No. 21-1110

IN THE
Supreme Court of the United States

TRAVIS BOYS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF OF AMICI CURIAE FIVE EXCLUDED JURORS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Amici have differing views of the merits of Mr. Boys's case. But all are harmed by discriminatory practices in jury selection. They believe that prosecutors' unexplained decisions to exclude Black Amici from serving as jurors should have been supported by race-neutral explanations.

Angel Poche, Juror No. 9, worked as a hairdresser at the time of the trial. She is now 35 years old and lives in New Orleans East. She stated unequivocally that she could be a "fair and impartial" juror several times during voir dire. She was the first Black prospective juror struck by prosecutors in this case.

Denise Craig, Juror No. 23, is a native of New Orleans, as were her parents. She is a mother of two and grandmother of one. She is a Food Service Supervisor at Children's Hospital New Orleans, where she has worked for over 25 years. Ms. Craig lost several days' pay by fulfilling her duty to respond to the jury summons in March 2018. She was the second Black prospective juror struck by prosecutors in this case.

Louis Stewart, Juror No. 26, is a 34-year-old construction worker from New Orleans. He has lived in New Orleans his entire life, except for a brief period after Hurricane Katrina. His entire family has

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[1] Pursuant to this Court's Rule 37, Amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amici made a monetary contribution to the preparation or submission of the brief. Notice was provided timely, and Petitioner and Respondent granted consent to the submission of this amicus brief.

lived in New Orleans for many generations, though some of his ancestors came from France. He has been called for jury duty three times but has never been selected to serve. Neither have any of his friends. He was the fourth Black prospective juror struck by prosecutors in this case.

Latressia Matthews, Juror No. 37, is a mother of three, an accountant, a public employee, a gun owner, and an entrepreneur. She previously served as a juror in a drug case where she voted to convict the defendant. She was the sixth Black prospective juror struck by prosecutors in this case.

Wesley Ware, Juror No. 53, is the founder and former director of BreakOUT!, an organization dedicated to fighting the criminalization of LGBTQ youth. He received a Soros U.S. Justice Fellowship and previously served as the LGBTQ Project Director at the Juvenile Justice Project of Louisiana. He has more than two decades working in and supporting abolitionist movements. Mr. Ware is white. The Orleans Parish District Attorney's office has highlighted their exclusion of Mr. Ware in opposing Petitioner's *Batson* claim. Mr. Ware joins this Brief of Excluded Jurors because he believes that prosecutors' decision to strike him (and to replace him with Juror No. 57, another white juror) fails to support the State's claim that they conducted jury selection in a colorblind manner.

SUMMARY OF ARGUMENT

Amici, who prosecutors excluded without explanation in this case, write in support of the Petitioner. They urge this Court to intervene because the Louisiana courts' "step one" *Batson* jurisprudence is profoundly flawed in two independent ways.

I. Under *Batson*, a party can establish a prima facie case of discrimination in jury selection by identifying "a 'pattern' of strikes against black jurors included in the particular venire." *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). Ordinarily, such a "pattern" is established with evidence that a party has disproportionately struck prospective jurors belonging to a cognizable group. In other words, "step one" is satisfied where a party uses their peremptory strikes against jurors of a given race or sex at a rate that exceeds that group's representation in the pool of qualified jurors. *See Jones v. West*, 555 F.3d 90, 98 (2d Cir. 2009) ("Discriminatory purpose may be inferred when a party exercises a disproportionate share of its total peremptory strikes against members of a cognizable racial group compared to the percentage of that racial group in the venire."). Such a pattern permits an "inference[] that discrimination may have occurred." *Johnson v. California*, 545 U.S. 162, 173 (2005).

But Louisiana courts have adopted a *per se* rule that such disparities—no matter how stark—can *never* constitute a "pattern" that supports an "inference" of possible discrimination. Under Louisiana law, these patterns are deemed "statistical evidence," and in Louisiana, statistical evidence is *al-*

ways insufficient to clear *Batson*'s first step. *Compare State v. Boys*, 321 So. 3d 1087, 1102 (La. App. 4 Cir. 5/26/21), *and State v. Duncan*, 802 So. 2d 533, 550 (La. 2001) (rejecting prima facie case where prosecutors used 8 of 8 strikes (100%) against women, who made up 17 of 31 (55%) of qualified pool, because claim rested on "statistics"), *with Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002) ("[W]e have no doubt that statistics, alone and without more, can . . . be sufficient to establish the requisite *prima facie* showing under *Batson*."), *and State v. Martinez*, 42 P.3d 851, 858-59 (N.M. 2002).

By requiring direct evidence of discrimination *on top of* stark disparities, Louisiana has effectively replaced "step one" of the *Batson* inquiry with "step three." Louisiana's "no statistical evidence" rule rejects the primary and most useful "yardstick" for identifying a prima facie case of discrimination. It thus flouts this Court's holding in *Johnson* prohibiting a State from adopting "inappropriate yardstick[s]" for evaluating "step one" *Batson* claims. 545 U.S. at 168.

In other jurisdictions, courts would require prosecutors to provide race-neutral explanations for their strikes against Amici because there was an obvious pattern of strikes targeting Black jurors. *Batson*, 476 U.S. at 97. Prosecutors used 8 of 11 (73%) peremptory strikes to eliminate Black jurors, despite that fact that Black jurors comprised less than 44% (17 of 39) of the qualified venire. But applying Louisiana's "no statistical evidence" rule, the courts below held that no inference of discrimination could be drawn. An explanation should have been solicited for Amici's exclusion.

II. Amicus Latressia Matthews's dubious exclusion—and a peculiar Louisiana law prohibiting state courts from weighing her exclusion in their *Batson* analysis—provides an additional, independent basis for granting the petition. Under *Flowers v. Mississippi*, "the State's decision to strike [other] black prospective jurors" in the same venire, or even from past cases, can provide strong corroborating "evidence suggesting that the State was motivated in substantial part by discriminatory intent" when it struck a different Black juror. 139 S. Ct. 2228, 2246-47 (2019). Here, the State's exclusion of Amicus Matthews is strongly probative of prosecutors' biased jury selection strategy because her *voir dire* responses indicated she would be an ideal juror for the State. Indeed, her answers were *so* pro-prosecution that the defendant simultaneously moved to have her excused. But under Louisiana law, because of defendant's simultaneous motion, prosecutors' unexplained decision to strike Amicus Matthews *cannot* be (and was not) considered when evaluating prosecutors' strikes against other Black Amici. *See* La. Code Crim. Proc. art. 795(D); S*tate v. McCoy*, 218 So. 3d 535, 589 (La. 2016).

Thus, under Louisiana's rule, the *most* suspicious strikes—those involving jurors for whom there is the *least* non-racial justification for excluding—are insulated from the *Batson* analysis. By prohibiting state courts from considering "all relevant facts and circumstances" in assessing *Batson* challenges, the Louisiana Supreme Court egregiously misapplies this Court's *Batson* jurisprudence.

ARGUMENT

I. THE DISPROPORTIONATE USE OF PEREMPTORY STRIKES AGAINST BLACK JURORS ESTABLISHES A PRIMA FACIE CASE OF JURY DISCRIMINATION

A. *Batson* and *Johnson* establish a simple, but flexible, threshold at "step one."

Seventeen years ago, this Court held that States may not apply "inappropriate yardstick[s] by which to measure the sufficiency of a prima facie case" of discrimination in peremptory strikes. *Johnson*, 545 U.S. at 168 (rejecting California's "more likely than not" standard). *Batson*'s first step is not meant to be "onerous." *Id.* at 170. Rather, a defendant satisfies his burden of production at "step one" by identifying evidence sufficient to permit the trial judge to draw an "inference[] that discrimination may have occurred." *Id.* at 173; *see also id.* at 170 ("[P]etitioner's evidence supported *an inference* of discrimination") (emphasis in original).

The Court has announced at least two independent ways that a party can establish an "inference" of discrimination under *Batson*. The first is by identifying "a 'pattern' of strikes against black jurors included in the particular venire." *Batson*, 476 U.S. at 97. But evidence of such a "pattern" is not necessary. *Johnson*, 545 U.S. at 169, n.5. Indeed, "a wide variety of evidence" can independently suffice to establish a prima facie case, *id.* at 169, and this Court has

consistently offered illustrations "in permissive terms," *id.* at 169, n.5.

This case involves a "pattern" of strikes.[2] Courts outside of Louisiana, both before and after *Johnson*, have adopted a straightforward and logical way of discerning a cognizable "pattern." *See, e.g.*, *Overton*, 295 F.3d at 278–79 ("[W]e have no doubt that statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite *prima facie* showing under *Batson*."); *Martinez*, 42 P.3d at 858 ("[W]e see no reason to retreat from our decided case law holding a disproportionate use of peremptory strikes against one racial group gives rise to an inference of discriminatory intent."). These courts simply ask whether a party's "challenge rate" of jurors who are members of the cognizable group exceeds the percentage of that group in the qualified venire. *See Jones*, 555 F.3d at 98 ("Discriminatory

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[2] As Petitioner notes, of course, there is also substantial evidence beyond the pattern of disproportionate strikes that supports an "inference" of discrimination against Amici. This includes:

- The lack of any obvious basis in the Amici's *voir dire* responses to explain prosecutors' desire to strike them.
- The States' acceptance of white jurors who provided substantially the same answers in *voir dire* to Black jurors who they struck.
- The State's overwhelming use of for-cause challenges to target Black jurors. *See generally* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the Jury*, 118 Mich. L. Rev. 785 (2020) (explaining challenges for cause are an important, but largely overlooked, vehicle for racial exclusion).

But, where a "pattern" of discrimination is already apparent, none of these additional circumstances are necessary at "step one."

purpose may be inferred when a party exercises a disproportionate share of its total peremptory strikes against members of a cognizable racial group compared to the percentage of that racial group in the venire."). Thus, if a party uses "Y"% of its peremptory strikes against female jurors, and female jurors comprise only "X"% of the qualified pool, a sex-neutral explanation should be solicited whenever Y > X. *Id.* Such a disparity might not constitute conclusive proof of discrimination, but it at least allows for the required "inference." This approach honors the basic *Batson* framework, which "is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 172.

Indeed, where complete demographic information is available (as it is in this case), this basic approach is how *Batson* "step one" cases are ordinarily resolved outside Louisiana. *See, e.g.*, *Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) (holding "step one" satisfied where "Hispanics constituted only about 12% of the venire, [but] 21% (four out of nineteen) of the prospective juror challenges were made against Hispanics"); *State v. Thompson*, 132 A.3d 1229, 1242 (N.J. 2016) (holding "step one" satisfied where prosecutor used 78% (7 of 9) peremptory strikes against African American jurors, who made up 32% (30 of 95) of prospective jurors); *Martinez*, 42 P.3d at 859-60 (holding "step one" satisfied where party "used 100% [3 of 3] of its strikes against Hispanics, even though Hispanics made up 45% [15 of 33] of the venire"); *State v. Bennett*, 843 S.E.2d 222, 236 (N.C. 2020) (holding "step one" satisfied where prosecutors used 100% (2 of 2) of their peremptory

strikes against African American jurors, who made up 36% (5 of 14) of questioned jurors); *Leadon v. State*, 332 S.W.3d 600, 613 (Tex. Crim. App. 2010) (holding "step one" satisfied where "14.29% of the panel within the strike zone were black[, but] the State used 36.36% of its strikes on black panel members"); W*atkins v. State*, 245 S.W.3d 444, 451–52 (Tex. Crim. App. 2008) (holding "step one" satisfied where the State used 55% of its peremptory challenges against an identifiable racial group that made up only 22% of the [qualified] venire"); *Linscomb v. State*, 829 S.W.2d 164, 166 (Tex. Crim. App. 1992) (en banc) (holding "step one" satisfied where prosecutor "used 40% of her available strikes to exclude members of an identifiable race which comprised only 19% of the group against whom peremptory challenges could effectively be exercised").[3]

Recognizing that a "pattern" can be established by showing a disproportionate "challenge rate" is the

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[3] Note that in each of these cases, a party's "challenge rate" acquires meaning only if we know the baseline demographics in the qualified venire. *See* Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 476–77 (1996) ("Using fifty percent of one's peremptory challenges against members of a group constituting a small portion of the venire has to be evaluated differently than exercising fifty percent of one's peremptory challenges against members of a group constituting half or more of the venire."). Accordingly, numerous courts have rejected "step one" *Batson* claims where the record lacked the necessary information about the demographics of the pool from which the parties were striking. *See, e.g.*, *Abu-Jamal v. Horn*, 520 F.3d 272, 290 (3d Cir. 2008), *rev'd on other grounds*, 558 U.S. 1143 (2010); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1044 (11th Cir. 2005); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991).

most sensible way of assessing a prima facie case, "solv[ing] all the problems left unsolved, or even created by, other methods" at *Batson*'s "step one." Melilli, *supra*, at 478. And refusing to recognize a prima facie case under such circumstances, where the basic numbers demonstrate an obvious pattern, "would undermine the general antidiscrimination principle established by *Batson*." *Overton*, 295 F.3d at 278–79.

B. Louisiana's *per se* rejection of the foregoing approach is precisely the sort of "inappropriate yardstick" this Court condemned in *Johnson*.

But under Louisiana law, a party can *never* prevail at "step one" by establishing a "pattern" of suspicious and disproportionate strikes in the above manner. This approach—explicitly set forth in Louisiana case law—is directly contrary to *Batson* and *Johnson*.

In case after case, the Louisiana courts have underscored the "insufficiency" of "statistics" at *Batson's* first step while affirming trial courts' erroneous curtailment of the *Batson* inquiry. *See State v. Turner*, 263 So. 3d 337, 375, 385-86 (La. 2018) (finding no inference of discrimination where prosecutors used 6 of 7 strikes (86%) against Black jurors, who made up 15 of 37 (41%) of qualified pool); *State v. Dorsey*, 74 So. 3d 603, 616 (La. 2011) (finding no inference of discrimination where prosecutors used 5 of 7 strikes (71%) against Black jurors, who made up 7 of 34 (21%) of qualified pool); *State v. Duncan*, 802 So. 2d 533, 550 (La. 2001) (finding no inference of discrimination where prosecutors used 8 of 8 strikes (100%) against women, who made up 17 of 31 (55%) of qualified pool); *id.* at 548-49 (finding no inference

of discrimination where prosecutors used 5 of 8 strikes (63%) against Black jurors, who made up 6 of 31 (19%) of qualified pool). *See also State v. Williams*, 137 So. 3d 832, 849 (La. App. 4 Cir. 2014) (affirming trial court's refusal to solicit race-neutral explanation where prosecutors used 11 of 12 peremptory strikes against Black jurors), *cert. granted, judgment vacated*, 579 U.S. 911 (2016). *See also* Matt Sledge, *After DNA tests fall short, man freed by plea deal in case where prosecutors saw racial bias*, NEW ORLEANS ADVOC., Dec. 19, 2021 (discussing Jabari Williams's case on remand after this Court's GVR order).

In every one of these cases, as in the appeal of Travis Boys, the Louisiana courts refused to recognize obvious patterns in the use of peremptory strikes against Black jurors that support, at minimum, an "inference" of discrimination. In each case, the courts use the same refrain: "Defendant's reliance on statistics alone does not support a prima facie case of race discrimination." *Boys*, 321 So. 3d at 1102; *Turner*, 263 So. 3d at 386; *Dorsey*, 74 So. 3d at 617; *Duncan*, 802 So. 2d at 550.

Louisiana's "no statistical evidence" rule is not a method for assessing a prima facie case; it is simply an excuse for refusing to follow *Batson* and *Johnson*'s command that race-neutral explanations should be solicited where there has been a "pattern" of suspicious strikes. It also conflates "step one" and "step three" of the *Batson* framework, imposing a requirement that a party adduce substantial, direct evidence of discrimination before the court will inquire into the reasons for a challenged strike. The State has taken the most obvious and appropriate

"yardstick" for measuring a prima facie case of discrimination and discarded it. *But see Johnson*, 545 U.S. at 168.

C. A party's use of 73% of their peremptory strikes against a group comprising 44% of the qualified venire easily clears the low "step one" threshold.

One does not need a degree in statistics to recognize that the State's disproportionate striking of Black jurors in this case constitutes a "pattern" under *Batson* and *Johnson*. The State's "challenge rate" of Black jurors (73%) was grossly disproportionate to the representation of Black jurors in the pool of qualified jurors (44%). If there were no correlation between a prosecutor's use of peremptory strikes and race, we would ordinarily expect only four or five of the State's eleven peremptory strikes (i.e., 44%) to have targeted Black jurors; instead, there were eight such strikes. Although identifying a "pattern" is not *necessary* to establish a prima facie case of discrimination, it is *sufficient*, and a "pattern" was certainly present here. *Batson*, 476 U.S. at 97.

To be clear, it may be that there was a good reason for this pattern. Or it may be that there was no reason apart from race. But Amici would like an explanation from the State as to why prosecutors excluded them from serving in this case; *Batson* and *Johnson* require as much.

Instead of acknowledging this obvious "pattern," the Louisiana courts ruled that no "inference" of discrimination arose, emphasizing irrelevant considerations. In this case, Louisiana courts found no "in-

ference" of discrimination, in substantial part, because the seated jury "included five black jurors" (roughly matching the demographics of the qualified venire). *Boys*, 321 So. 3d at 1101. But this result was obtained *despite*, not *because of*, prosecutors' disproportionate striking of Amici from the qualified venire. The seated jury was diverse only because the defendant's strikes—which the State did not challenge under *McCollum v. Georgia*, 505 U.S. 42 (1992)—were overwhelmingly used against white prospective jurors. But as this Court recently reiterated, "the argument that race-based peremptories are permissible because both the prosecution and defense [can] employ them . . . and in essence balance things out" was expressly rejected in *Batson*. *Flowers*, 139 S. Ct. at 2242.

From the perspective of Amici, it matters not one whit whether the defendant may, or may not, have engaged in racially motivated strikes against other jurors. The only relevant question is whether prosecutors' disproportionate strikes against *them* were improperly motivated by a discriminatory purpose. *Cf. Sanchez v. Roden*, 753 F.3d 279, 299 (1st Cir. 2014) ("[B]y focusing . . . on the presence of other African Americans on the jury at the time of [the defendant]'s *Batson* challenge, the [state appellate court] ignored Juror No. 261's right not to be discriminated against on account of his race. The [state appellate court] simply missed the core concern addressed in the [U.S.] Supreme Court's jurisprudence.").

That prosecutors used three[4] peremptory strikes against *white* prospective jurors also does not diminish the prima facie case here, at least when those strikes are viewed in light of "all of the relevant facts and circumstances." *Flowers*, 139 S. Ct. at 2235. Two of the three strikes against white jurors, for example, came at the very end of jury selection, after the defendant had already exhausted his peremptory strikes. Tr. 3/14/2018, pp. 427-28. Thus, at the time prosecutors used their penultimate strike against Amicus Wesley Ware (who is white), it was guaranteed that he would be replaced by Juror No. 57 (a white female).[5] *Id.* Likewise, when prosecutors used their final strike against Juror No. 1 (a white male), it was guaranteed that he would be replaced by Ju-

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[4] The appellate court's assumption that Juror No. 48, Matthew Sylve, is white—contrary to the apparent stipulation by both the defendant *and* the State that Mr. Sylve is Black—is incorrect. Apart from the uncontested evidence contained in the defendant's *Batson* "Proffer," Pet. App. at 114a, the appellate court ignored that the State represented that it was prepared to "carry the burden of production regarding its justifications for the strike of the eight challenged Black jurors it peremptorily struck at trial, which includes juror[] number . . . 48." *See* Pet. App. at 110a.

[5] The Colorado Supreme Court has recognized this exact issue as an "important consideration" in the *Batson* analysis. *Valdez v. People*, 966 P.2d 587, 593–94 (Colo. 1998) ("[T]he defendan"s theory of a discriminatory pattern is further weakened by the fact that one of the potential African-American jurors excused by the prosecutor was replaced by another African American. This is an important consideration under the jury selection method used in this case because the prosecutor knew which potential juror would replace a potential juror whom he struck."). *See also Miller-El v. Dretke*, 545 U.S. 231, 249-50 (2005).

ror No. 59. *Id.* This move was hardly surprising: Juror No. 59 had known the victim since childhood, was friendly with him for over 30 years, and had three family members and "several close friends" serve on the New Orleans Police Department where the victim worked. Tr. 3/14/2018, pp. 370, 408-11. Defendant's effort to challenge Juror No. 59 "for cause" was denied. *Id*. In context, the prosecutors' willingness to strike these white jurors, including Amicus Ware, does nothing to negate the inference that their decision to strike the other Black Amici might have been improperly motivated.

II. LOUISIANA LAW, WHICH PROVIDES THAT PROSECUTORS' STRIKE AGAINST AMICUS MATTHEWS CANNOT BE CONSIDERED AS EVIDENCE OF DISCRIMINATORY INTENT, DIRECTLY VIOLATES *BATSON*

Amicus Latressia Matthews would have been an ideal juror for prosecutors. A mother of three, Ms. Matthews previously served as a juror in a drug case where the defendant was convicted. Tr. 3/14/2018, p. 190. During voir dire, she volunteered that she owned a 9mm pistol that she was trained to use at a gun range. *Id.* at 270-71. The record fails to suggest any non-discriminatory basis for her exclusion by prosecutors. *Cf. Miller-El*, 545 U.S. at 247 (noting inference of discrimination is heightened where struck Black juror "should have been an ideal juror in the eyes of a prosecutor"). Indeed, Ms. Matthews seemed like such a pro-prosecution prospective juror that the defendant *also* sought to have her removed using

one of his peremptory strikes. *Id.* at 335-36. Under this Court's long-standing precedent—from *Miller-El* to *Foster* to *Flowers*—prosecutors' decision to strike Ms. Matthews was part of the "relevant facts and circumstances" state courts must consider when assessing *Batson* claims. *See, e.g.*, *Flowers*, 139 S. Ct. at 2246 ("[T]he State's decision to strike five of the six black prospective jurors is further evidence that the State was motivated in substantial part by discriminatory intent" when the State struck Juror Wright); *Foster v. Chatman*, 578 U.S. 488, 512-14 (2016) (explaining that notations next to the names of other struck Black jurors bolstered case that Jurors Garrett and Hood were impermissibly struck); *Miller-El*, 545 U.S. at 266 (explaining that strikes against other Black veniremen supported argument that strikes against Jurors Fields and Warren were motivated by race).

But Louisiana law *forbids* its courts from considering the strike of Amicus Latressia Matthews when assessing whether a prima facie case of discrimination exists as to the exclusion of the other Black Amici. Under La. Code Crim. Proc. art. 795(D), as interpreted by the Louisiana Supreme Court, when the State strikes a juror for dubious (and potentially racially motivated) reasons, but that juror is simultaneously excluded by the defense, the State's strike cannot be considered as evidence supporting a prima facie case of discrimination *as to other jurors*. *See McCoy*, 218 So. 3d at 589 (explaining that, pursuant to La. Code Crim. Proc. art. 795(D), "the State's peremptory challenge of Ms. Venus [cannot] be considered when evaluating the State's peremptory challenge of Ms. Curry," since the defendant also struck

Ms. Venus), *rev'd on other grounds*, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Faithfully applying Louisiana law, the court below held that because the defendant also wished to exclude Ms. Matthews, any further discussion of prosecutors' decision to strike her was "unwarranted" under La. Code Crim. Proc. art. 795(D). *Boys*, 321 So. 3d at 1098 n.8.

To be clear, Louisiana law does *not* provide just that a defendant who strikes Juror A forfeits his claim to a new trial based on prosecutors' racially motivated decision to strike Juror A at the same time. Rather, as interpreted by the Louisiana Supreme Court (and applied in this case), Louisiana law provides that Juror A's suspicious strike cannot be weighed as circumstantial evidence of the same party's motivation for striking Juror B. *McCoy*, 218 So. 3d at 589. Under this rule, the *most* suspicious prosecution strikes—those involving jurors for whom there is the *least* justification for the State to exclude—are insulated from the *Batson* analysis.

Louisiana's approach defies common sense and represents an egregious misapplication of settled law. As this Court explained most recently in *Flowers*, a party's decision to strike one Black juror will often provide circumstantial evidence in support of a *Batson* claim as to the exclusion of another juror. 139 S. Ct. at 2246. Thus, even though this Court ultimately did not find a *Batson* violation with respect to the exclusion of Black jurors Tashia Cunningham, Edith Burnside, Flancie Jones, and Dianne Copper, the *Flowers* Court carefully reviewed the prosecutor's use of strikes against them. *Id.* at 2246-50. These strikes, the Court emphasized, provided circumstantial evidence bolstering the defendant's

claim that Black juror Carolyn Wright was excluded improperly. *Id.* Indeed, the Court underscored that evidence of the exclusion of other Black jurors *even in other trials* can provide circumstantial evidence in support of a *Batson* claim, regardless of whether there was a finding that those strikes were racially motivated. *Id.* at 2243, 2245-46. *But see id.* at 2253 (Thomas, J., dissenting) (criticizing Court's use of previous peremptory strikes to assess motivation for striking Juror Wright). When the Louisiana courts pretermitted any further discussion of the basis for prosecutor's decision to strike Amicus Matthews, it violated this Court's clear directive to consider "all relevant facts and circumstances" in evaluating *Batson* claims.

This precise issue was previously presented to this Court in a petition for a writ of certiorari filed by Robert McCoy in 2016. Pet. at 25-30, *McCoy v. Louisiana*, 138 S. Ct. 53 (2017) (No. 16-8255). This Court granted review, and ultimately reversed Mr. McCoy's conviction and death sentence, on a separate question. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1512 (2018). Now the issue returns, once again in a murder case. Because this issue will continue to taint jury selection proceedings in Louisiana and because the Louisiana Legislature and courts "ha[ve] conspicuously disregarded governing Supreme Court precedent," this Court's intervention is warranted. *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (Alito, J., concurring in the judgment) (describing limited circumstances where such intervention is warranted). *Cf. Wearry v. Cain*, 577 U.S. 385, 395 (2016)

(recognizing propriety of summarily reversing Louisiana courts, notwithstanding "fact-intensive" inquiry, in such circumstances).

CONCLUSION

Just a few Terms ago, this Court issued a "GVR" order in another "step one" *Batson* case that was tried in the same Orleans Parish courthouse and affirmed by the same court of appeal. *Williams v. Louisiana*, 579 U.S. 911 (2016). Under a *different* provision of the same Louisiana jury selection law, La. Code Crim. Proc. art. 795(C), Louisiana courts were refusing to solicit race-neutral explanations from prosecutors in a way that simply "d[id] not comply with this Court's *Batson* jurisprudence." 579 U.S. 911, 911 (Ginsburg, J., concurring in the decision to grant, vacate, and remand). Article 795(D), and the Louisiana courts' *per se* refusal to recognize patterns of disproportionate strikes more generally, subvert *Batson* and its progeny just as flagrantly.

Louisiana's unwillingness to faithfully implement *Batson* and *Johnson* has had predictable results. A recent study of peremptory strikes in over 1,000 Louisiana jury trials identified massive racial disparities in how Louisiana prosecutors wield peremptory strikes. *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1624-35 (2018). Although Black Louisianans made up approximately a quarter of the prospective jurors in the statewide dataset, nearly half of Louisiana prosecutors' peremptory strikes were used to eliminate them from jury service. *Id.* at 1624. When a Black Louisianan is struck from a jury, it is three times

more likely that she was excluded by a government strike than by a defendant strike (even though prosecutors typically use far fewer peremptory strikes in absolute terms). *Id.* at 1630. This practice is, in many respects, the modern-day continuation of Louisiana's historical hostility toward Black jury service, which this Court has forcefully condemned. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394-96 (2020); *id*. at 1417 (Kavanaugh, J., concurring in part).

Because "[t]he State appear[s] to proceed as if *Batson* had never been decided," and because Louisiana Legislature and courts are inadequately guarding the right of Amici and other Black citizens to serve as jurors, the petition for a writ of certiorari should be granted. *Cf. Flowers*, 139 S. Ct. at 2246.

Respectfully submitted,

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