No. 21-444

In the Supreme Court of the United States

ANDRE LEE THOMAS,

Petitioner,

v.

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

Respondent.

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

BRIEF OF *AMICI CURIAE* FORMER PROSECUTORS AND JUDGES IN SUPPORT OF PETITIONER

DEMIAN A. ORDWAY
Counsel of Record
ALISON B. MILLER
ADAN MARTINEZ
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
dordway@hsgllp.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are twelve former federal and state prosecutors and judges, identified in the Appendix, who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring public confidence in that system, including in the guarantee that all persons—and particularly capital criminal defendants—are treated equally and fairly in the eyes of the law.

That public confidence is gravely undermined by the presence of racial bias in the jury selection process. Since this nation's founding, a defendant's Sixth Amendment right to an impartial jury has been the bedrock of our criminal justice system. To protect that right, prosecutors and judges—no less than defense counsel—are legally and ethically bound to ensure against seating jurors who exhibit racial bias. The prosecutor in particular is, as this Court has noted:

> [T]he representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

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[1] Pursuant to S. Ct. Rule 37.2(a), all parties received timely notice of amici's intent to file this brief, and all have provided written consent to its filing. No counsel for a party authored this brief in whole or in part, and no person other than the *amici* or their counsel made a monetary contribution to fund its preparation or submission.

> therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Strickler v. Greene, 527 U.S. 263, 281 (1999).

Before the Court here is an application to overturn a conviction where the prosecution, defense, and trial judge failed to prevent racial bias from infecting the jury. *Amici* submit that granting certiorari to correct this violation of the Petitioner's Sixth Amendment rights is imperative to ensure fairness in the administration of justice, and, equally importantly, the appearance of such.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[2]

Our system of criminal justice has long "relied on [a variety of] safeguards to protect the [defendant's] right to an impartial jury" free of racial bias. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). At Mr. Thomas's trial, those safeguards failed. Three people were sworn onto Mr. Thomas's jury despite all three having provided answers to a jury questionnaire that unequivocally acknowledged their opposition to interracial marriage. App. 391a–96a[3] (answers included "I oppose" or "I vigorously oppose" "people of different racial backgrounds marrying and/or having

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[2] *Amici Curiae* adopt the facts and procedural history set forth in the petition for writ of *certiorari*.

[3] References to "App." are to the Petitioner's Appendix in No. 17-70002.

children," because "I think we should stay with our Blood Line" or "I don't believe God intended for this"). Where Mr. Thomas, a black man, stood accused of murdering his wife, a white woman, and her two children—one of which, his own son—seating these jurors presented "an unacceptable risk of racial prejudice infecting [a] capital sentencing proceeding." *Turner v. Murray*, 476 U.S. 28, 35 (1986).

The Court should grant certiorari because "[n]o surer way could be devised to bring the processes of justice into disrepute" than "to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors." *Aldridge v. United States*, 283 U.S. 308, 314–15 (1931); *see also Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (racial animus "poisons public confidence in the judicial process.") (internal quotation marks omitted). Because our system of justice relies so heavily on public confidence, even a "tincture" of racial bias can cause disproportionately large damage. *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting). That damage is all the greater when it is the result of multiple system failures. Here, in addition to defense counsel, the prosecutor and trial judge failed to fulfill their obligations to ensure against seating jurors that expressed racial prejudice. And these failures compounded in the setting of a capital case, where "there [wa]s a unique opportunity for racial prejudice to operate but remain undetected" because of the broad scope of juror discretion at the sentencing phase. *Turner v. Murray*, 476 U.S. 28, 35 (1986).

This case provides the Court an opportunity to draw a clear line safeguarding the right to an impartial jury. As this Court recognized more than 50 years ago, opposition to interracial marriage has its roots in "the doctrine of White Supremacy." *Loving v. Virginia*. *See* 388 U.S. 1, 7 (1967). Unrebutted evidence of a juror's belief in the moral superiority of white people over black people is and should be constitutionally disqualifying where, as here, a capital defendant is accused of an interracial crime. *See Turner*, 476 U.S. at 37. State appellate courts have consistently found error when trial courts have failed to strike jurors on far more equivocal evidence of racial prejudice. And contrary to the reasoning of the Fifth Circuit, those same courts have repeatedly rejected the notion that jurors owning up to those beliefs can be rehabilitated with an affirmative answer to the question of whether they can decide the case solely on the evidence.

ARGUMENT

I. Certiorari Should be Granted Because This Case Implicates Public Confidence in the Criminal Justice System.

Referring to the introduction of a racial stereotype in a capital murder proceeding, this Court noted that "[s]ome toxins can be deadly in small doses." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017). Indeed, "even a tincture of racial bias can inflict great damage on [the criminal justice] system" because it "is dependent on the public's trust." *Peña-Rodriguez* 137 S. Ct. at 875 (Alito, J., dissenting); *see also Georgia v. McCollum*,

505 U.S. 42, 50 (1992) ("[P]ublic confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection."). The "risk of racial prejudice infecting a capital sentencing proceeding is especially serious." *Turner*, 476 U.S. at 35.

This case is emblematic of racial bias infecting the jury, a cornerstone of our "democratic heritage" and "critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Empirical evidence confirms the extraordinary importance of juries in securing that confidence. *See* AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM, p. 6 (1999) ("[M]ore than three-quarters [of those surveyed], 78%, say [juries are] the fairest way to determine guilt or innocence, and more than two-thirds, 69%, believe that juries are the most important part of our justice system."). As this Court has observed, "[p]ermitting racial prejudice in the jury system" is especially dangerous, and "damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Peña-Rodriguez* 137 S. Ct. at 868 (internal quotation marks and citations omitted). Here, there was far more than a "tincture" of bias tainting jury selection—before they were sworn, *three* jurors provided clear evidence of their own prejudice in answers to a jury questionnaire, and *voir dire* provided no countervailing evidence.

Allowing those three jurors to be sworn was a failure of the system on multiple levels. Prosecutors

have an affirmative duty to ensure that would-be jurors are impartial. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, 74 (3d Ed. 2009) ("The primary purpose of the jury selection process is to empanel a jury that is representative of the community and does not have personal interests or prejudices for or against a party to the extent that they cannot render a verdict based upon the law and the facts.").[4] That duty includes moving to strike potential jurors for racial bias. ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, STANDARD 3–1.6 (IMPROPER BIAS PROHIBITED) ("A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work.").[5]

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[4] *Available at* https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf. *See also* Alaska Rules of professional Conduct. Rule 3.8 Special Responsibilities of a Prosecutor ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and rectify the conviction of innocent persons.") Arkansas Rules of Professional Conduct. Rule 3.8. (same); Colorado Bar Association Rules of Professional Conduct. Rule 3.8 (same); Georgia State Bar Handbook. Rule 3.8 (same); Nebraska Supreme Court Rules § 3-503.8, comment [1] (same).

[5] The ABA Criminal Justice Standards for the Prosecution Function are a set of model prosecutorial standards that have been implemented in many jurisdictions and cited approvingly

Judges, of course, have the same obligation and should strike potential jurors *sua sponte* if there is evidence of racial bias. *See, e.g.*, *Dennis v. U.S.*, 339 U.S. 162, 168 (1950) ("[W]hile impaneling a jury the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor.") (discussing *United States v. Wood*, 299 U.S. 123, 133–134 (1936) and *Frazier v. United States,* 335 U.S. 511, 511–12 (1948)); *see also* United States Courts Strategic Plan for the Federal Judiciary (Sept. 2020) at 4 ("Equal justice requires fairness and impartiality in the delivery of justice and a commitment to non-discrimination, regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.").[6]

Here, the prosecutor knew that all three jurors opposed interracial marriage and the trial judge knew

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by this Court and others. *See generally* Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUSTICE (2009), *available at Available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.pdf. *See also* Alabama Rules of Professional Conduct. Advocate. Rule 3.8 Special Responsibilities of a Prosecutor (noting that "the ABA Standards . . .should be reviewed and used in interpreting the requirements of Rule 3.8").

[6] *Available at* https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf

the same for one juror, Mr. Ulmer, having heard his answers on *voir dire*. Neither of them intervened.[7]

The greater the system failure, the greater the harm to public confidence. Granting certiorari sends a clear message: racial bias in a jury will not be tolerated. That message is sorely needed, as public confidence in the criminal justice system is already low. A June/July 2021 Gallup poll concluded that only 20% of Americans have a "great deal" or "quite a lot" of confidence in the criminal justice system, down from 24% in 2019.[8] Likewise, the most recent polling commissioned by the National Center for State Courts found that as of 2019, only 35% of Americans had

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[7] This failure was particularly egregious given the low bar for striking jurors under these circumstances. *See* ABA PRINCIPLES FOR JURIES AND JURY TRIALS (Revised 2016), II.C.3 ("If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial."); *People v. Arnold*, 96 N.Y.2d 358, 363 (N.Y. 2001) ("Prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused."); *Pietri v. State*, 885 So. 2d 245, 257 (Fla. 2004) ("[I]f any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.") (internal quotation marks omitted); *Ordway v. Com.*, 391 S.W.3d 762, 780 (Ky. 2013) ("The trial court should err on the side of caution by striking the doubtful juror; that is, if a juror falls within a gray area, he should be stricken.").

[8] *Available at* https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx

confidence in the state and federal court systems.[9] The survey characterized those levels as "lagging across the board" relative to the prior year. *Id.*

II. The Court Should Draw a Clear Line to Protect the Jury from Racial Bias.

This is not a case where a court is challenged to adjudicate difficult questions of how and whether nuanced actions and speech may reveal racial bias. Confessed opposition to interracial marriage leaves no room for impartiality when the defendant in a capital case is a black man accused of killing his wife, a white woman. Unrebutted evidence shows that three jurors held this belief, and no particularized evidence that they could set it aside. State appellate courts have rarely faced such transparent facts, but when they have, they have found error. This Court should draw the same clear line.

1. Not all prejudices are alike. Sociologists regard "blatant" prejudice as "includ[ing] belief in the genetic inferiority of the outgroup." Pettigrew & Meertens, *Subtle and Blatant Prejudice in Western Europe*, European Journal of Social Psychology, Vol. 25, at 58 (1995) (hereafter "Pettigrew & Meertens"). This Court has specifically recognized and taken steps to guard against the risk of jurors in a capital case nurturing a

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[9] *Available at* https://www.ncsc.org/__data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf. This polling is typically conducted annually but does not appear to have been conducted in 2020. *See* https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide (linking to annual surveys).

"blatant" prejudice. *Turner*, 476 U.S. at 35 ("a juror who believes that blacks are . . . morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors" or "less favorably inclined towards petitioner's evidence of [mitigating factors]" in a capital case); *Peña-Rodriguez* 137 S. Ct. at 871 ("blatant racial prejudice is antithetical to the functioning of the jury system").

Opposition to interracial marriage is a form of blatant racial prejudice that has its roots in white supremacy. *See Loving*, 388 U.S. at 7 (characterizing proffered justifications for ban on interracial marriages as "obviously an endorsement of the doctrine of White Supremacy"); Pettigrew & Meertens at 58 ("blatant prejudice involves opposition to . . . any intergroup sexual contact or intermarriage"). Unlike other forms of prejudice that find expression by implication and innuendo, *see, e.g.*, *Bennett v. Stirling,* 842 F.3d 319, 324 (4th Cir. 2016) (Wilkinson, J.) (granting habeas in part because a prosecutor's likening of a black capital defendant to "King Kong" and a "caveman," among others, were "poorly disguised appeals to racial prejudice"), opposition to interracial marriage draws damaging, racially biased distinctions on its face.

There can be no doubt that the statements made by the three jurors at issue here fit within this paradigm of blatant prejudice. Two of the jurors, Mr. Copeland and Ms. Armstrong, checked a box on a jury questionnaire stating, "I oppose people of different racial backgrounds marrying and/or having children." App. 393a–96a. Mr. Copeland and Ms. Armstrong

further volunteered, respectively, that "we should stay with our Blood Line" and that interracial marriage is "harmful for the children involved because they do not have a specific race to belong to." *Id.* The third juror, Mr. Ulmer, checked a box on the questionnaire stating, "I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so." *Id.* at 391a–92a. Mr. Ulmer further wrote that he did not "believe God intended for this," *Id.*, and when questioned during *voir dire*, he stated "I think it's wrong to have those relationships." *Id.* at 10a. These justifications echo those given by the State of Virginia in support of its unconstitutional ban on interracial marriage. *See* 388 U.S. at 7 (*inter alia*, "to preserve the racial integrity of its citizens . . ., to prevent the corruption of blood . . . and the obliteration of racial pride").

2. "[T]he seating of any juror who should have been dismissed for cause . . . require[s] reversal." *Skilling v. United States*, 561 U.S. 358, 395–96 (2010) (quoting *United States v. Martinez-Salazar,* 528 U.S. 304, 316 (2000)); *see also Aldridge v. United States*, 283 U.S. 308, 314) (1931) ("[I]f any [potential juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit."). Where, as here, venirepersons made statements clearly indicative of racial bias without any particularized evidence that they could set that bias aside as jurors, state courts have found reversable error. Indeed, they have found error on far weaker evidence.

The Washington Court of Appeals, for example, held that it was an abuse of discretion for the trial court to refuse to strike a juror in a drug possession case who admitted he was "a little bit prejudiced" because he had read in the news and seen on television "a lot of black people who are dealing drugs." *State v. Witherspoon*, 919 P.2d 99, 101 (Wash. Div. 3 1996). The Utah Supreme Court found error where the trial court failed to remove a juror who simply said "he would look less favorably on [defendant] because of his race." *State v. Maestas*, 299 P.3d 892, 912 (Utah 2012), *cert. denied*, 133 S. Ct. 1634 (2013). In South Carolina, the state's Supreme Court reversed a murder conviction and death sentence where the trial court seated a juror that admitted he harbored resentment against defendant's black *attorney*. *State v. Sanders*, 88 S.E. 10, 12 (S.C. 1916).[10]

The Kentucky Supreme Court's decision in *Alexander v. Commonwealth* is particularly instructive for its factual similarity. 862 S.W.2d 856 (Ky. 1993), *overruled on other grounds by Stringer v. Com.*, 956 S.W.2d 883 (Ky. 1997). In *Alexander* the

[10] The court in the *Sanders* case may have been particularly forward-thinking. To the extent that courts of that era approved jurors who made statements in *voir dire* indicative of racial bias, their reasoning is an outdated feature of the times. *See e.g.*, *Johnson v State*, 88 Neb 565 (1911) (affirming a murder conviction where juror admitted, on *voir dire* examination, that he had a feeling of prejudice against the defendant's race, because the "so-called prejudice against the [defendant's] race was simply a feeling or belief that the colored race was inferior to the white race").

Court held that a trial court erred in not dismissing for cause a juror who expressed a "distaste" for "mixed marriage" during *voir dire* in the prosecution of a black defendant for sexually molesting a multi-racial child. *Id.* at 864.

In each of these cases, the reviewing court found error notwithstanding purported rehabilitative testimony elicited on *voir dire* that the potential juror could decide the case fairly.[11] The testimony consistently included, but was often not limited to, affirmative answers to what the *Alexander* court referred to as the "magic question", namely "could [they] decide the case based solely upon the evidence presented at trial?" 862 S.W.2d at 865. These courts roundly rejected the notion that an affirmative answer to that generic question automatically purges the cloud of prejudice that hangs over a juror that has

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[11] *Witherspoon*, 919 P.2d at 101 (trial court "abused its discretion in denying [defendant's] challenge for cause" notwithstanding "attempts to rehabilitate Juror No. 3" in which "he ultimately agreed that he would presume [defendant] was innocent"); *Maestas*, 299 P.3d at 913 (juror's "state[ment] that he could follow the law" was "alone . . . not enough" to rehabilitate him after he made statements indicative of racial bias); *Sanders*, 88 S.E. at 12 (holding that the trial court "erroneously exercised his discretion in ruling that the juror was competent" despite the juror testifying that he believed he "could render a verdict based on the law and the evidence"); *Alexander*, 862 S.W.2d at 865 ("both venirepersons should have been stricken for cause" notwithstanding that both testified that "they could decide the case based solely on the evidence at trial").

provided evidence of a racial bias. As the Kentucky Supreme Court explained:

> There is no "magic" in the "magic question." It is just another question where the answer *may* have some bearing on deciding whether a particular juror is disqualified by bias or prejudice . . . [T]he "magic question" does not provide a device to "rehabilitate" a juror who should be considered disqualified by his . . . attitude as expressed on voir dire.

Id. Federal courts have reached the same conclusion. *See, e.g.*, *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) ("It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism.").[12] At bottom, a conclusory answer to the "magic question" neither lessens the possibility of a juror's bias affecting his or her deliberations nor the potential for an openly stated prejudice to undermine public confidence in the fairness of the criminal justice system.

For Mr. Copeland and Ms. Armstrong, affirmative answers to the generic "magic question" are the *only* pieces of testimony in the record even suggesting that

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[12] "[T]he bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 558 (1983) (Brennan, J. concurring).

they could set aside their bias. These jurors were not asked specific questions about whether and how their racial bias might impact their ability to consider the evidence in the case. App. at 10a–11a. And although Mr. Ulmer answered "no" in response to various questions about whether "the color of anyone's skin would . . . have any impact or bearing upon your deliberations," App. at 10a, those answers are not materially different from statements routinely found insufficient that a juror will "presume [the defendant] innocent", *Witherspoon*, 919 P.2d at 101, or "follow the law", *Maestas*, 299 P.3d at 913. On this record, it was error for the Fifth Circuit to hold that Texas courts were not "objectively unreasonable in concluding" that these jurors could "decide[] the case solely on the evidence presented," App. 18a.

The error in seating these three jurors was plain. The record unequivocally shows that these jurors could not have been impartial to Mr. Thomas. On that basis alone, they should have been struck.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

DEMIAN A. ORDWAY
Counsel of Record
ALISON B. MILLER
ADAN MARTINEZ
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
dordway@hsgllp.com

Counsel for Amici Curiae

October 22, 2021

Appendix

AMICI CURIAE

The Honorable Elsa Alcala
Former Judge, Texas Court of Criminal Appeals

The Honorable Charles F. Baird
Former Judge, 299th District Court, Travis County, Texas
Former Visiting Justice, Thirteenth and Fourteenth Courts of Appeals, Texas
Former Judge, County Courts, Travis County, Texas
Former Judge, Texas Court of Criminal Appeals

The Honorable William G. Bassler
Former U.S. District Judge, District of New Jersey

The Honorable Leonard Davis
Former Chief U.S. District Judge, Eastern District of Texas

Creighton Horton
Former Assistant Attorney General of Utah

The Honorable Wallace B. Jefferson
Former Chief Justice, Supreme Court of Texas

The Honorable Michol O'Connor
Former Justice, Texas Court of Appeals, First District
Former Assistant U.S. Attorney, Southern District of Texas

Former Assistant District Attorney, Harris County, Texas

The Honorable Robert O'Conor, Jr.
Former U.S. District Judge, Southern District of Texas

The Honorable Morris L. Overstreet
Former Judge, Texas Court of Criminal Appeals

The Honorable Chase T. Rogers
Former Chief Justice, Connecticut Supreme Court

The Honorable Kevin Sharp
Former Chief U.S. District Judge, Middle District of Tennessee

Larry Thompson
Former U.S. Deputy Attorney General
Former U.S. Attorney, Northern District of Georgia