No. 22-418

In the Supreme Court of the United States

GENE DEVERAUX,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court commits structural error, requiring automatic reversal under the Sixth Amendment, when it seats a biased juror after erroneously denying a for-cause challenge to that juror.

STATEMENT OF RELATED PROCEEDINGS

Montana Supreme Court

State v. Deveraux, No. DA 19-0671 (July 5, 2022).

Montana Twenty-Second Judicial District Court, Carbon County

State v. Deveraux, No. DC 17-01 (Nov. 19, 2019).

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The Montana Supreme Court opinion (Pet.App.1a-24a), is published at 512 P.3d 1198. The Montana district court's decision denying Deveraux's motion for a new trial (Pet.App.25a-50a) is unpublished.

JURISDICTION

The Montana Supreme Court entered judgment on July 5, 2022. Pet.App.1a. On September 16, 2022, Deveraux applied for an extension of time to file a petition for writ of certiorari. Justice Kagan granted that application, extending Deveraux's time to file a petition to and including November 2, 2022. Deveraux timely filed the petition. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to … trial, by an impartial jury ….

U.S. Const. amend. XIV:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

The Sixth Amendment guarantees criminal defendants the right to a trial by "an impartial jury." *United States* v. *Tsarnaev*, 142 S. Ct. 1024, 1034 (2022). Impartial juries, of course, must necessarily be composed of impartial jurors. *See United States* v.

Martinez-Salazar, 528 U.S. 304, 307 (2000) (holding that a "defendant … convicted by a jury on which no biased juror sat, … has not been deprived of any … constitutional right"). Peremptory challenges are used under federal and state law to secure an impartial jury, but they "are not of federal constitutional dimension." *Id.* at 311. Subject to federal constitutional baselines, states have broad authority to regulate the jury selection process. *See, e.g.*, *Rivera* v. *Illinois*, 556 U.S. 148, 152 (2009); *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991); *Ross* v. *Oklahoma*, 487 U.S. 81, 89-90 (1988).

Viewed through Deveraux's frame, this Court's impartial-jury jurisprudence is in disarray. The lack of a square holding that the deprivation of the right to an impartial jury is a structural error has imposed untold costs on lower courts. And in the absence of needed clarity from this Court, state supreme courts and lower federal courts have applied conflicting standards to assess for-cause challenges to prospective jurors, leaving only confusion in their wake. And until this Court steps in, this ever-widening confusion will persist.

But pulling back from Deveraux's framing reveals a far different jurisprudential landscape. On closer examination, many of the purportedly different approaches to assessing for-cause challenges to prospective jurors are nothing more than states doing what the Sixth Amendment and state law have long permitted them to do. Rather than confusion run amok, much of what Deveraux identifies is simply the product of healthy federalism. Even if Deveraux is right that confusion reigns and that Montana's structural

error rule may, at times, fail to weed out biased jurors, it didn't fail to weed one out here. For that reason, his case is a poor vehicle to consider whether Montana's structural error rule violates the Sixth Amendment. This Court should deny the petition.

STATEMENT OF THE CASE

Gene Deveraux and B.J. married in March 2008, and they lived together with three of B.J.'s four minor children. Pet.App.3a ¶ 3. B.J.'s fourth child lived with her father but visited Deveraux's and B.J.'s home from time to time. *See id.*

About a decade later, the State of Montana charged Deveraux with two counts of incest, two counts of sexual intercourse without consent, and one count of felony sexual assault, all against the same child. *Id.* The State also charged Deveraux with one count of sexual intercourse without consent against B.J. *Id.*

Deveraux's alleged conduct against B.J. was grievous. Three years after they were married, B.J. suffered severe injuries after a drunk driver struck her car, leaving her with a broken pelvis, shattered femur, injured spine, and severe nerve damage. *Id.* After the accident, B.J. depended entirely on Deveraux, but Deveraux exploited her dependance for sexual favors. *See id.* Deveraux continued to abuse B.J. until they separated in 2014, *id.*, but B.J. never reached out to law enforcement because she believed her marital status prevented her from seeking charges.

During *voir dire*, the trial court asked the potential jurors if any of them had any "deep-seated is-

sues" or "personal relationships with people" who had dealt with rape or child sexual abuse. Pet.App.4a ¶ 5. Five potential jurors, including R.G., identified themselves. *Id.* ¶¶ 5-6. The trial judge conducted private *voir dire* with each of these potential jurors. *Id.* ¶ 5.

During R.G.'s private *voir dire*, he disclosed that his girlfriend's ex-husband raped her during their marriage. Pet.App.56a. After R.G. explained that his girlfriend had been the victim of marital rape, *id.*, Deveraux's counsel followed up:

> **Stephens:** … [M]y client has been … accused of raping his wife. Is that an issue you think you can overcome and extend to my client the presumption of innocence[?]
>
> **R.G.:** It's an emotional thing that I understand—I know the penalties for things like this are huge.… And I know the hardness of the person coming forward to testify on the stand, how incredibly horrible that would be. And I may have a problem in this area, out of sympathy.
>
> **Stephens:** … If you were my client, would you want you on the jury?
>
> **R.G.:** I don't believe so.

Pet.App.57a. Deveraux's counsel pressed, and R.G. elaborated: "I think to be fair to [Deveraux], I should not be chosen." *Id.* Deveraux moved to dismiss R.G. for cause. *Id.*

The State's attorney followed up on R.G.'s responses, clarifying that R.G. "[found] rape repug-

nant," that he understood that there were laws against rape, and that the law forbids marital rape. Pet.App.58a. Recognizing that there was not a problem with a prospective juror believing that rape is repugnant, the State's attorney clarified:

> **Nixon:** … [C]an you put that aside and basically fulfill your duty as a juror to listen to the judge, to be impartial, and to listen to the testimony of the witnesses?
>
> **R.G.:** I can judge fairly. It's just uncomfortable thing.
>
> * * *
>
> **Nixon:** … My only question is, can you be fair and impartial?
>
> **R.G.:** I can be. I just—well, I'm just like everybody else, I suppose. I just don't like it at all.

Pet.App.58a-59a. Based on R.G.'s testimony, the State objected to Deveraux's motion to excuse for cause. Pet.App.59a.

The Court took the opportunity to address R.G. directly and to reiterate that the primary concern of all parties was whether, given what happened to his girlfriend, R.G. could set all that aside and render a fair and impartial verdict based on the evidence. Pet.App.59a-60a. The Court elaborated:

> **Court:** I do not mean to imply that the answer is yes. Okay? I'm asking you that because both parties deserve the answer.

> … I'm just asking you, given the facts that you dealt with through your friend, whether that is of a magnitude that you do not believe that you can be fair and impartial and base a verdict solely on the evidence here, or whether you think you can put that aside and go ahead and judge this case based on the information and evidence just provided in the courtroom?
>
> **R.G.:** I can judge this case by the evidence provided in the courtroom.

Pet.App.60a. After hearing R.G.'s responses, the Court denied Deveraux's motion to exclude R.G. for cause. *Id.*

Deveraux opted not to use a peremptory challenge against R.G. Instead, he used all six of his peremptory challenges on other prospective jurors—all after the private *voir dire* with R.G. Pet.App.15a ¶ 26, 16a ¶ 28.

The trial court seated R.G. on the jury. The trial lasted five days, and the jury returned a unanimous guilty verdict against Deveraux on all counts. Pet.App.26a.

Following the jury's verdict, Deveraux moved for a new trial, arguing that the trial court committed a structural error, violating his Sixth Amendment right to an impartial jury, when it rejected his for-cause challenge and seated R.G. Pet.App.42a-43a.

The trial court first examined R.G.'s colloquies with Deveraux's counsel, the State's counsel, and the court, to determine if they revealed any improper bias. Pet.App.29a-35a. But it determined that R.G.'s

statements showed "more about [his] distaste for sexually motivated offenses tha[n] a true inability to fairly weigh the evidence." Pet.App.35a. The trial court also rejected Deveraux's arguments that the State's counsel improperly rehabilitated R.G. and that R.G.'s statements failed to show his ability to be impartial. *See* Pet.App.35a-40a. The trial court thus concluded that Deveraux's for-cause challenge to R.G. was properly denied. Pet.App.40a.

The court then analyzed the rest of Deveraux's structural error claim, under the Montana Supreme Court's test in *State* v. *Good*, 43 P.3d 948 (Mont. 2002). *See* Pet.App.40a. That test finds structural error if: "(1) a district court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the defendant uses one of his or her peremptory challenges to remove the disputed juror; and (3) the defendant exhausts all of his or her peremptory challenges." *Good*, 43 P.3d at 960. Having already found that the trial court didn't abuse its discretion by denying Deveraux's for-cause challenge to R.G., the court explained that Deveraux's failure to use a peremptory challenge to remove R.G. was an alternative basis for denying his motion. Pet.App.40a-43a.

Deveraux appealed to the Montana Supreme Court, arguing in relevant part that the trial court erred by denying his motion to exclude R.G. for cause. Pet.8-9. Relying on Montana law, Deveraux argued that the trial court's denial of his for-cause challenge was an abuse of discretion, and he further claimed that seating a biased juror was a structural error that required reversal, *id.*, even though he

didn't use one of his remaining peremptory challenges to remove R.G.

Recognizing that both the federal and Montana constitutions safeguard the right to an impartial jury, the Montana Supreme Court grounded its review of Deveraux's challenge to the trial court's for-cause ruling in state law. *See* Pet.App.14a ¶ 24 (explaining that a defendant may "challenge a prospective juror for cause if the juror manifests" indication of bias "that would prevent the juror from acting with entire impartiality" (citing *State* v. *Johnson*, 437 P.3d 147, 150 (Mont. 2019))); *see also* Mont. Code Ann. § 46-16-115(j). And because Deveraux framed the issue as a structural error requiring automatic reversal, the Court reviewed *Good*'s three-factor structural error test: (1) erroneous denial of for-cause challenge to a prospective juror; (2) defendant uses a peremptory challenge to remove disputed juror; and (3) defendant exhausts all peremptory challenges. Pet.App.14a ¶ 25 (quoting *Good*, 43 P.3d at 960).

Deveraux didn't use a peremptory challenge against R.G., so the Montana Supreme Court held that he failed to satisfy part two of the *Good* analysis. Pet.App.14a ¶ 26, 16a ¶ 28. Deveraux argued that two of the Court's earlier decisions allowed it to consider his structural error claim despite his failure to use a peremptory challenge on R.G., but the Court was not persuaded. *See* Pet.App.15a-16a ¶¶ 26-27. It found that Deveraux failed to explain why, when he had peremptory challenges available to remove R.G., he "was compelled to use his peremptory challenges on other less desirable individuals." Pet.App.16a ¶ 28. And Deveraux only explained the

need to remove four of the six individuals he removed, so he didn't show that he was unable to use one on R.G. *Id.* The Court thus denied Deveraux's structural error claim. *Id.*

REASONS FOR DENYING THE PETITION

I. Deveraux's petition is a poor vehicle for determining whether seating a biased juror is structural error requiring reversal.

Deveraux argues that his case provides this Court the chance to hold what it has, to date, only implied: "[When] a trial court erroneously denies a defendant's for cause challenge, and a biased juror is consequently seated, the error 'require[s] reversal.'" Pet.10 (quoting *Skilling* v. *United States*, 561 U.S. 358, 395-96 (2010)). And he further argues that his case provides an "ideal opportunity" to constitutionalize this Court's dicta in *Martinez-Salazar*, *see* Pet.27—that is, that the Sixth Amendment safeguards a defendant's "choice" either "to stand on his objection to the erroneous denial of the challenge for cause or to use a peremptory challenge to effect an instantaneous cure of the error," *see* 528 U.S. at 316.

Even assuming that Deveraux's proposed rules are securely grounded in the Sixth Amendment's text and history, his case presents a poor vehicle to resolve the question presented for at least two reasons.

First, the record provides no basis for finding that the trial court erroneously denied Deveraux's for-cause challenge and seated a biased juror, especially given the broad deference afforded to trial court judge's during the jury selection process. *See, e.g.*, *Skilling*, 561 U.S. at 386. Without that critical

piece—the presence of a biased juror on the jury, or a credible basis for believing the trial court's ruling was erroneous—this Court's review is unnecessary.

Second, this Court's existing cases broadly support states' right to require defendants to use peremptory challenges to preserve an impartial-jury challenge. *See, e.g.*, *Ross*, 487 U.S. at 89-90. Even if Montana's structural error rule, as Deveraux argues, raises constitutional concerns in specific applications, Deveraux's case doesn't raise those concerns. He doesn't argue, for instance, that he exhausted his peremptory challenges and was unable to use one to excuse a biased juror who was ultimately seated on his jury. Instead, when his for-cause challenge was denied, he opted not to use an available peremptory challenge on the disputed juror.

Montana's courts fairly considered Deveraux's impartial jury claim and rendered a decision under Montana law that did no violence to his rights under the Sixth Amendment to the United States Constitution. This Court should deny the petition.

A. There is no basis in the record for finding that the trial court seated a biased juror.

Trial courts safeguard criminal defendants' right to an impartial jury "by ensuring that jurors have 'no bias or prejudice that would prevent them from returning a verdict according to the law and evidence.'" *Tsarnaev*, 142 S. Ct. at 1034 (quoting *Connors* v. *United States*, 158 U.S. 408, 413 (1895)).

Jury selection falls squarely "'within the province of the trial judge.'" *Skilling*, 561 U.S. at 386 (quoting *Ristaino* v. *Ross*, 424 U.S. 589, 594-95 (1976)). That's

because, unlike "the cold transcript received by the appellate court," "in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing" a "prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Id.* A trial court's discretion extends to the nature and breadth of the questions it poses to prospective jurors. *Tsarnaev*, 142 S. Ct. at 1034; *see also Skilling*, 561 U.S. at 386 ("No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*.").

A criminal defendant's Sixth Amendment right to an impartial jury is not violated unless a "member of the jury as finally composed was removable for cause." *Rivera*, 556 U.S. at 158. A prospective juror who shows indications of actual bias is removable for cause only if the prospective juror is unable to convince the trial court judge that he "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *See Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961). Prospective jurors challenged on the basis of implied bias—such as when existing relationships or prior conduct suggests juror partiality—are removable for cause only if the challenger shows the existence of actual bias. *Smith* v. *Phillips*, 455 U.S. 209, 215-16 (1982) ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). Actual bias, then, is the touchstone for Sixth Amendment impartial jury violations.[1]

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[1] Justice O'Connor argued in a separate opinion that "some extreme situations"—such an when a juror is an employee of the prosecuting agency, a close relative of witness or defendant, or a witness or participant in the criminal transaction—may war-

Appellate courts may disturb a trial court's finding of juror impartiality only for "manifest error." *Skilling*, 561 U.S. at 396 (quoting *Mu'Min* v. *Virginia*, 500 U.S. 415, 428 (1991)); Pet.App.12a ¶ 19 (reviewing denial of for-cause to challenge to remove prospective juror for an abuse of discretion). And in Montana, a trial court's denial of a for-cause challenge is only an abuse of discretion if "a prospective juror's statements during voir dire raise serious doubts about the juror's ability to be fair and impartial or actual bias is discovered." Pet.App.12a ¶ 19.

Nothing in the record suggests that the trial judge's denial of Deveraux's for-cause challenge to R.G. was "manifest error." During *voir dire*, R.G. indicated, in response to a question of all prospective jurors, that he had prior experience with sexual assault. Pet.App.53-55a. When Deveraux's counsel asked all the prospective jurors who had such experience whether they preferred further examination in open court or in chambers, R.G. (and others) said they preferred to continue in chambers. Pet.App.53-55a. Once in chambers, R.G. said that his significant other had personal experience with similar sexual assault, and he said that he "may have a problem in this area, out of sympathy." When Deveraux's counsel asked R.G. if he thought Deveraux would want him on the jury, he candidly answered: "I don't think

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rant a "conclusive presumption of implied bias." *Phillips*, 455 U.S. at 222-23 (O'Connor, J., concurring). Even if a prospective juror's implied bias requires a court in some cases to disqualify that juror, as some federal circuits have held, *see United States* v. *Mitchell*, 690 F.3d 137, 144 (3d Cir. 2012) (collecting cases), no claim of implied bias is raised here.

so … I think to be fair to [Deveraux], I should not be chosen." Pet.App.57a.

To rehabilitate R.G., both the State and the trial judge followed up to determine if he could set aside his feelings about Deveraux's alleged conduct and impartially consider the evidence. In response to the State's questions, R.G. did just that, saying "I can judge fairly. It's just an uncomfortable thing," and "I can be [fair and impartial] …. I'm just like everybody else, I suppose. I just don't like it at all." Pet.App.59a. The trial judge also followed up with R.G. to see if he could set aside his personal feelings and render a verdict based solely on the evidence:

> **Court:** … I do not mean to imply that the answer is yes. Okay? I'm asking you that because both parties deserve that answer.
>
> **…** I'm just asking you, given the facts that you dealt with through your friend, whether that is of a magnitude that you do not believe that you can be fair and impartial and base a verdict solely on the evidence here, or whether you think you can put that aside and go ahead and judge this case based on the information and evidence just provided in that courtroom?
>
> **R.G.:** I can judge this case by the evidence provided in the courtroom.

Pet.App.60a.

Nothing in the cold transcript suggests that the trial court's ruling was a "manifest error." *Skilling*, 561 U.S. at 396 (quoting *Mu'Min*, 500 U.S. at 428). That ruling warrants deference in light of the trial

court's ability to observe R.G.'s "inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Id.* at 386. Nor do R.G.'s concerns with Deveraux's alleged conduct necessarily undermine his impartiality, as long as the court was satisfied that he could lay aside his personal opinions and render an impartial verdict. *Id.* at 398-99 (explaining that "[j]urors … need not enter the box with empty heads in order to determine the facts impartially"). If prospective jurors are categorically biased simply because they have serious misgivings about a defendant's alleged criminal conduct, then "few trials would be constitutionally acceptable." *Phillips*, 455 U.S. at 217. R.G. satisfied the trial court that he could "lay aside his impression or opinion and render a verdict based on the evidence in the record," *Irvin*, 366 U.S. at 723, and no cause exists in the record to disturb that finding.

Deveraux argues that the Montana Supreme Court sidestepped this issue, ruling only on the exhaustion prong of Montana's structural error test, because it necessarily disagreed with the trial court's for-cause finding. Pet.24a-25a. But the Montana Supreme Court's silence on whether the trial court's for-cause ruling was erroneous was just that, silence. Deveraux failed to use a peremptory challenge, so it had no need, under Montana law, to address the trial court's for-cause ruling. Pet.App.13a-15a. To reach the question presented here—whether the presence of a biased juror is a structural error requiring reversal—the issue of R.G.'s bias must be resolved first. Given this Court's oft-repeated admonition that it is "a court of review, not of first view," *Manuel* v. *Joliet*, 580 U.S. 357, 372 (2017) (quotation omitted), the

Montana Supreme Court's silence on this issue cuts in favor of denying the petition. But even if this Court's hands aren't so tied, the record adequately supports the trial court's finding that R.G. was impartial. Either way, Deveraux's case is a poor vehicle and his petition should be denied.

B. State laws requiring defendants to exhaust peremptory challenges to preserve claims of juror bias are constitutional.

1. Nothing in this Court's Sixth Amendment jurisprudence forbids states from requiring defendants to preserve a claim that a trial court erroneously denied a for-cause challenge to a juror by using an available peremptory challenge to remove that juror.

Start with *Ross* v. *Oklahoma*. This Court found "nothing arbitrary or irrational" about Oklahoma's statutory requirement that an erroneous for-cause denial "is grounds for reversal only if the defendant exhausts all peremptory challenges" and a biased juror is seated. 487 U.S. at 89-90. *Ross* explained that "the concept of a peremptory challenge as a totally freewheeling right unconstrained by any procedural requirement [was] difficult to imagine." *Id.* at 90.

A few years later, in *Mu'Min* v. *Virginia*, this Court considered its authority to supervise *voir dire* in federal and state criminal trials. *See* 500 U.S. at 422. It explained that for cases "tried in state courts," the Court's "authority is limited to enforcing the commands of the United States Constitution." *Id.* Absent concerns of racial prejudice, for which the Fourteenth Amendment may require further inquiry,

state trial courts retain substantial latitude in deciding how to conduct *voir dire*. *Id.* at 424.

Next, in *United States* v. *Martinez-Salazar*, this Court considered whether Federal Rule of Criminal Procedure 24(b) imposed a similar exhaustion requirement as the Oklahoma statute in *Ross*. 528 U.S. at 314-15. But this Court declined to read a similar requirement into Rule 24(b) because nothing in the rule or in the cases applying it required a similar exhaustion requirement under federal law. *See id.* Indeed, the only permissible "control over a federal criminal defendant's choice of whom to challenge peremptorily" that the Court found was the Equal Protection Clause's prohibition on peremptorily removing potential jurors "solely on the basis of the juror's gender, ethnic origin, or race." *Id.* at 315 (citing *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994), *Hernandez* v. *New York*, 500 U.S. 352 (1991), and *Batson* v. *Kentucky*, 476 U.S. 79 (1986)).

And, finally, in *Rivera* v. *Illinois*, this Court explained that "[j]ust as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge." 556 U.S. at 152. Because a state's provision of peremptory challenges is a "benefit beyond the minimum requirements of fair jury selection," *id.* at 157-58 (cleaned up), the state "retain[s] discretion to design and implement their own systems," *id.* at 158.

2. Fairly read, this Court's cases permit states, consonant with the Sixth Amendment, to require a defendant to exhaust his peremptory challenges to preserve a claim that his for-cause challenge was er-

roneously denied. But even if these cases are read more narrowly to permit states to require exhaustion only when a defendant has available peremptory challenges, Deveraux's case is still a poor vehicle for review.

When Deveraux's for-cause challenge to R.G. was denied, he still had his full allotment of peremptory challenges at his disposal, but he opted not to use one on R.G. Pet.App.15a ¶ 26, 16a ¶ 28. At a minimum, Deveraux retained two peremptory challenges that he could have used to remove R.G., but he used them instead to remove two other jurors, neither of whom had been challenged for cause. Pet.App.16a ¶ 28.

Because this Court's cases provide that the Sixth Amendment impartial jury right is not offended by exhaustion requirements similar to that in *Ross*, Deveraux's case would be a far better vehicle if he had exhausted all six peremptory challenges on other for-cause denials and had none left to use on R.G. In that hypothetical case, Deveraux may have been unable to cure the trial court's error, and thus left with a biased juror. But this is not that case.

3. Deveraux's proposed rule would, of course, cast much of this aside. If a trial court erroneously denies a for-cause challenge and seats a biased juror, it commits structural error and an appellate court must reverse. Pet.10 (quoting *Skilling*, 561 U.S. at 395-96). And if a defendant, like Deveraux, stands on his objection rather than curing a trial court's error, the result is the same: the appellate court must reverse. Pet.27 (quoting *Martinez-Salazar*, 528 U.S. at 316).

Without question, seating a biased juror can work a grave injustice, but jury selection decisions "are fast paced, made on the spot and under pressure," and "often between shades of gray." *Id.* States and the federal government provide peremptory challenges, not because of any constitutional requirement, but to secure to defendants an impartial jury. *See id.* at 311. And to date, this Court has found "nothing arbitrary or irrational" with state laws that qualify the grant of peremptory challenges with "the requirement that the defendant must use those challenges to cure erroneous refusals by the trial court to excuse jurors for cause." *Ross*, 487 U.S. at 90.

Little imagination is needed to see the potential for abuse with Deveraux's proposed rule. Justice Scalia, writing separately in *Martinez-Salazar*, expressed concern with allowing a defendant to "object[] on appeal to the seating of a juror he was entirely able to prevent." *See* 528 U.S. at 318 (Scalia, J., concurring). He explained that it wouldn't be "easy to overturn a conviction where, to take an extreme example, a defendant had plenty of peremptories left but chose instead to allow to be placed upon the jury a person to whom he had registered an objection for cause, and whose presence he believed would nullify any conviction." *Id.* at 318-19; *see People* v. *Abu-Nantambu-El*, 454 P.3d 1044, 1054 ¶ 51 (Colo. 2019) (Samour, J., dissenting) (finding the majority's lack of concern over "gamesmanship" as "little more than whistling past the graveyard").

But even if Deveraux's proposed rule has merit, his case presents a poor vehicle to test it. As discussed already, his claim that the trial court errone-

ously denied his motion to exclude R.G. rests on a broken reed. And given the potential for abuse outlined above, the better course is to wait for a vehicle without the deficiencies present here.

II. Deveraux's report of a split among state supreme courts and lower federal courts is greatly exaggerated.

1. When supervising the *voir dire* requirements of cases tried in state courts, this Court's "authority is limited to enforcing the commands of the United States Constitution." *Mu'Min*, 500 U.S. at 422. States may withhold peremptory challenges "altogether without impairing the constitutional guarantee of an impartial jury." *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992). They may also provide *more* protection in their criminal justice systems than the federal constitution demands. *California* v. *Ramos*, 463 U.S. 992, 1013-14 (1983). So, even though this Court has never held that seating a biased juror over the erroneous denial of a for-cause challenge is structural error, *see* Pet.10, states may no doubt create such rules as a matter of state law.

Many of the state cases Deveraux relies on (at 18a-20a) to allegedly highlight one side of the "already-troubling split" ground their structural error rule, at least in part, in state law. *State* v. *Carrera*, 517 P.3d 440, 461-62 (Utah Ct. App. 2022); *Ries* v. *State*, 920 N.W.2d 620, 636 (Minn. 2018); *Commonwealth* v. *Hampton*, 928 N.E.2d 917, 927 (Mass. 2010); *Johnson* v. *United States*, 701 A.2d 1085, 1089-90 (D.C. Ct. App. 1997); *see also State* v. *Gesch*, 482 N.W.2d 99, 100 (Wis. 1992) (grounding structural error rule in federal and state constitution). But

states do not need this Court's blessing to authorize this practice because it's "elementary" that they may provide more protection than what the federal constitution requires. *Ramos*, 463 U.S. 992, 1013-14.

This Court's cases also suggest that states may require defendants to use peremptory challenges to preserve an impartial-jury claim. *Ross*, 487 U.S. at 89 ("[States may require] a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror."); *see also Ries*, 920 N.W.2d at 635 ("To be sure, if we wanted to create such a forfeiture rule, we could have done so in the text of … Minn. R. Crim. P. 26.02."). Both Montana's and Texas's structural error rules deploy some version of a *Ross*-like forfeiture rule. Pet.15a-18a.

The so-called "deepen[ing] split" that Deveraux identifies, *see* Pet.21, is whether a state's forfeiture rule violates the Sixth Amendment if it results in the seating of a biased juror. That some states, like perhaps Colorado or Wisconsin, provide greater protection than the federal constitution demands, while others provide only what it requires, is a healthy outworking of our federalism. So, the purportedly deepening split Deveraux identifies, it turns out, is little more than a fissure. And here, Deveraux's for-cause challenge to R.G. was not erroneous, *see supra* Sect. I.A., so the split he identifies does nothing to help his case.

2. Deveraux argues that confusion over whether seating biased jurors is structural error plagues federal jurists as well. Pet.21. But much of that confu-

sion rests instead on the doorstep of either this Court's decision in *Weaver* v. *Massachusetts*, 137 S. Ct. 1899 (2017) or in the context of petitions for federal habeas relief under 28 U.S.C. § 2254.

Weaver involved the question whether a defendant must demonstrate prejudice when "a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel." 137 S. Ct. at 1907. Departing from its existing trial-error or structural-error approach, *Weaver* identified three broad rationales for determining when errors are structural. *Id.* at 1908; *see also Arizona* v. *Fulminante*, 499 U.S. 279, 309-10 (1991) (classifying errors as "trial errors" or "structural defects"). And it explained that "[a]n error can count as structural even if the error *does not lead to fundamental unfairness in every case*." *Weaver*, 137 S. Ct. at 1208 (emphasis added). Not only that, but *Weaver* also explained that even though the Sixth Amendment public trial right at issue there "is structural, it is subject to exceptions"—so at least *that* structural error does not always entitle a defendant to a new trial. *See id.* at 1910-11. Finally, the Court suggested that its decision may rest on the difference of a structural error "preserved and then raised on direct review" and the same error "raised as an ineffective assistance of counsel claim." *See id.* at 1912.

Many of the federal cases Deveraux cites trace their confusion, directly or indirectly, to this Court's decision in *Weaver*. *See, e.g.*, *Canfield* v. *Lumpkin*, 998 F.3d 242, 249 n.25 (5th Cir. 2021) (explaining that *Weaver* left open "the question regarding whether, when a structural error is first identified through

an ineffective-assistance-of-counsel claim instead of on direct appeal," a petitioner must show prejudice); *Austin* v. *Davis*, 876 F.3d 757, 804 n.33 (5th Cir. 2017) (Owen, J., concurring) ("The Supreme Court's listing of 'structural errors' that require automatic reversal do not include jury bias, either when it is raised in a direct appeal or in habeas proceedings." (citing *Weaver*, 137 S. Ct. at 1907-09, 1911)). Not only that, but many of these cases involve ineffective-assistance-of-counsel claims on collateral review, which raise different issues under *Weaver* and involve the heightened procedural requirements of federal habeas review. *See, e.g.*, *Canfield*, 998 F.3d at 246 (explaining that 28 U.S.C. § 2254(d) raises the already high bar for ineffective assistance of counsel claims on federal habeas review); *Thomas* v. *Lumpkin*, 995 F.3d 432, 444-46 (5th Cir. 2021) (reviewing an ineffective-assistance-of-counsel claim under "AEDPA deference"). Even though these cases touch on the scope of structural errors, they do so in a procedural posture that is worlds apart from this case, which limits the opportunities for apples-to-apples comparisons.

Even the federal cases that arise in a similar procedural posture as Deveraux's case provide limited guidance. *See Mu'Min*, 500 U.S. at 424 (recognizing that federal courts "enjoy more latitude in setting standards for *voir dire* in federal courts" than they do when "interpreting the provisions of the Fourteenth Amendment with respect to *voir dire* in state courts"). To be sure, Deveraux is right that both *United States* v. *Mitchell*, 690 F.3d 137, 147-48 (3d Cir. 2012), and *United States* v. *Nelson*, 277 F.3d 164, 204 (2d Cir. 2002)—direct appeals involving pre-

served impartial-jury claims—require automatic reversal when a biased juror sits on a jury, *see* Pet.22a, but it's really beside the point. These cases have nothing to say about the question presented here—whether state forfeiture rules are consonant with the Sixth Amendment.

3. Deveraux argues that "[i]n the absence of clear guidance from this Court," state courts have taken irreconcilable positions on whether the erroneous denial of a for-cause challenge is structure error, and federal courts languish in confusion. Pet.14a-24a. But the reality on the ground is not so dire.

State courts have long retained discretion to impose forfeiture rules, like those in *Ross*, or to require reversal any time a for-cause challenge is erroneously denied, preserved or not. These differences are not, of themselves, troubling; they are the byproduct of healthy federalism. Not only that, but many of the cases Deveraux relies on ground their more protective rules in state law, which only reinforces that the so-called "split" he identifies raises no urgent issue for this Court's review. And the concerns with seating biased jurors are not present here, because the juror he challenged, R.G., wasn't biased.

Much of the "confusion" among federal jurists that Deveraux points to concerns downstream consequences of this Court's decision in *Weaver* or in ineffective-assistance-of-counsel claims on direct or collateral review. But that confusion has little salience here, where the Court is asked to review whether a state forfeiture rule complies with the Sixth Amendment. And because this Court's supervisory authority over state laws defining the parameters of the jury

selection process is more limited, many of the federal cases Deveraux relies on have little purchase here.

CONCLUSION

For the reasons set forth above, this Court should deny the petition.

Respectfully submitted,

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