filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Western District of Wisconsin.

2. The State of Wisconsin has approximately 5.8 million persons, of which 6.7% are African-Americans. U.S. Census Bureau, *Quick Facts. Wisconsin*. Retrieved from https://www.census.gov/quickfacts/fact/table/WI/RHI225219#RHI225219 (last visited Dec. 27, 2020). In 2018, the Wisconsin Department of Corrections noted that 44% of all men in Wisconsin prisons are African-Americans. Wis. Dep't of Corrections, *Profile of Inmates in Prison* on December 31, 2018, https://doc.wi.gov/DataResearch/DataAndReports/InmateProfile.pdf. A 2016 study of the Weldon Cooper Center's Racial Dot Map shows that most African-American neighborhoods in Wisconsin are jails, prisons, apartment complexes, Section 8 housing or homeless shelters. Brentin Mock, *Half of Wisconsin's Black Neighborhoods Are Jails.* Bloomberg City Lab (Aug. 9, 2016), https://www.bloomberg.com/news/articles/2016-08-09/half-of-wisconsins-black-neighborhoods-are-jails. In La Crosse County, African-Americans are arrested at a rate of more than twelve times that of white persons for marijuana possession, despite similar usage. American Civil Liberties Union, *Counties Ranked by Racial Disparity in*

Marijuana Arrests in 2018, https://graphics.aclu.org/marijuana-arrest-report/WI (visited Dec. 28, 2020).

Of the potential jurors who could have been selected to serve on Mr. Lee's jury, only one juror was non-white. Officer Parshall is a white person. All of the witnesses, save for Mr. Lee, are white persons.

3. Because issues of race, police and crime were central to the case, trial counsel submitted numerous questions to the district court to ask the venire. App. 25-35. In sum, trial counsel requested ten questions on race, twenty-one questions regarding police, and four questions on crime. Among the questions specifically requested by trial counsel were:

- What sorts of negative or derogatory comments about African-American people have you heard over the years? How do you feel about those comments? Have you said some of those things yourself? Some people feel racial discrimination is a thing of the past, that today people of different races are treated pretty much the same by our society. What do you think? Tell me about the contacts you have had with African-American people in your life. OR In your personal life what kind of contact do you have with people of races other than your own? OR What is the racial composition of your neighborhood, your kids' schools, your workplace? Do you have any close friends who are of races other than your own? What races are your friends? What sorts of things do

> you do together? Do you visit in one another's homes?
>
> - Do you believe that a police officer arresting a person on suspicion of committing a crime can use any level of force? Do you have an opinion about which is more important – law and order or preserving everyone's constitutional rights? If so, what is your opinion? What problems do you have with the idea of an ordinary citizen suing a police officer because of actions he claims he took in the line of duty?
> - Do you think America is 'soft on crime'? What is your opinion about the number of African-American males serving time in prison in the United States?

The district court failed to ask *any* of trial counsel's requested questions and rejected trial counsel's request for additional questions. *Id.*

The district court asked one question about race and one question about discrimination. App. 20, 21. ("Would anyone find it difficult to serve as an impartial juror in a case in which an African-American man is accusing a white police officer of excessive force?"); *id.*, at App. 20. ("Have you or someone you know ever been discriminated against because of race, ethnic background, gender, religion, or sexual preference?").

The instant case involved a civil rights suit with a black plaintiff and a white police officer defendant. The one question the Court did ask about race involved this

issue. However, racial bias cannot be revealed by one standardized closed-ended question about whether a juror can be impartial to an African-American man in such a case. The likelihood of a venireman saying he or she could not be fair when asked such a leading question by a judge is next to none. Quite simply, this is not the type of penetrating questioning on race that would allow any lawyer to know anything about whether or not a potential juror was unbiased.

The Court did ask seven questions related to police and law enforcement. The vast majority of the questions asked by the Court were closed ended and not likely to elicit candid responses. Potential jurors tend to answer such questions in a manner they feel the judge wants to hear. The few open-ended questions asked by the district court actually elicited responses. Most troubling of the voir dire conducted by the district court in this area is the question related to the believability of testimony of a police officer: "Do any of you believe that a person employed in law enforcement is more or less credible as a witness than someone who is not employed in law enforcement? Said a different way, would you weigh a law enforcement officer's testimony differently than you would other witnesses?" This question is closed-ended, which is already problematic as expressed previously.

The district court asked two questions about crime. While both of these questions elicited responses from potential jurors, they do not touch on the genuine issue: how people feel about crime. Mr. Lee is a prisoner convicted of a crime as a result of the events that

occurred prior to his encounter with Officer Parshall. The jury needed to be questioned in a general open-ended fashion about crime in society.

Aside from the deficiencies in the *voir dire* conducted by the district court in these specific areas, one must question whether a solely judge-conducted *voir dire* is effective in allowing the parties to have a basis for exercising challenges in a case such as this. When all the questions are asked by the judge, circumstances exist that inhibit honest responses from potential jurors. The judge is the authority in the courtroom. Most likely counsel has said next to nothing at this point. The judge has the respect of potential jurors, and potential jurors may well not want to give the judge the "wrong" answer, and thus, be seen unfavorably. Therefore, potential jurors may tend to conform answers to what they think the judge wants to hear. Whereas potential jurors tend to be more candid with lawyers because they perceive the lawyers are biased on behalf of their clients.

Further, the lawyer has greater knowledge of the case, which leads to more specific and germane questions. Where, as here, jurors are in an unfamiliar place that is formal, hearing questions full of legalese. Potential jurors may well not give answers that are anything other than designed to maintain the respect of the judge and other potential jurors. This is particularly problematic when the people on the jury panel are asked questions about their willingness to adhere to legal concepts they have never thought about.

4. Mr. Lee appealed to the Seventh Circuit. The Seventh Circuit found that "issues of race, police and crime . . . were significant in the jury selection process because the claim of excessive force arose in the context of Lee, an African-American, by Parshall, a white police officer." App. 2. The Seventh Circuit reasoned that the district court "discussed the potential for implicit bias" and "allow[ed] the jurors to signal the potential impact of bias[,]" App. 4. The Seventh Circuit therefore concluded that "[t]he questioning by the district court, taken as a whole, meets the standard of reasonably extensive examination such that the parties would have a basis for intelligent exercise of the right to challenge, and which would reasonably assure that bias or prejudice would be discovered." Petitioner disagrees.

5. Mr. Lee timely petitioned for rehearing *en banc*, which the Seventh Circuit denied. This petition followed.

REASONS FOR GRANTING THE PETITION

This case squarely presents the important question: whether district courts are required to probe the venire in a civil action about racial prejudice in cases where race is central to the outcome. That question has significant consequences for lawsuits seeking to hold police officers accountable under 42 U.S.C. § 1983. If the Seventh Circuit's decision is allowed to stand, civil litigants will be without the tools necessary to make

informed decisions about the venire. This will, in turn, erode confidence that cases involving a police officer's misconduct are on equal footing.

This Court has held that the Constitution demands that criminal defendants be permitted to ask questions about racial bias during *voir dire*. *Turner v. Murray*, 476 U.S. 28 (1986); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). This Court has held that racial bias in the make-up of juries is unlawful. *Ham v. South Carolina*, 409 U.S. 524 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972). This Court has held that race-based jury discrimination is unlawful. *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970). And this Court has held that racial bias by counsel using peremptory challenges is unlawful. *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Georgia v. McCollum*, 505 U.S. 42 (1992). These anti-discrimination principles should have been applied to this case. Instead, the Seventh Circuit concluded it was constitutionally sufficient for the district court to "allow[ ] the jurors to signal the potential impact of a bias . . . without identifying the nature of their bias[.]" In so doing, the Seventh Circuit ignored Rule 47(a)'s prescription that trial courts "must permit the parties or their attorneys to make any further inquiry it considers proper[.]"

The Court should grant the petition.

I. The decision below also conflicts with the principles underpinning *voir dire*.

Impartial juries predate the Constitution. For example, accused foreign citizens were historically offered the right to a jury *de mediate linguoe*, i.e., a jury of one half similarly foreign citizens. *See Boon v. State*, 1 Ga. 618, 631 (1846). The burden to securing such a jury remained with the accused:

> In the Case of the Chelsea Waterworks Co., 10 Exch. 731, Baron Parke said: 'In the case of a trial by jury *de medietate linguoe*, which by the 47th section of the jury act is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet if he was found guilty, and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them.'

Kohl v. Lehlback, 160 U.S. 293, 301 (1895). Still, other mechanisms afforded common law litigants an *opportunity* to strike biased jurors. "Challenges at common law . . . to the polls [were] for disqualification of a juror. Challenges to the polls were either 'principal' or 'to the favor,' the former being upon grounds of absolute disqualification, the latter for actual bias." *United States v. Wood*, 299 U.S. 123, 134-35 (1936); *see also Crawford v. United States*, 30 App. D.C. 1, 32, 1907 U.S. App. (C.J. Shepard, dissenting) ("The rule of the common law on this subject is thus stated by Blackstone: Jurors may be challenged *propter affectum*, for suspicion of bias or partiality.").

FED.R.CIV.P. 47 provides today's district court litigants with a vehicle to impartial jurors. Through voir dire, presiding judges (and occasionally counsel) ferret out juror bias. This process has always existed in this country:

> [G]enerally in this country this class of questions is allowed to be put by the parties directly to the jurors; and in some of our states this doctrine is also aided by express statutes. When this is not done, and even when it is, the court will sometimes, in aid of the general object, and without prejudice to other methods, call upon the jurors, collectively or singly, to declare if they know any impediment to their serving, or if they are obnoxious to a particular objection which may have been suggested.

United States v. Blodgett, 30 F. Cas. 1157, 1158 (S.D. Ga. 1867). "[D]enial of trial by an impartial jury is also the denial of due process." *Casias v. United States*, 315 F.2d 614, 615 (10th Cir. 1963) (*en banc*); *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 515 (10th Cir. 1998).

In accord with this tradition, the oldest American cases on juror sufficiency consider the answers jurors provided in voir dire. *United States v. Burr*, 25 F. Cas. 49 (D.Va. 1807). *Burr* implies that, to secure the right to a jury trial, the Constitution commands that juror biases be examined. Chief Justice John Marshall, sitting as the trial judge, began his opinion:

> The great value of the trial by jury certainly consists in its fairness and impartiality. Those

> who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution.

Id. at 50. The Court went on to distinguish between biases which could preclude jury service from those biases which can be set aside. *Id*. The necessity of an examination of potential juror bias was always presumed.

At the turn of the twentieth century, this Court acknowledged that the investigation into juror bias was, as a general principle, more rigorous in civil disputes. *Crawford v. United States*, 212 U.S. 183, 194 (1909) ("In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made [to a juror], as in civil cases."). Although pathways to an impartial jury differ by jurisdiction, the existence of such a pathway is beyond Constitutional question:

> While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impaneling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, *taking care to preserve the right of trial by an impartial jury*.

United States v. Wood, 299 U.S. 123, 145-46 (1936) (emphasis added).

"The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). In line with this principle, twentieth century jurisprudence refined and reinforced the Constitutional obligation imposed on district courts to inoculate or excise juror bias to secure the right to a jury trial. *United States v. Wood*, 299 U.S. 123 (1936); *Frazier v. United States*, 335 U.S. 497 (1948); *Dennis v. United States*, 339 U.S. 162, 168 (1950) ("In both the *Wood* and *Frazier* cases this Court stressed that while impaneling a jury the trial court has a serious duty to determine the question of actual bias."); *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' ").

The racial bias of jurors themselves is an obvious consideration for civil and criminal litigants. In *Aldridge v. United States*, 283 U.S. 308 (1931), this Court found it was permissible to question jurors as to their biases against other races. Decades later, in *Ham v. South Carolina*, this Court found it was reversible error to refuse to investigate the racial biases held by potential jurors. 409 U.S. 524 (1973).

Circuit courts followed suit, reinforcing the necessity of impartial juries. *Kiernan v. Van Schaik*, 347 F.2d 775, 779 (3d Cir. 1965) ("Litigants therefore have the

right, at the least, to some surface information regarding the prospective jurors."); *United States v. Peterson*, 483 F.2d 1222, 1226-27 (D.C. Cir. 1973) ("Examination of prospective jurors is a step vital to the fairness of jury trials."); *Beard v. Mitchell*, 604 F.2d 485, 501 (7th Cir. 1979); *Fietzer v. Ford Motor Co*., 622 F.2d 281, 284-85 (7th Cir. 1980); *Darbin v. Nourse*, 664 F.2d 1109, 1113-14 (9th Cir. 1981) ("[I]t is an abuse of discretion for the district court to refuse to probe the jury adequately for bias or prejudice about material matters on request of counsel."); *Skaggs v. Otis Elevator Co*., 164 F.3d 511, 515 (10th Cir. 1998).

During the latter stages of the twentieth century, decisions on juror bias reflected conversations on race spurred by the Civil Rights Movement. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co*., 500 U.S. 614 (1991); *J.E.B. v. Ala. ex rel. T.B*., 511 U.S. 127, 128 (1994) ("[W]hether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.").

Although much ink was spilled on the pre-eminent importance of impartial juries, the historical span of relevant jurisprudence offers little instruction to district courts on *how* to properly effectuate *voir dire* and thus guarantee a fair and impartial jury.

Some guideposts are clear. The trial court must permit a reasonable exploration of germane factors

that might expose a basis for challenge. *Ham*, 409 U.S. 524 (1973); *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 285 (7th Cir. 1980). *How* that reasonable exploration must take place is unclear.

Although always essential to a jury trial, this issue is of particular importance today. On May 25, 2020, George Floyd was murdered by a Minneapolis Police Department officer. The events of Mr. Floyd's arrest and murder were captured by cellphone video by several bystanders as well as by other officers' body cameras. The video footage shows Mr. Floyd pinned face down on the ground and increasingly unresponsive, while the officer kneels on Mr. Floyd's neck, two other officers hold Mr. Floyd down, and another officer stands by, all three failing to follow their constitutional obligation to intervene and stop the murder of Mr. Floyd. Nationwide protests erupted in response to yet another example of unconscionable police brutality that continues as a result of our collective deliberate indifference to the constitutional rights of African-Americans and people of color. Indeed, at oral argument in this case, which occurred prior to Mr. Floyd's murder, Judge Conley mentioned the importance of jury selection at the intersection of race and policing. *See also Estate of Jones v. City of Martinsburg*, No. 18-2142 (4th Cir. Jun. 10, 2020) ("Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives."); *Jamison v. McClendon*, No. 16-cv-595 (S.D. Miss. Aug. 4, 2020) (describing the historical difficulty having a trial about

civil rights, much less a fair one, and pointing out that "as people marching in the streets remind us today, some have always stood up to face our nation's failings"). How is this bias adequately examined by a district court? To secure an impartial jury, district courts must actually probe for these biases, especially in cases like the present, where those issues are paramount.

The Court should grant certiorari in this case and reverse the Seventh Circuit's flawed judgment.

II. The decision below should be reviewed to provide much needed guidance on what "must permit the parties or their attorneys to make any further inquiry" means under Rule 47(a).

Rule 47 sets forth the procedures for selecting jurors in civil trials. Rule 47(a) permits district courts "to examine prospective jurors[.]" However, when a district court does so "it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper." FED.R.CIV.P. 47(a). Rule 47(b) grants trial counsel with "peremptory challenges" that "[t]he court must allow[.]" FED.R.CIV.P. 47(b). Together, these rules are designed to assure that *voir dire* results in an impartial jury.

Because federal courts fall underneath this Court's supervisory jurisdiction, there is "more latitude in setting standards for *voir dire*." *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991). While trial courts enjoy

discretion in conducting *voir dire*, that discretion is "subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931). This Court has consistently explained that trial courts have an affirmative obligation to guard against racial and ethnic bias in the judicial process. *See*, *e.g.*, *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). The district court failed to do so in this case.

As Justice O'Connor explained in *Smith v. Phillips*, "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring). This regularly occurring problem in cases seeking to hold police officers accountable for violence against African-Americans and other people of color requires probing of juries for unconscious bias and unacknowledged prejudice. *Cf. Skilling v. U.S.*, 561 U.S. 358, 394 (2010) ("The District Court, moreover, did not simply take venire members who proclaimed their impartiality at their word[.]").

This Court has long recognized that peremptory challenges are "an important aspect of trial by jury." *Rosales-Lopez*, 451 U.S. at 188. "The essential nature of the peremptory challenge is that it is one exercised . . . without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Importantly, peremptory challenges permit trial counsel to remove potential jurors who have unconscious bias or unacknowledged prejudice.

In order to accomplish the shared goals of Rules 47(a) and (b), trial courts must allow questioning of potential jurors at *voir dire* to allow counsel to assess suspected bias or prejudice. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("*Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown . . . ; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.").

Mr. Lee's requests to probe the jury about unconscious bias and unacknowledged prejudice were reasonable. In this case, Mr. Lee, an African-American man, sued a white police officer for excessive force. The threat of racial bias or prejudice was real. Indeed, the Seventh Circuit agreed that race was a significant factor "because the claim of excessive force arose in the context of an arrest[.]" To address that reality, trial counsel requested questions calculated to determine unconscious bias or unacknowledged prejudice. The district court denied trial counsel's requests without explanation and, consequently, stripped Mr. Lee of determining the racial biases of the potential jury and of effective use of his allotted peremptory challenges.

Furthermore, the federal courts are divided on probing jurors on attitudes relating to police and policing. *Butler v. City of Camden*, 352 F.3d 811 (3d Cir. 2003) (trial court may commit error when it fails to probe potential jurors for police bias when requested by counsel); *Paine v. City of Lompoc*, 106 F.3d 562 (9th

Cir. 1998); *United States v. Victoria-Peguero*, 920 F.3d 77 (1st Cir. 1990); *United States v. Espinosa*, 771 F.3d 1382 (10th Cir. 1985); *United States v. Spaar*, 748 F.3d 1249 (8th Cir. 1984); *Brown v. United States*, 338 F.3d 543 (D.C. Cir. 1964); *cf. United States v. Lawes*, 292 F.3d 123 (2d Cir. 2002) (split panel) (describing "long struggle between bench and bar" in which "the bar has sought the right to question jurors at great length"); *United States v. Lancaster*, 96 F.3d 734 (4th Cir. 1996) (*en banc*).

The facts presented in this petition are of national importance and present a clear background for defining the requirements of Rule 47(a). Accordingly, this Court should grant the petition to provide nationwide guidance regarding when district courts "must permit the parties or their attorneys to make any further inquiry" concerning the bias or prejudice of potential jurors.

III. The question presented is exceptionally important and warrants review in this Court.

In many cases, civil and criminal, issues of race, policing and crime are central to the outcome. And yet, trial courts have little guidance as to requirements of the Due Process Clause and Rule 47(a) in civil actions brought under 42 U.S.C. § 1983. This Court's decision will provide nationwide guidance and will also have a direct impact on a large number of lawsuits.

While selecting a jury, "the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor." *Dennis v. United States*, 339 U.S. 162, 168 (1950). Failure to permit serious inquiry into unconscious bias and unacknowledged prejudice will result in two wrongs. First, plaintiffs will be deprived of the informed exercise of peremptory challenges. Second, racially biased or prejudiced jurors will decide cases based on those beliefs rather than the evidence before them.

Aside from the deficiencies in the *voir dire* conducted by the Court in these specific areas, one must question whether a solely judge-conducted *voir dire* is effective in allowing the parties to have a basis for exercising challenges in a case such as this. The leading commentators agree that trial counsel should be permitted to question jurors directly. *See*, *e.g.*, ABA Criminal Justice Standards on Trial By Jury, § 15-2.4 (2005), available at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk/#2.4 ("Following initial questioning by the court, counsel for each side should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel."); *see*, *e.g.*, Note, Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality, 61 Va. L. Rev. 1266 (1975); Suggs & Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245 (1981); Padawer-Singer, Singer & Singer, Voir Dire by Two Lawyers: An Essential Safeguard, 57

Judicature 386 (1974), and Jones, Judge-Versus Attorney-Conducted Voir Dire, 11 L. & Hum. Behav. 131 (1987); Jurywork: Systematic Techniques (2d ed.).

Where, as here, jurors are in an unfamiliar place that is formal, hearing questions full of legalese. Potential jurors may well not give answers that are anything other than designed to maintain the respect of the judge and other potential jurors. This is particularly problematic when the people on the jury panel are asked questions about their willingness to adhere to legal concepts they have never thought about. *See* Rosenberg, When Dissonance Fails: On Eliminating Evaluation Apprehension from Attitude Measurement, 1 J. & Personality & Soc. Psych. 28 (1965); Collins and Hoyt, Personal Responsibility for Consequences: An Integration of the Forced Compliance Literature, 8 J. Experimental Soc. Psych. 558 (1972); Festinger, A Theory of Social Comparison Processes, 7 Hum. Rel. 117 (1954); Schachter, The Psychology of Affiliation (1959).

This Court should grant the petition and provide much needed guidance (and fairness) on these issues.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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