No. 21-267

IN THE

Supreme Court of the United States

JAMES GARFIELD BROADNAX,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE1

Since its founding by Thurgood Marshall more than 80 years ago, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has strived to secure the constitutional promise of equality for all people. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). Accordingly, LDF has long been concerned with eradicating jury discrimination. *See, e.g.*, *Ham v. South Carolina*, 409 U.S. 524 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986); *Chamberlin v. Hall*, 139 S. Ct. 2773 (2019); *Miles v. California*, 141 S. Ct. 1686 (2021); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); Brief of Plaintiffs-Appellants, *Attala Cty. NAACP v. Evans*, No. 20-60913, 2021 WL 606430 (5th Cir. Feb. 5, 2021); *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020); *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution embodies the loftiest of our ideals. "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." *Smith v. Texas*, 311

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief. All parties have been timely notified of the submission of this brief.

U.S. 128, 130 (1940). For whether the pronouncements of the Equal Protection Clause ring true or are empty promises determines the extent to which this country is a community of equals or a caste system that relegates many to second-class citizenship.

"The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (citing *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)); *Batson*, 476 U.S. 79, 85 (1986) ("Exclusion of [B]lack citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."). Indeed, "race neutrality in jury selection [is] a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution." *Powers*, 499 U.S. at 416. Accordingly, racial discrimination in jury selection not only "violates our Constitution and the laws enacted under it," but it "is at war with our basic concepts of a democratic society and a representative government." *Smith*, 311 U.S. at 130.

As discussed *infra*, longstanding precedent makes clear that racially discriminatory peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment. Yet, the lower court decisions in this case would place many of these grave constitutional violations beyond the reach of judicial review. The opinions below would allow prosecutors to deny equal rights to Black jurors and the accused so long as prosecutors succeeded in withholding key evidence of their unconstitutional conduct until federal habeas proceedings, thereby undermining not

only the fairness of the deliberative process, but also the very legitimacy of our justice system and our representative democracy. We urge the Supreme Court to grant certiorari and declare that *Cullen v. Pinholster*, 563 U.S. 170 (2011), may not be construed to nullify the Equal Protection Clause by barring the consideration of key new evidence that fundamentally alters the nature of a *Batson* claim, which a diligent habeas petitioner timely requested but prosecutors withheld until after the completion of state court proceedings.

ARGUMENT

I. This Court Should Grant Certiorari To Prevent Racial Discrimination In Jury Selection From Being Insulated From Judicial Review.

a. The Insidious Harms Caused By Racially Discriminatory Peremptory Challenges Extend Beyond Individual Court Proceedings.

As this Court explained long ago, denying Black people the

> right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon 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.

Flowers, 139 S. Ct. 2228, 2239 (2019) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). Racial discrimination in jury selection also "causes a criminal defendant cognizable injury," *Powers*, 499 U.S. at 411, by denying his "right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice,'" *Batson*, 476 U.S. at 87 (citation omitted). In addition, "[a]ctive discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers*, 499 U.S. at 412. "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.*

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith*, 311 U.S. at 130. The exclusion of an "identifiable segment of the community" "from jury service" "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972)

Research shows that racially heterogeneous juries deliberate longer, consider more facts, and make fewer mistakes than homogenous juries. Samuel R.

Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 507, 606 (2006). Indeed, those working in racially diverse groups "anticipate differences of opinion and perspective," leading them to better prepare to make their case, anticipate alternative viewpoints and new information, and work harder to reach consensus than if they were with others like themselves who they assumed shared their presumptions. Katherine W. Phillips, *How Diversity Makes Us Smarter*, 311 Sci. Am. (2014). "Diversity jolts us into cognitive action in ways that homogeneity simply does not." Phillips, *supra.*

Moreover, our judicial system's failure to eradicate racial discrimination from jury selection, discussed *infra*, has damaged the legitimacy of our judicial system. Most Americans have lost faith in "the courts as a fair and impartial arbiter where all are treated equally."[2] Per a 2021 Gallup poll, 61% of Black Americans, 41% of white Americans, and 30% of Hispanic Americans "say they have 'very little' or 'no' confidence in the criminal justice system."[3] Moreover, a 2019 public opinion poll found that only one-third of Americans were confident in the courts and judiciary, with a majority of Americans holding the belief that

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[2] Willow Research, *Do Americans Have Confidence in the Courts?* (Mar. 27, 2019), https://willowresearch.com/american-confidence-courts/.

[3] Jeffrey M. Jones, *In U.S., Black Confidence in Police Recovers From 2020 Low*, Gallup (July 14, 2021), https://news.gallup.com/poll/352304/black-confidence-police-recovers-2020-low.aspx.

the poor and minorities are not treated fairly in our courts.[4]

As this Court has stressed, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413. However, these purposes cannot be realized if racial discrimination is allowed to infect the jury selection process. Indeed, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99.

Furthermore, the harm to those excluded from jury service cannot be overstated. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers*, 139 S. Ct. at 2238 (citing *Powers*, 499 U.S. at 407). Serving on a jury "postulates a conscious duty of participation in the machinery of justice;" indeed, "[o]ne of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." *Powers*, 499 U.S. at 406 (quoting *Balzac v. Puerto Rico*, 258 U.S. 298, 310 (1922)). In this way, [j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued

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[4] *See* Willow Research, *supra* note 4.

acceptance of the laws by all of the people." *Id.* at 407 (citation omitted).

In sum, racially discriminatory jury selection "damages both the fact and the perception" of the fairness of our judicial system, and thereby harms the excluded jurors, the community at large, and the criminal defendant. *Powers*, 499 U.S. at 406, 409, 411; *see id.* at 406 (citing *Batson*, 476 U.S. at 87). Thus, the Supreme Court has reaffirmed again and again that "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers*, 139 S. Ct. at 2242; *see also id.* at 2239 (collecting cases).

b. The Racially Discriminatory Use Of Peremptory Challenges Has Continued Unabated Since *Batson*.

Our Nation all too often continues to honor the Equal Protection Clause in the breach. For as long as this Court has denounced racial discrimination in jury selection, the practice has persisted. *See Miller-El v. Drekte*, 545 U.S. 231, 267–69 (2005) (*Miller-El II*) (Breyer, J., concurring) (citing eight studies and anecdotal reports detailing widespread race discrimination in jury selection); *Flowers*, 139 S. Ct. at 2239–40 ("[i]n the century after *Strauder*, . . . [t]he exclusion of [B]lack prospective jurors was almost total in certain jurisdictions, especially in cases involving [B]lack defendants.").

For example, a 2018 study that reviewed over 1,300 North Carolina felony trials throughout 2011 found that prosecutors exercised peremptory strikes against Black jurors "at more than twice the rate that they

excluded white jurors[.]" Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1419, 1422, 1426 (2018). *See also* Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District* at 2, APM Reports (2018), https://features.apmreports.org/files/peremptory_strike_methodology.pdf (analyzing 225 trials from 1992-2017 and finding that prosecutors in the Fifth Circuit Court District struck potential Black jurors "at a rate four and a half times that of white jurors").

Similarly, in a study of over 5,000 Louisiana criminal trials between 2011 and 2017, investigative journalists determined that "prosecutors disproportionately strike [B]lack jurors no matter who they are prosecuting." Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1620-22, 1624 & n.178, 1628 (2018) (collecting studies and other resources with empirical findings on *Batson*). A study of *Batson* claims on appeal in California from 2006–2018 showed that California prosecutors disproportionately use their peremptory strikes against Black and Latinx jurors. Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* 13 (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf. And a study of capital murder cases in Pennsylvania from 1981-1997 suggested that *Batson* had "no effect whatever on prosecutorial strikes against [B]lack veniremembers." David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials*, 3 J. Const. L. 3, 73 (2001).

II. The Dallas County District Attorney's Office, Which Prosecuted Mr. Broadnax, Has A History Of Systematically Removing Black Prospective Jurors, And Mr. Broadnax Presented Evidence Of Racially Disparate Removal In His Case.

a. The Dallas County DA's Office Has A History Of Systematically Removing Qualified Black Prospective Jurors.

As in any case concerning intentional discrimination, context matters. *See Batson v. Kentucky*, 476 U.S. at 93 (requiring "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available") (citation omitted). Thus, in *Batson* cases, this Court has found relevant the "historical evidence of racial discrimination by the District Attorney's Office." *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) [hereinafter *Miller-El I*]. And this Court and other courts have recognized that the Dallas County District Attorney's Office has an "appalling" and "disturbing" history of intentionally discriminating against Black people and other racial minorities in jury selection. *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. Jan. 31, 2000) (unpublished); *see also Miller-El I*, 537 U.S. at 346–47.

Beginning in at least the 1950s, the Dallas County District Attorney's Office's culture was "suffused with bias against African-Americans in jury selection." *Miller-El I*, 537 U.S. at 347. For example, one former Dallas County assistant district attorney recalled that when he was a prosecutor in the late 1950s, he allowed

a Black woman to serve on a jury.[5] After his supervisor, longtime Dallas County District Attorney Henry Wade, learned that the Black woman was reluctant to convict and caused a deadlocked jury, Wade warned the assistant district attorney: "If you ever put another n****r on a jury, you're fired."[6]

The office's jury selection practices did not improve over time. In the mid-to-late 1960s, an assistant district attorney's aide created a written circular on how to select a jury. The document encouraged prosecutors not to "take Jews, Negroes, Dagos, Mexicans[,] or a member of any minority race on a jury, no matter how rich or how well educated." *Miller-El I*, 537 U.S. at 334–35. A longtime assistant district attorney followed up the circular with a memorandum advising other prosecutors to exclude "any member of a minority group" because "they almost always empathize with the accused."[7] The memo was included in the training manual for all Dallas County ADAs for nearly a decade, and possibly more, and was available to office personnel and prosecutors well into the 1980s. *Miller-El I*, 537 U.S. at 335, 347.

Even after the training manual was removed from circulation, the office's culture of disparately removing Black and minority prospective jurors persisted. A study published in the Dallas Morning News of capital murder cases tried in Dallas County between 1980 and 1986 showed that prosecutors used 90 percent of all

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[5] Tex. Def. Serv., *A State of Denial, Texas Justice and the Death Penalty* 52, n. 41 (2000), https://www.texasdefender.org/wp-content/uploads/2019/12/TDS-2001-State-of-Denial.pdf.
[6] *Id.*
[7] *Id.* at 53.

peremptory strikes to keep Black prospective jurors out of the jury box.[8] The blatant nature of the practice was evidenced by prosecutors' coding of the venire lists, using "C," "N," or "B" to identify the Black prospective jurors on the rolls.[9] *See Miller-El I*, 537 U.S. at 347. A follow-up study from the Dallas Morning news confirmed that in 2002, Dallas County prosecutors were excluding qualified Black prospective jurors at more than twice the rate they removed white prospective jurors and subjecting Black people to disparate questioning when compared to white jurors.[10]

The Dallas County District Attorney's Office prosecutors' actions at Mr. Broadnax's trial were consistent with this longstanding pattern, revealing an intent to remove all Black prospective jurors. And they largely succeeded. During jury selection, the State disparately questioned Black prospective jurors, engaged in race-based questioning of Black venire members, and used peremptory strikes to remove all Black prospective jurors and one Latina prospective juror. *See* Pet. Br. at 7–10. The final jury included a Black member solely because the court, after considering that the state struck "one hundred percent of the African-Americans in the strike range" and "this resulted in a disproportionate number of African-Americans being struck from the panel," *Batson* Hrg.

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[8] *Id.* at 56.

[9] *Id*.

[10] Associated Press, *Report: Dallas prosecutors bar black jurors*, NBC News (Aug. 22, 2005), https://www.nbcnews.com/id/wbna9033376.

Tr. 5:9-12, reinstated him after a *Batson* hearing at the end of jury selection. *See also* Pet. Br. at 10.

During the federal habeas proceedings, Mr. Broadnax discovered, for the first time, that the prosecutors in his case had "marked the race of each [Black] prospective juror," *see Miller-El I*, 537 U.S. at 347—just as other prosecutors in their office had in the past.

b. The Fifth Circuit's Post-Hoc Rationalizations Minimizing The Dallas County DA's Office's History Of Discrimination And The Probative Value Of The State's Bolding Of Black Veniremembers' Names Contravene Controlling Precedent.

As discussed *infra*, the Fifth Circuit (wrongly) concluded that this new evidence showing just how much prosecutors were focused on prospective jurors' race could not be considered under *Pinholster*. But, contrary to this Court's controlling precedent, the Fifth Circuit also created a post hoc reason to discount the race-coded spreadsheet and bolding of Black prospective jurors' names. Like the district court, the Fifth Circuit hypothesized that, in light of the prior admonishments the Dallas County DA's office received from this Court for discriminating in jury selection, *see Miller-El I* and *Miller-El II*, "[t]he office would have had considerable motivation to identify which jury venire members belonged to a protected class when preparing to defend its use of peremptory challenges" Pet. App. 13a–14a.

This was error for at least three reasons. First, the State has never offered this justification for why it bolded the Black prospective jurors' names.[11] Rather, both the district court and the Fifth Circuit invented their benign justification from whole cloth. This approach is squarely foreclosed by *Miller-El II*, which held that when a prosecutor attempts to justify his challenged peremptory strikes, he has to "state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." 545 U.S. at 252. M*iller-El II* emphasized that the pretextual significance of a racially discriminatory reason "does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Id.*; *see also id.* ("The Court of Appeals's . . . substitution of a reason . . . does nothing to satisfy the prosecutor['s] burden of stating a racially neutral explanation for their own actions.").

Second, this justification cannot be reconciled with the State's racially disparate treatment of Black and white jurors in this case. *See* Pet. Br. 7–10. The prosecutor not only disparately questioned Black jurors and asked them race-based questions, but also used the majority of the State's peremptory challenges to remove *all* Black prospective jurors. The prosecutor's pattern of strikes against Black venire members was so troubling that the trial judge rejected one of the strikes and required the juror to be seated.

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[11] While the State initially claimed that notes highlighting Black jurors were created in preparation for a *Batson* hearing, the circumstantial evidence foreclosed the plausibility of that explanation and the State abandoned this argument. *Compare* D. Ct. Dkt. 63 at 70–73 *with* COA Opp'n, at 36–37. *See also* D. Ct. Dkt. 69 at 9–13; COA Br. at 18–19.

Moreover, the State did not bold the names of all prospective jurors in a protected class; rather, the State only bolded the names of Black prospective jurors. The State's actions during voir dire are inconsistent with an explanation that they race-coded the jurors and bolded the names of Black prospective jurors for a nondiscriminatory reason of any kind. *See Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (explaining that "the focus on race in the prosecution's file," including the prosecution's inscription of "N" next to the name of each Black prospective juror, "belie[s] the State's claim that it exercised its strikes in a 'color-blind' manner" and "demonstrates a concerted effort to keep [B]lack prospective jurors off the jury").

And third, the characterization of the prosecutors' race coding by the lower courts in this case stands in stark contrast to how this Court characterized the same office's almost identical actions of marking the race of prospective jurors on juror cards. *See Miller-El I*, 537 U.S. at 347. Rather than characterizing this evidence as indicative of the prosecutors' diligence in preparing for an inevitable *Batson* challenge given that they used their peremptory strikes to remove *all* Black prospective jurors, this Court held that nearly identical evidence "reinforce[s]" "[t]he supposition that race was a factor." *Miller-El I*, 537 U.S. at 347. Similarly, in *Foster v. Chatman*, this Court held that the prosecution's inscription of the letter "N" next to each Black prospective juror demonstrated that the prosecutors were "motivated in substantial part by race" when they struck Black jurors. 136 S. Ct. at 1755. Neither the district court nor the Fifth Circuit acknowledged this Court's prior treatment of identical evidence.

The Fifth Circuit committed a similar error by implying that the Dallas County DA's history of racial discrimination in jury selection is irrelevant and a *Batson* violation could not have occurred because "[a]t the time of [Broadnax's] trial, Dallas had elected the first African-American District Attorney in Texas, and his office prosecuted Broadnax." Pet. App. 14a n.10. To start, that the head of the office was Black says nothing about whether the prosecutors in his office would select a jury in a racially discriminatory manner. These prosecutors, even if they were not "part of [the] culture of discrimination" rampant throughout the District Attorney's Office for decades, "were likely not ignorant of it." *Miller-El I*, 537 U.S. at 347.

Even if one of the prosecutors who was involved in voir dire was a minority, this would not eliminate the probative value of the race-coded spreadsheet and the bolding of Black prospective jurors' names in Mr. Broadnax's *Batson* claim. This Court has unequivocally rejected the premise that a "minority" will not "discriminate against other members of their group." *See Castaneda v. Partida*, 430 U.S. 482, 499 (1977) ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) ("[I]n the . . . context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race.").

A prosecutor may harbor racial stereotypes and assumptions about prospective jurors and try to

capitalize on them no matter the prosecutor's racial identity. What is relevant to the peremptory strikes is evidence that sheds light on the prosecutor's state of mind and actual reasons for the strikes. Whether the prosecutor struck a Black venire member because of pure racial animus, or because of the "assumption or belief that the [B]lack juror would favor a [B]lack defendant" (an assumption not limited to white prosecutors), the strike is unconstitutional. *Flowers*, 139 S. Ct. at 2241.

Furthermore, the prosecutors in Mr. Broadnax's trial *did* engage in jury discrimination and systemic removal of Black prospective jurors. So much so that the trial court granted a *Batson* challenge and reseated a struck juror "[because of the fact] 'that there were no African-American jurors on this jury and there was a disproportionate number of African-Americans who were struck.'" *See* Pet. Br. 10. Thus, the Fifth Circuit's representations about the likelihood that a DA's Office headed by a Black DA likely would not discriminate based on race are unfounded and inconsistent with the record in this case.

III. Evidence Of Racial Discrimination In Jury Selection Held Exclusively In The Hands Of Prosecutors Is Hard To Uncover; The Court Should Not Read *Pinholster* To Undermine The Constitutional Guarantee To A Jury Selected Without Discrimination.

a. Prosecutors Use Pretextual Explanations To Conceal Their Racially Motivated Strikes.

More than three decades after *Batson*, prosecutors still exclude jurors based on race because little effort is required to hide their unspoken objective. When *Batson* was decided, Justice Marshall warned that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror[.]" *Batson*, 476 U.S. at 106 (Marshall, J., concurring). That warning has proved prescient as prosecutors routinely devise facially neutral reasons for striking Black jurors and teach others to do the same.[12]

In multiple jurisdictions across the country, prosecutors have been trained to provide "race-neutral" reasons to conceal their illegitimate use of peremptory challenges. For example, in 1995 and 2011, the North Carolina Conference of District Attorneys held training sessions to teach prosecutors

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[12] *See e.g.*, Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection*, 43 (July 2021), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf ("The Batson decision did not deter prosecutors from engaging in illegal race-based peremptory strikes so much as it incentivized them to find ways to keep striking Black jurors without triggering a *Batson* objection.").

how to strike Black jurors without garnering scrutiny.[13] Similarly, in Santa Clara County, California, the 2016 edition of a prosecution training manual lists 77 reasons that courts had previously accepted for striking jurors of color.[14] These tactics have effectively undermined *Batson*'s central goal of eradicating discrimination in jury selection. *See* Semel et al., *supra*, at 44 (explaining that training prosecutors to evade *Batson* "all but ensures the continuation of the pernicious legacy of racial discrimination in jury selection").

Prosecutors have, for example, claimed they were concerned about Black "jurors' demeanor, appearance, distrust of the criminal legal system, relationship with someone who had a negative experience with law enforcement, and place of residence." Semel et al., *supra*, at 16. Courts routinely accept these and other justifications for removing Black jurors, even when white jurors with similar characteristics are not struck by the prosecution.[15] This heightens the importance of evidence that reveals the prosecution's intent—

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[13] *Id*.

[14] *Id.*

[15] *See e.g.*, *Davis v. State*, 329 S.W.3d 798, 815-16, 818 (Tex. Crim. App. 2010) (finding no racial discrimination where prosecution struck Black juror for needing "enormous amount of evidence" to find future dangerousness while not striking white juror for needing to be "99.999' [percent] sure" to impose death) (alteration in original); *see also* Semel et al., *supra*, at 65 ("In case after case, the California Supreme Court has devised rationales to avoid comparative analysis, to restrict its application, to speculate about jurors' similarities and differences rather than adhere to the record, or to find the analysis itself unpersuasive.").

particularly evidence of racial discrimination within the prosecution's file.

b. Evidence Exclusively Held By Prosecutors May Be The Most Probative Evidence Of The Invidious Intent.

Criminal defendants shoulder the burden of proving intentional discrimination at *Batson's* third step. *See Snyder v. Louisiana*, 552 U.S. 472 (2008) ("[T]he question presented at the third stage of the *Batson* inquiry is 'whether the defendant has shown purposeful discrimination.'") (citation omitted). Establishing purposeful discrimination is a difficult task. And it is especially difficult to prove intentional discrimination in jury selection due to the myriad explanations that conceal racially motivated strikes. The prosecution's jury selection notes are uniquely suited to expose this practice.

Foster v. Chatman illustrates both the powerful impact of evidence held in the prosecution's file and the practical difficulty of obtaining it. 136 S. Ct. 1737 (2016). At trial, Foster unsuccessfully objected to the prosecution's peremptory challenges of four Black prospective jurors. Years later, after Foster's *Batson* claim was denied on appeal, Foster obtained the prosecution's jury selection notes through a Georgia Open Records Act request. The prosecution's file revealed stark evidence of racial discrimination. *See Foster*, 136 S. Ct. at 1744 (listing prosecution materials on which Black jurors' names were repeatedly circled, highlighted, and otherwise singled out). Rejecting the prosecution's attempt to minimize the significance of this evidence, the Court emphasized

"the persistent focus on race in the prosecution's file." *Id.* at 1754. The Court in *Foster* made clear that it would not turn a blind eye to evidence within the prosecution's file that "demonstrates a concerted effort to keep [B]lack prospective jurors off the jury." *Id.* at 1755.

Absent Foster's diligence and the passage of the Georgia Open Records Act in 2002,[16] the prosecution's notes would have never been revealed. The prosecution's notes were significant because they allowed the Court to discern the prosecution's motive. *See Foster*, 136 S. Ct. at 1755 ("The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a 'color blind' manner."); *see also Miller-El II*, 545 U.S. at 266 ("[T]he prosecutors' own notes proclaim that the [training manual's] emphasis on race was on their minds when they considered every potential juror.").

Evidence of racial discrimination held exclusively by the prosecution is difficult to obtain. When a defendant does uncover evidence of this type, it is crucial that it be properly considered under *Batson* as part of "all relevant circumstances" regarding purposeful discrimination. *Flowers*, 139 S. Ct. at 2245 (citation omitted); *see also Snyder*, 552 U.S. at 478 ("[I]n reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon racial animosity must be consulted.") (citation omitted). Assessing discriminatory purpose requires a careful inquiry of circumstantial evidence of intent. *See Foster*, 136 S. Ct. at 1748. Evidence of racial discrimination within

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[16] *See* Ga. Code Ann. §§ 50-18-70–50-18-77 (2002).

the prosecution's jury selection materials offers rare and unique insight into the prosecution's intent, which enhances the accuracy of *Batson* determinations and furthers the Court's "efforts to eradicate racial discrimination" in jury selection. *Batson*, 476 U.S. at 85. This Court must ensure that unnecessary procedural hurdles do not preclude consideration of this vital evidence.

c. *Pinholster* Should Not Nullify The Equal Protection Clause By Barring New Evidence That Fundamentally Alters A *Batson* Claim Where Prosecutors Withheld That Evidence From A Diligent Habeas Petitioner Until After State Court Proceedings.

Pinholster and the Antiterrorism and Effective Death Penalty Act of 1996 should not limit consideration of such evidence. First, given the nature of the evidence of racial discrimination within the prosecution's file, it "fundamentally alters" the *Batson* claim within the meaning of *Pinholster*. *See, e.g.*, *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (finding claim "fundamentally altered" where new evidence placed "claim in a significantly different and substantially improved evidentiary posture" (citation omitted)). The overriding concern when assessing a *Batson* claim is whether the prosecution's race neutral explanations are credible. This necessarily requires a searching inquiry into the prosecution's intent. *See Foster*, 136 S. Ct. at 1748 (emphasizing that assessing whether discriminatory purpose "was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available" (citation omitted)). There is no other type of

evidence suited to aid that inquiry—save for the improbable circumstance where a prosecutor openly acknowledges race as a basis for the strike—like evidence within the prosecution's file demonstrating a "persistent focus on race." *Id*. at 1754.

In Mr. Broadnax's case, the prosecution's jury selection file included a spreadsheet that listed the race of each prospective juror. The names of the prospective Black jurors—and only their names—were bolded. In short, the prosecution was identifying and tracking the Black jurors, which is a tactic that this Court has deemed especially relevant in prior *Batson* cases. *See, e.g., Miller El I*, 537 U.S. at 347 (emphasizing that "the prosecutors marked the race of each prospective juror on their juror cards"); *Foster*, 136 S. Ct. at 1744 (noting that "the names of [B]lack prospective jurors were highlighted in bright green" on jury venire list). This evidence is fundamentally different than any evidence the petitioner could have presented prior to federal habeas proceedings, as it sheds light directly on the prosecution's intent, which is the essence of the *Batson* inquiry. Such evidence, therefore, fundamentally alters the *Batson* claim within the meaning of *Pinholster*.

Second, Mr. Broadnax's case is just the sort of case the Supreme Court majority said "may well present a new claim." *Pinholster*, 563 U.S. at 186 n.10. In *Pinholster*, this Court held that "review under [28 U.S.C.] § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. In her dissenting opinion, Justice Sotomayor expressed concern that this approach would punish diligent petitioners who, through no fault of their own, were unable to obtain

evidence withheld in state court. *See id.* at 214 (Sotomayor, J., dissenting) (noting *Pinholster's* "potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court"). Justice Sotomayor detailed the hypothetical example of a petitioner who "diligently attempted in state court to develop the factual basis" for a *Brady* claim but was unable to do so because the prosecution withheld supporting evidence. *Id.* If the petitioner later obtained the evidence after state court proceedings concluded, Justice Sotomayor observed, a federal court could not consider the new evidence.

In response to this concern, the majority explained that the scenario Justice Sotomayor highlighted "may well present a new claim." *Id.* at 186 n.10. But the majority declined to "draw the line between new claims and claims adjudicated on the merits." *Id.* (citation omitted). Mr. Broadnax's case, which exemplifies the concern raised in Justice Sotomayor's dissent, demonstrates the urgency of resolving this question. Like Justice Sotomayor's hypothetical petitioner, Mr. Broadnax diligently sought evidence within the prosecution's file in support of his *Batson* claim during state habeas proceedings. The prosecution withheld that evidence until the state proceedings concluded. And the courts below refused to consider the evidence during federal habeas proceedings—even though it demonstrates that the prosecution improperly focused on race when exercising peremptory strikes in Mr. Broadnax's case. Thus, Mr. Broadnax's case, like Justice Sotomayor's hypothetical petitioner, "may well present a new claim." *Id.*

Third, aside from the fact that this is a capital case, which this Court has said it must scrutinize more closely, *see Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("[o]ur duty to search for constitutional error is never more exacting than it is in a capital case" (citation omitted)), it is especially important for this Court to review this issue because of the grave harms of racially discriminatory jury selection. As discussed *supra*, evidence that fundamentally alters a *Batson* claim must be considered not only to protect the constitutional rights of habeas petitioners, but also to vindicate the constitutional rights of excluded Black jurors, protect the integrity of the deliberative process, and promote the legitimacy of our judicial system. *See, e.g.*, *Miller-El II*, 545 U.S. at 238 (explaining that "the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality . . . and undermines public confidence in adjudication" (internal quotation marks and citation omitted)); *Flowers*, 139 S. Ct. at 2241 (Indeed, "[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.").

CONCLUSION

Accordingly, this Court must grant certiorari and definitively hold that *Pinholster*, 563 U.S. 170 (2011), may not be construed to abrogate the Equal Protection Clause by insulating from constitutional scrutiny significant new evidence of a *Batson* violation that, though timely requested by a diligent habeas petitioner, was withheld by prosecutors until after the

completion of state court proceedings. To do otherwise would render the Equal Protection Clause "but a vain and illusory requirement." *Batson*, 476 U.S. at 98.]

Respectfully Submitted,

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