No. 21-1110

IN THE

Supreme Court of the United States

TRAVIS BOYS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

BRIEF OF THE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AND THE LOUISIANA STATE CONFERENCE OF THE NAACP AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of social and racial justice. As part of this mission, the Howard University School of Law's Civil Rights Clinic advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution. The Clinic has a particular interest in eradicating unjust laws, policies, and procedural rules that disproportionately impact the Black community.

The Louisiana State Conference of the NAACP (the "Louisiana NAACP") is Louisiana's oldest civil rights organization. For more than a century, the Louisiana NAACP has championed equality and justice and sought to end all forms of racial discrimination. As a part of that work, the Louisiana NAACP has long battled pervasive discrimination in Louisiana's jury selection processes.

Amici support full participation of citizens of color in criminal trial juries in Louisiana and share an interest in preventing wrongful convictions of innocent people of color by juries from which citizens of color have been unconstitutionally excluded. Given their

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

collective expertise in matters concerning racial discrimination in the criminal system, Amici believe their perspective would be helpful to this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ausha Byng recalls feeling excited when she received her jury service summons: "Most people get the notices[,] and they don't want to do it. But me, I was excited."[2] A college student and mother to an infant, Ms. Byng had notified her professors and arranged childcare in the event she was selected to serve. Ms. Byng, who is biracial, was the only person of color in the jury pool. During voir dire, the prosecutor asked all potential jurors identical questions but singled Ms. Byng out for one: Whether she trusted the police. She answered honestly: She did not. Her response earned a swift response from prosecutors: "The state would like to thank and excuse juror number five."[3] Ms. Byng believes the government singled her out for special questioning and removed her from the jury panel because of her race. Years later, Ms. Byng recalls feeling "extremely embarrassed [and] really excluded," but she was "not going to lie to be on a jury."[4] Ms. Byng is still awaiting her opportunity to serve.

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[2] Emmanuel Felton, *Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection*, WASH. POST. (Dec. 23, 2021, 3:00 PM), https://tinyurl.com/yc6n3j7n.

[3] *Id.*

[4] *Id.*

Ausha Byng's ordeal reflects "[t]he reality . . . . that a juror dismissed because of [her] race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation."[5] Amici submit this brief to emphasize that, when prosecutors strike jurors on the basis of race, the injury extends far beyond defendants like Petitioner Travis Boys to affect the stricken juror and the community at large. Eradicating "racial exclusion of citizens from the duty, and honor, of jury service" is necessary "to preserve public confidence in the jury system."[6]

"Other than voting," moreover, "serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[7] And as with voting, jury service epitomizes the "commonsense judgment of the community" as a "guard against the exercise of arbitrary power."[8] "[T]he liberties of the American people," Frederick Douglass observed more than a century ago, are thus "dependent upon the ballot box [and] the jury box . . . . [W]ithout these[,] no class of people could live and flourish in this country."[9]

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[5] *Holland v. Illinois*, 493 U.S. 474, 489 (1990) (Kennedy, J., concurring).

[6] *Id.* at 488–89.

[7] *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)).

[8] *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

[9] FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS, WRITTEN BY HIMSELF 460 (Park Publishing Co. ed. 1892) (1881).

It is unsurprising then, that efforts to deny full liberty to Black Americans have focused on race-based exclusion from jury service. The form of these efforts have shifted throughout history, from de jure exclusion of Black people from jury service before and during Reconstruction, to the use of "discriminatory tools to prevent [B]lack persons from being called for jury service," to the "more covert and less overt" use of race-based peremptory challenges in individual cases.[10] This pattern is deeply imbedded in Louisiana's history, including Orleans Parish, the jurisdiction of Mr. Boys' criminal trial. But no matter the form or locale of jury discrimination, "the results [are] the same for [B]lack jurors and [B]lack defendants, as well as for the [B]lack community's confidence in the fairness of the American criminal justice system."[11] This is the harm *Batson v. Kentucky*[12] and its progeny were intended to ameliorate.

Nevertheless, nearly four decades after this Court decided *Batson*, "state-sanctioned racial discrimination in jury selection remains ubiquitous, and the racial composition in juries continues to shape substantive trial outcomes."[13] This is in part because, as demonstrated by this case, prosecutorial use of peremptory challenges to exclude Black people from the jury box has become much less overt but no less damaging since *Batson*. As illustrated in Ausha Byng's

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[10] *Flowers*, 139 S. Ct. at 2239–40.

[11] *Id.* (citation omitted).

[12] 476 U.S. 79 (1986).

[13] *See* Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1593 (2018).

experience, some prosecutors use facially race-neutral questions as a litmus test to eject potential jurors of color. Others use ostensibly race-neutral peremptory challenges to eject qualified Black venire members for their physical appearances or body language.[14] And some remove potential Black jurors for providing similar answers to those given by eligible white venire members.[15]

But this Court has frequently acted to "guard[] against any backsliding" into unconstitutional exclusion of Black people from juries,[16] and it should do so here. The petition should be granted, and the Louisiana Fourth Circuit Court of Appeal should be reversed.

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[14] *See* Michael Karlik, *Appeals Court Finds No Racial Violation After Prosecutor Excused Black Juror for Looking 'Sour'*, COLO. POL. (Oct. 22, 2021), https://tinyurl.com/2p8nk9dw.

[15] *See* Hassan Kanu, *Court Recognizes Implicit Bias in Nixing Juror for Supporting Black Lives Matter*, REUTERS (Sept. 22, 2021, 11:03 AM), https://tinyurl.com/yvk29p55.

[16] *Flowers*, 139 S. Ct. at 2243 (citing *Foster v. Chatman*, 578 U.S. 488 (2016); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005)).

ARGUMENT

I. Racial Discrimination In Jury Selection Deprives Black Americans Of A Critical Civic Duty, Hinders Democratic Participation, And Undermines Public Confidence In The American Legal System

"There is no more valuable work that the average citizen can perform in support of our Government than the full and honest discharge of jury duty."[17] The "effectiveness of the democratic system itself is largely measured by the integrity, the intelligence, and the general quality of citizenship of the jurors who serve in our courts."[18] The denial of a citizen's opportunity to fulfill this "high civic obligation"[19] on the basis of race visits a grave injury upon not only the individual who is denied that opportunity, but also upon the local community and the integrity of the American legal system.[20] And given this country's

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[17] ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 15, https://tinyurl.com/6zfufdpu (rev. 2012).

[18] *Id.*

[19] *Id.*

[20] The Orleans Parish District Attorney's Office concedes as much, acknowledging that "[w]hen prospective jurors are excluded on the basis of their race, the entire system is harmed: the excluded jurors who were prevented from fulfilling their civic duty, the community, the defendant, the victims, and the integrity of the process as a whole." *See State's Stipulations in Response to Defendant's Presentation of Evidence of Discrimination in Jury Selection on Remand from the Louisiana Supreme Court,* No. 508-064 "E", at 2, (June 15, 2021) (hereinafter *State's Stipulations*).

profound racial disparities in the administration of criminal justice, the presence of Black people on juries is critical to the public's perception of fairness in our legal system. Representative juries—that is, juries with nonwhite members that more accurately reflect the communities they serve— also provide an "inestimable safeguard against the corrupt or overzealous prosecutor"[21] and as the "criminal defendant's fundamental protection of life and liberty against race or color prejudice."[22]

A. Striking Jurors on the Basis of Race Harms the Individual, the Local Community, and Public Confidence

The jury plays an invaluable role in our democracy: "Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system."[23] This Court has repeatedly emphasized the important link between jurors and their communities, both "as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[24] "Community participation in the

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[21] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

[22] *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975)).

[23] EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION 4 (2021) (hereinafter 2021 EJI JURY DISCRIMINATION REPORT) (citing *JEB v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 (1994)).

[24] *Taylor*, 419 U.S. at 530 (citing *Duncan*, 391 U.S. at 155–56).

administration of the criminal law . . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."[25]

Giving community members—particularly members of marginalized communities—a voice on juries engenders the perception of procedural fairness, which "enhances the broader legitimacy of the judicial system."[26] Research shows that legitimacy—"the belief that authorities, institutions and social arrangements are appropriate, proper, and just"—promotes compliance with the law and support of legal institutions among the public.[27] "Empirical research on legitimacy demonstrates that individuals' trust and confidence in the . . . . courts have important consequences for legal outcomes because perceptions of legal institutions can affect behavior in a number of ways."[28] For instance, when there is a higher level of trust in legal authorities, the agencies operating in the criminal justice system are also more effective.[29]

In stark contrast to the legitimacy promoted by equal access to jury service, discrimination in jury selection "invites cynicism respecting the jury's

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[25] *Id.*

[26] NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 129 (2007).

[27] Amy Farrell et al., *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 L. & SOC. INQUIRY 773, 775 (2013) (citation removed).

[28] *Id.* at 773.

[29] *Id.*

neutrality and its obligation to adhere to the law."[30] It is "at war with our basic concepts of a democratic society and a representative government."[31] And when discriminatory prosecutors exclude eligible Black venire members, the effect is magnified; it is "practically a brand on them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[32]

The failure to adequately address purposeful discrimination—which is well documented but repeatedly dismissed[33]—leaves people of color to constantly question their confidence in the American criminal system. All "members of a democratic society need to connect . . . . with each other [and] the state in ways that are inspiring, empowering, educational, and habit forming," but purposeful discrimination destroys the opportunity jury service provides to

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[30] *Powers*, 499 U.S. at 412.

[31] *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (citation omitted).

[32] *Strauder*, 100 U.S. at 308.

[33] *See*, *e.g.*, *Miller-El*, 545 U.S. at 267–68 (Breyer, J., concurring) (citation omitted) (emphasizing the "awkward, sometime[s] hopeless, task of second-guessing a prosecutor's instinctive judgement—the underlying basis for which may be invisible even to the prosecutor exercising the challenge."); *see generally* Annie Sloan, *"What to Do About* Batson*?": Using A Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233 (2020).

"bring[] private citizens together to deliberate on a public problem."[34]

1. Empirical Data Demonstrates the Significance of Jury Service and Its Impact on Civic Participation

Empirical data bears out what this Court has repeatedly acknowledged: Jury service can change how people view themselves, their peers, and their government.[35] In one study, two-thirds of "jurors [without prompting] drew a cognitive connection between jury service and voting."[36] The researchers also found "evidence of persistent, long-term (greater than 4 months) attitudinal change flowing from juror service, particular[ly] from those serving for the first-time."[37] Empaneled jurors viewed the legal system as more fair, and "they indicated a greater confidence in state and local court judges than before [and] changes [which] contrasted with the experiences of those who had not serviced on juries.[38]

In another study, jurors reported engagement in additional post-jury service civic responsibilities, including community service and cause-based

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[34] JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 9 (2010).

[35] *See generally*, *id.*

[36] Perry Deess & John Gastil, *How Jury Service Makes Us into Better Citizens*, 126 JURY EXPERT 51 (2009).

[37] *Id.*

[38] *Id.*

advocacy.[39] Several longitudinal studies are in accord, providing significant evidence of the "participation effect," where "an intense—preferably deliberative—experience in one civic arena can spur increases in another."[40] The datasets show a positive connection between jury service and voter turnout;[41] in fact, jury service significantly increases electoral participation amongst even infrequent voters in post-service elections.[42]

These results remained consistent when researchers compared national jury sample information, including data from Orleans Parish.[43] In particular, jurors were 4.3 percent more likely to vote in post-service elections.[44] For instance, jurors who were both infrequent, pre-jury service voters and who were unable to reach a conclusive verdict during deliberations (i.e., a "hung jury") had a nearly seven percent increase in post-service voting.[45] And where a juror was tasked with deciding a complex criminal

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[39] John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 351, 355 (2008) (hereinafter *Jury Service and Electoral Participation*).

[40] GASTIL, *supra* note 34, at 51.

[41] *See generally* Deess, *supra* note 36.

[42] *See*, *e.g.*, John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 592–93 (2002) (hereinafter *Civic Awakening*); *see also Jury Service and Electoral Participation*, *supra* note 39, at 363–64.

[43] Deess, *supra* note 36, at 51.

[44] *Id.* at 56.

[45] *Id.*

trial, each additional charge against the accused increased the juror's likelihood of post-service voting by 1.3 percent (i.e., a case involving five criminal charges would amount to an average increase in post-service voting of approximately 6.5 percent).[46]

B. Black Representation on Juries Affects Case Outcomes

The exclusion of Black people from juries is relevant beyond "issues involving race;"[47] racial bias in jury selection negatively affects trial outcomes and impacts jury performance. Race-based "exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[48]

Researchers have found that diverse juries tend to outperform homogenous juries[49] because "diversity helps jurors perform better during a complex, group deliberation setting."[50] White jurors serving on representative juries are more likely to discuss the effects of race and discuss "controversial" issues, including

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[46] *Id.*

[47] *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

[48] *Id.* at 503–04.

[49] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 608 (2006).

[50] Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberations as a Function of Jury Diversity and Defendant Race*, 43 J. L. HUM. BEHAV. 232, 243 (2019).

racial profiling.[51] Compared to homogenous juries, diverse juries consider a wider breadth of information with greater accuracy.[52] Representative juries "motivate all jurors to perform their duty diligently and thoughtfully regardless of the defendant's race."[53]

In addition, whether a jury is homogenous or diverse affects the length of deliberations.[54] For instance, where the defendant is Black, all-white juries typically spend less time analyzing the facts presented at trial and deliberating compared to racially diverse juries.[55] Because the period of deliberations is typically much shorter, research suggests these juries, in turn, make more errors,[56] including wrongful convictions.[57] That risk is not significantly changed by the presence of one Black juror. To the contrary, even if a single black juror disagrees with the conclusion of

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[51] Sommers, *supra* note 49, at 598.

[52] *Id.* at 608.

[53] 2021 EJI JURY DISCRIMINATION REPORT, *supra* note 23, at 60 (citation removed).

[54] Sommers, *supra* note 49, at 608.

[55] 2021 EJI JURY DISCRIMINATION REPORT, *supra* note 23, at 34 (citation removed).

[56] EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION 6 (Aug. 2010) (hereinafter 2010 EJI JURY DISCRIMINATION REPORT).

[57] "In 56% of cases in Louisiana in which the defendant was later proven innocent after decades in prison were wrongful convictions based on non-unanimous jury verdicts."). *See* INNOCENCE PROJECT NEW ORLEANS, *In Louisiana, You Can Be Convicted of a Serious Crime by a 10-2 Jury Verdict*, https://perma.cc/45EK-LVBW (last visited Feb. 14, 2022).

his fellow white jurors, "jury dynamics research shows that a single dissenting juror virtually never succeeds in hanging a jury, let alone reversing its predisposition."[58]

Even where a Black juror makes it into the jury box, community members serving on racially unbalanced juries are harmed when their opinions and perspectives are unable to offset the groupthink mentality of an otherwise homogenous venire. For instance, Willie Newton and Bobby Howard were the only Black jurors in Louisiana's prosecution against Matthew Allen, a young Black man accused of murder.[59] Both men disagreed with the other jurors as to the severity of the verdict, and both "were bothered their voices were silenced . . . ."[60] "That really hurt me," Mr. Newton recalls, "[i]t hurt me real bad when I looked at that young man . . . ."[61]

The harm of excluding Black jurors, coupled with the dilution or outright erasure of their voices on juries, ultimately cripples the efficiency and integrity of the American criminal legal system.

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[58] Sherry Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698 (1985).

[59] Mr. Howard explained the reasoning for his dissent: "Maybe my life experience is a little different than some of the white people." Jeff Adelson et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, ADVOCATE (Apr. 1, 2018, 8:05 AM), https://tinyurl.com/bdhhj8vc.

[60] *Id.* (discussing the nonunanimous felony verdict).

[61] *Id.*

II. The History Of Racial Discrimination In Louisiana And Orleans Parish Underscores The Need For This Court's Intervention

Given the significance and power of jury service, it is unsurprising that the exclusion of Black people from juries has been a primary aim of white supremacy. Indeed, "the variety and persistence" of efforts to deny the right to serve on a jury are as remarkable as the many "institutions designed to deprive [Black people] of the right to vote."[62] The current practice of more subtle racism in jury selection follows centuries of myriad other methods of discrimination that demonstrate the need for this Court's "vigorous[] enforce[ment] and reinforce[ment]" of the Fourteenth Amendment's Equal Protection Clause.[63]

The first response to the equality promised by the Fourteenth Amendment was brute violence—particularly in Louisiana. White terrorists in Louisiana and elsewhere throughout the South employed lynching as "a systemic way by which . . . . to assert white supremacy . . . ." in opposition to the equality principles underlying the Reconstruction Amendments.[64] The

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[62] *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966).

[63] *Flowers*, 139 S. Ct. at 2243.

[64] Lorraine Boissoneault, *The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 Years Ago*, SMITHSONIAN MAG. (Sept. 28, 2018), https://tinyurl.com/2p8m4xrj; *see also* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 384 (A.A. Knopf ed. 2000) (1947) (describing the rise of the Ku Klux Klan as having "stimulated the lawlessness and violence that characterized the postwar period in the United States.").

Equal Justice Initiative has documented in excess of 1,000 lynchings and other acts of racially motivated violence in the state.[65] "These attacks reflected the ease with which white resentment erupted into death and destruction for Black communities and the relative impunity with which that violence spread."[66] Louisiana was home to repeated mass killings,[67] including the Colfax Massacre—"[t]he bloodiest single instance of racial carnage in the Reconstruction era;"[68] no killer was ever punished.[69] When the dust settled, white lynch mobs had killed at least 718 Black people, including children.[70]

In direct response to the carnage, Congress enacted a suite of legislation, culminating with the Civil Rights Act of 1875, which banned race-based discrimination in jury selection.[71] Just five years later in

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[65] EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876, at 53 (2020) (hereinafter EJI RECONSTRUCTION REPORT).

[66] *Id.* at 73.

[67] *Id.* at 48–49.

[68] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 437 (2014).

[69] *See United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875) (holding, in part, that the protections afforded by the Fourteenth Amendment did not apply to private actions, only those undertaken by state actors).

[70] *See* EJI RECONSTRUCTION REPORT, *supra* note 65, at 48–49.

[71] Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

Strauder v. West Virginia,[72] this Court held that a state law excluding Black people from jury service violated the Equal Protection Clause.[73] With the blessing of federal law, and the protection of federal troops, Black people began serving on juries in Louisiana and exercising newfound political power.[74] Racially integrated juries protected the constitutional and civil rights of Black defendants *and* ensured that white terrorists were held accountable for their crimes of racial violence.[75]

But as the federal troops retreated, an era of Restoration followed, and white Southerners regained power and sought to return to the pre-Civil War status quo.[76]

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[72] 100 U.S. 303, 309 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

[73] *Id.* at 310.

[74] Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 50 (1990); *see also* Frampton, *supra* note 13, at 1601 (citation omitted).

[75] Colbert, *supra* note 74, at 55 ("Federal prosecutions cumulating in jury verdicts increased nearly twelvefold, from forty-three cases during the Department's initial year in 1870 to over 500 cases in 1872.") (citation omitted).

[76] MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH, 1888-1908, at 10 (2001).

A. Louisiana Created a Race-Based Jury Selection System to Exclude Black People from Civic Participation

When efforts to quell Black civic participation through murder, terrorism, and express legal exclusion failed, Louisiana turned to slightly more sophisticated means. Louisiana convened its 1898 Constitutional Convention "to establish the supremacy of the white race in [the] State to the extent to which it could be legally and constitutionally done . . . ."[77] It achieved these goals by amending its constitution to require men to be literate, own property without owing any outstanding taxes, or meet the "Grandfather Clause" requirements in order to vote.[78] Delegates also adopted the nation's first nonunanimous jury verdict workaround,[79] ensuring that even

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[77] *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 375 (H.J. Hearsey ed., 1898) (statement of Hon. Thomas J. Semmes, Chairman of the Committee on the Judiciary and former Confederate State Senator from Louisiana).

[78] LA. CONST. of 1898, art. 197, §§ 3–5 (the Grandfather Clause allowed men to vote who personally—or who's fathers or grandfathers—held voting rights before 1867).

[79] The original provision allowed juries to return verdicts with the concurrence of nine jurors. LA. CONST. of 1898, art. 116. A provision from the state's 1973 constitutional convention altered the nonunanimous verdict provision slightly to require verdicts to be decided by a 10-2 vote. LA. CONST. art. I, § 17. The nonunanimous jury was a "vestige of slavery" for over 120 years. *See* Adelson, *supra* note 59 (quoting former Calcasieu Parish District Attorney, John DeRosier).

when Black people somehow made it onto juries, their voices were meaningless.

While facially neutral, these changes applied almost exclusively to Black Louisianans while preserving the political rights of most poor, white men.[80] The conventioneers sought to significantly curtail the civic engagement opportunities available to the majority of Black citizens by marginalizing their political power through voting restrictions[81] and diluting the participation of Black venire members who managed to make it into the jury box.[82] These restrictive provisions were exceptionally successful: From 1897 to 1904, the number of registered Black voters in Louisiana plummeted from 130,000 to 1,000.[83] And by 1939, despite sharing near-equal populations,[84] no Black person had served on a jury in St. John Parish for at least 43 years.[85]

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[80] *See* Frampton, *supra* note 13, at 1615 (citation omitted).

[81] *See* Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 374–75 (2012).

[82] Frampton, *supra* note 13, at 1599.

[83] EQUAL JUST. INITIATIVE, *Louisiana Disenfranchises Black Voters and Jurors*, https://tinyurl.com/25dznauz (last visited Mar. 4, 2022).

[84] *Pierre v. Louisiana*, 306 U.S. 354, 359 (1939) (discussing the 1930 Census population demographics for St. John the Baptist Parish as being 49.7 percent white and 49.3 percent Black).

[85] *Id.* ("The testimony of petitioner's witness (the State offered no witnesses) showed that from 1896 to 1936 no negro had served on the Grand or Petit Juries in the Parish.").

By the turn of the twentieth century, racial terrorism, which had been briefly halted during Reconstruction, had returned. It is estimated that roughly 5,000 people were lynched between 1880 and 1950; three-fourths of the victims—around 3,700 people—were Black.[86] Exclusion of Black people from civic participation such as jury service was often the intended purpose of the violence, but it also allowed the violence to continue unabated.

On the rare instances where white perpetrators of racial violence were hauled into court, all-white juries refused to hold them accountable.[87] Of the thousands of lynchings of Black people after the Civil War, authorities successfully prosecuted and convicted a mere 40 perpetrators.[88] And Black people were robbed of any opportunity to protect themselves through the political process, unable to vote for local judges and prosecutors and barred from serving on criminal juries.

After this Court held de facto exclusion of Black people from juries unconstitutional in *Norris v. Alabama*,[89] and federal intervention and the civil rights movement of the 1950s and 1960s made the South's

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[86] Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 23–24 (2007) (citation omitted); *see also* Colbert, *supra note* 74, at 79, n. 396 (citation omitted).

[87] 2021 EJI JURY DISCRIMINATION REPORT, *supra* note 23, at 11.

[88] Colbert, *supra* note 74, at 79, n. 396 (citation omitted).

[89] 294 U.S. 587 (1935).

racial terror untenable, the focus turned to a new workaround: the peremptory challenge.[90] Peremptory challenges allow lawyers to remove prospective jurors from the panel "for any reason at all, as long as that reason is related to [their] view concerning the outcome of the case to be tried."[91] This tool is "often exercised upon . . . . sudden impressions and unaccountable prejudices."[92] *Batson* applied the principles of *Strauder* and *Norris* in holding that peremptory challenges may not be used to exclude jurors on the basis of race.[93] But in the decades since *Batson*, prosecutors' use of peremptory challenges to exclude jurors on the basis of race has evolved in ways that are increasingly difficult to detect. Race-based use of peremptory challenges has, just as the discriminatory tools invented to evade *Strauder*, become "more covert and less overt."[94] And data suggests that this is particularly true in Louisiana.[95]

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[90] *Id.* at 599.

[91] *Batson*, 476 U.S. at 89 (citation omitted).

[92] *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (citation omitted).

[93] *See*, *e.g.*, *Batson*, 476 U.S. at 85–88.

[94] *Flowers*, 139 S. Ct. at 2240.

[95] And even as the frequency of racial targeted lynching decreased in the twentieth century, the historical scourge of racial animus continued to thrive. The state "replace[d] lynchings with a more humane method of racial control—the judgment and imposition of capital sentences by all-white juries" as Black people were systemically excluded from jury service. *See* Colbert, *supra* note 74, at 80.

B. Empirical Data Confirms Extensive Race-Based Jury Selection in Louisiana

Empirical data "demonstrate[s] that racial exclusion remains central to the selection of criminal juries" in Louisiana.[96] In one particularly robust study, researchers examined 3,028 trials involving 41,303 potential jurors and 993 convictions over a five-year period.[97] The dataset demonstrated that Louisiana prosecutors used peremptory strikes to remove prospective Black jurors at more than 2.3 times the rate of potential white venire members on average.[98]

In addition, Louisiana prosecutors use nearly 60 percent of allotted preemptory challenges to remove Black prospective jurors even though only 33 percent of the venire pools were Black.[99] In some parishes, prosecutors disproportionately struck Black prospective jurors in 93 percent of trials.[100]

These findings remain stable even where the eligible Black venire person's seemingly race-neutral

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[96] Frampton, *supra* note 13, at 1625.

[97] Jeff Adelson, *Download Data Set Used in the Advocate's Exhaustive Research in 'Tilting the Scales' Series*, ADVOCATE (Apr. 1, 2018, 8:00 AM) (hereinafter *'Tilting the Scales'* Dataset, https://tinyurl.com/2p8eeera.

[98] Adelson, *supra* note 59.

[99] 2021 EJI JURY DISCRIMINATION REPORT, *supra* note 23, at 34 (citation omitted).

[100] URSULA NOYE, BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY'S OFFICE 2, (REPRIEVE AUSTL., Aug. 2015) (discussing Caddo Parish).

experiences match those of white people.[101] Nevertheless, prosecutors in Louisiana are more likely to eject prospective Black venire members despite providing nearly identical answers as potential white jurors. Researchers found that whether a prospective juror would be struck from the panel ultimately turned on their race—73 percent of Black prospective venire members were struck versus 49 percent of those who were white.[102]

Ultimately, "race [is] one of the most powerful factors predicting which jurors would be struck by the prosecution" in Louisiana.[103]

C. The *Boys* Trial Demonstrates Louisiana's Commitment to Preserving Racial Discrimination in Jury Selection

It should come as little surprise, considering the historical information and statistical findings discussed above, that Louisiana has "not been particularly receptive to jury discrimination claims."[104]

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[101] Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 L. HUM. BEHAV. 261, 267 (2007).

[102] *Id.* at 268–69.

[103] Will Craft, *Mississippi D.A. Doug Evans Has Long History of Striking Many Blacks from Juries*, APM REPORTS (June 12, 2018), https://tinyurl.com/fwffkhhn.

[104] 2010 EJI JURY DISCRIMINATION REPORT, *supra* note 56, at 23.

In this case, the prosecution struck four eligible Black jurors who gave nearly identical answers as white jurors who remained in the jury box, Pet. Brief at 7. According to this Court, "[w]hen 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."[105] The Orleans Parish District Attorney's Office conceded as much, acknowledging that "[a]dditional important factors beyond the sheer pattern of strikes include the differential treatment of Black and white jurors who give the same response or similar responses to a question of purported interest to the State."[106] Yet the trial court failed to fully engage with Petitioner's *Batson* objection.

The appellate court compounded this error. On appeal, the prosecution agreed with Mr. Boys' defense counsel that the *Batson* objection deserved more thorough consideration by the trial court. Pet. Br. at 9–10. Despite the unusual nature of the joint request, the appellate court rejected the motion without comment, validating the prosecution's strikes based on its own observations of jury selection rather than requiring the government to justify its peremptory strikes. This was an error.[107]

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[105] *Flowers*, 139 S. Ct. at 2248–49 (citation omitted).

[106] *State's Stipulations*, *supra* note 20, at 4.

[107] *See Snyder*, 552 U.S. at 478–79 (criticizing Louisiana appellate court for "credit[ing] the prosecutor's" "race neutral reason[ing]" by "simply allow[ing] the challenge without explanation.").

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the Louisiana Fourth Circuit Court of Appeal's decision.

Respectfully submitted,

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