No. 24-513

IN THE

Supreme Court of the United States

DARRYL CARTER, ET AL.,

Petitioners,

—v.—

JAMES E. STEWART, SR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF CADDO PARISH, LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

ALLISON A. JONES
Counsel of Record
MARCUS D. SANDIFER
DOWNER, JONES, MARINO & WILHITE
401 Market Street, Suite 1250
Shreveport, Louisiana 71101
(318) 213-4444
ajones@dhw-law.com

Counsel for Respondent

QUESTION PRESENTED

Petitioners Carter, Johnson, and Hawthrone were each excluded from jury service by use of a peremptory challenge by one of Respondent's Assistant District Attorneys. All were struck for reasons that would or did survive a *Batson* challenge and were not motivated by race. Specifically, Petitioner Carter expressed bias against evidence from police officers. Petitioner Johnson had a family member convicted of a felony and expressed bias against police officers. Petitioner Hawthorne expressed bias against the presumption of innocence of the criminal defendant. Still, Petitioners now claim they were excluded from jury service based upon a custom or practice of Respondent from excluding otherwise qualified jurors on account of their race. The question presented is whether Petitioners may maintain a cause of action under *Powers v. Ohio* when Respondent had a racially neutral reason for striking each Petitioner from jury service?

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STATEMENT OF THE CASE

On November 21, 2015, the citizens of Caddo Parish, Louisiana, elected their first Black District Attorney, James E. Stewart, Jr. Two days prior, this matter was filed.[1] Thereafter, on April 21, 2016, the Third Amended Complaint—the operative complaint in this matter—was filed, adding Petitioners Darryl Carter, Diane Johnson, and Therasa Hawthorne in this matter.[2]

The current posture of this case concerns only three potential jurors, Petitioners. Although Petitioners, and other now-dismissed plaintiffs, originally sought to completely eliminate the District Attorney's use of peremptory strikes in criminal proceedings, the only requests for relief which remain are nominal damages based upon Petitioners being peremptorily struck from jury service in the state criminal proceedings in two cases: (1) *State of Louisiana v. Odums*, a second-degree murder trial which began on April 20, 2015; and (2) *State v. Carter,* an illegal possession of a firearm trial, which began on June 15, 2015.[3] A review of the record of both of those cases establishes that each Petitioner was removed from the jury following *voir dire* via preemptory strike based upon racially-neutral reasons.

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[1] ROA.35.

[2] ROA.173. A fourth plaintiff, Kimberly Horton, was also added, but she was later dismissed due to failure to prosecute her claims. ROA.1931.

[3] ROA.191-92, ROA.2072.

I. Petitioners Carter and Johnson were removed from jury selection via peremptory strike after expressing problematic views on police and the burden of proof.

In *Odums*, Petitioners Carter and Johnson were removed from the jury following *voir dire* via peremptory strike from Jason Brown, an assistant district attorney employed by Respondent (an "ADA"). When Johnson recounted her time being questioned in *voir dire*, she stated that she did not think race played a serious factor in her non-selection.[4] She considered being called for jury service to be a positive experience despite not sitting on the jury.[5] Johnson disclosed on her jury questionnaire that she had a close family member convicted of a felony, and during *voir dire*, she showed a bias against the police department in her soliloquies with counsel.[6] Considering the weight of the evidence of anti-prosecution bias, Jason Brown exercised a peremptory challenge to remove Johnson from the jury.[7]

Petitioner Carter likewise showed bias against the police during the *voir dire* in *Odums*. Trial notes by Jason Brown showed that Carter indicated that he would not trust evidence that came from the Police Department in Shreveport, Louisiana.[8] Additionally, during *voir dire*, Carter struggled with understanding the burden of proof in the criminal proceeding; in

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[4] ROA.2325.

[5] ROA.2326.

[6] ROA.2271-76.

[7] ROA.2026.

[8] ROA.2290-91.

particular, he struggled with differentiating between proving every element beyond a reasonable doubt and the State needing to prove every fact beyond a reasonable doubt.[9] Carter also indicated that he may know the criminal defendant charged with second-degree murder.[10] Carter would later testify he took issue with being asked whether he knew the criminal defendant, stating that he felt singled out by the question.[11] But the ADA, Jason Brown, testified that he asked every juror on every jury panel this question.[12] Considering the weight of the evidence of bias that Petitioner Carter had against the prosecution, Jason Brown exercised a peremptory strike to remove him from the jury.[13]

At the conclusion of jury selection in the *Odums* case, counsel for the criminal defendant filed a *Batson* challenge.[14] The final composition of the fourteen-person jury (twelve jurors and two alternates) was seven white jurors to five non-white jurors.[15] The

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[9] ROA.2282-84.

[10] ROA.2283-84.

[11] ROA.2308-09.

[12] ROA.2285. This fact was further confirmed by the transcript from the first day of jury selection which shows the ADA asking this same question to a different *voir dire* panel. ROA.2284. The transcript of the second day of jury selection, when Petitioners Carter and Johnson were struck, were not available to either party as the court report for the matter could not be located and is possibly deceased. ROA.1112. This fact was confirmed by Sharon Porter, assistant Judicial Administrator of the First Judicial District Court of Louisiana, who is in charge of managing court reports and ordering transcripts for criminal proceedings. ROA.1111.

[13] ROA.2294-95.

[14] ROA.2296.

[15] ROA,2300-03.

prosecution used seven of their twelve peremptory challenges.[16] The trial court did not find a *prime facie* showing of discrimination had been made by the criminal defendant and denied the *Batson* challenge at the first step.[17]

II. Petitioner Hawthorne was removed from jury selection via peremptory strike after expressing opinions contrary to the presumption of innocence for criminal defendants.

In *Carter,* Petitioner Hawthorne was removed from the jury via peremptory strike. Petitioner Hawthorne did not believe that race played a role in her exclusion from jury service.[18] Petitioner Hawthorne stated that she had no evidence that any interaction in the courtroom would lead her to believe she was struck from jury selection because of her race.[19] During *voir dire*, Hawthorne expressed problematic views that she could not accept the presumption of innocence of the criminal defendant. Specifically, Hawthorne stated that the criminal defendant must be in court because of something he did something wrong or because the police have proof that he did something wrong.[20] The ADA in the *Carter* case admitted that this may seem like a pro-prosecution answer from a potential jury member, but the ADA believed such an answer may taint a conviction;[21]

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[16] ROA.2300-03.

[17] ROA.2299.

[18] ROA.2187.

[19] ROA.2188.

[20] ROA.2195-97.

[21] ROA.2195-97.

therefore, the ADA exercised a peremptory strike against Hawthorne.

No *Batson* challenge was filed in *Carter*. The final jury composition was majority Black with four Black jurors and two white jurors.[22] The State had three unused peremptory challenges when the majority Black jury was seated.

III. Petitioners sought to prove their case by the introduction of non-specific evidence to Petitioners' removal from jury selection, but the District Court and Fifth Circuit rejected Petitioners' arguments.

Seemingly ignoring the idiosyncrasies of jury selection, Petitioners sought to bolster their claims with an *in globo* study of juror removal in Caddo Parish (the "Diamond-Kaiser Report").[23] The Diamond-Kaiser Report is a bald evaluation of the number of peremptory strikes used against potential Black jurors in Caddo Parish compared to the number of strikes used against non-Black potential jurors. The study contains some analysis of race and gender at the macro-level, but it lacks evaluation of the particulars of jury selection as the study provided no unique insight into the specific removal of Petitioners.[24] Dr. Diamond and Dr. Kaiser confirmed that they did not specifically review the case files from the cases in which Petitioners were struck.[25] While the Diamond-Kaiser Report suggests an

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[22] ROA.1988.89.

[23] ROA.4389.

[24] ROA.,2691, ROA.2683.

[25] ROA.4547 (Dr. Diamond). ROA.4727-29 (Dr. Kaiser).

elevated number of Black potential jurors were removed from the jury venire via peremptory strikes, it does not show that race was the moving force behind the elevated removal number or that removal was not justified in specific instances, such as the *Carter* case and the *Odums* case. For these and other reasons, Respondents moved to exclude the report.[26]

The District Court and Fifth Circuit both agreed with Respondent that the Diamond-Kaiser Report was not helpful to the Courts' analysis, finding "[t]he study critically omits any controls for individual reasons a juror might be excused" and "shows only general numbers, with no nuance to tell us whether the struck jurors shared characteristics other than race with Plaintiffs—characteristics (like bias) that might provide a race-neutral basis for a peremptory strike."[27]

In addition to the universally-rejected Diamond-Kaiser Report, Petitioners also submitted declarations from a former prosecutor who separated employment five (5) years before the *Odums* and *Carter* cases, a now-suspended local defense attorney, an unsworn and out of court statement from a prosecutor discussing a case from the 1980s, and an unsworn campaign letter from Respondent before he took office. Respondent also moved to strike the foregoing, which motion was granted by the District Court and undisturbed by the Fifth Circuit.[28] After rejecting the Diamond-Kaiser Report and other evidence submitted by Petitioners, the Fifth Circuit affirmed the District Court's finding that summary

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[26] ROA.6372.

[27] Pet. App. 6a. (parenthetical in original).

[28] *Pet. App.* 19a.

judgment was appropriate in favor of Respondents. In particular, the courts found that Petitioners had not come forth with adequate summary judgment evidence to support their claims.

REASONS FOR DENYING CERTIORARI

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED BY PETITIONERS AND PETITIONERS OBJECT ONLY TO AN ALLEGED MISAPPLICATION OF SETTLED LAW.

Petitioners present two questions for review by this Court. The first question, whether a cause of action exists for Petitioners, was squarely answered by this Court in *Powers v. Ohio*, 499 U.S. 400 (1991) and has not been actually disputed by any lower court. The second question, whether the summary judgment standard governs causes of actions under *Powers*, has also not been disputed by any lower court as all applied the normal summary judgment standard. Neither question was disputed by Respondent. Even if this Court were to answer both questions in Petitioners' favor, the outcome of this matter would not be changed because the lower courts appropriately applied settled law principles.

A. This Court's decision in *Powers* is settled law that was appropriately applied by the District Court and the Fifth Circuit.

Although the cause of action suggested by *Powers* rarely makes an appearance, there is no dispute that a cause of action exists for jurors who were excluded from jury service on racially discriminatory grounds, either in their own right under *Powers* or via third-party standing under *Batson*.[29] Neither the Courts

[29] *Batson v. Kentucky*, 476 U.S. 79 (1986).

below nor any other Court of Appeals has upset or interpreted this Court's jurisprudence to the contrary. The holding by this Court in *Powers* now seems matter-of-fact: "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race." *Powers*, 499 U.S. at 402. In this case, Petitioners simply failed to meet their burden of proof that racial discrimination occurred.

Indeed, this Court acknowledged in *Powers* that such a cause of action for a non-selected juror would be rare and difficult to prove. *Id.* at 414. This case is illustrative. Petitioners have deposed each ADA in the *Odums* and *Carter* cases, deposed other ADAs on the topics of training of prosecutors and recordkeeping, deposed the current and former District Attorneys for Caddo Parish, sought a decade and a half's worth of records from Respondent's office, and have spent years attempting to prove a case of racial discrimination. Yet, no racial discrimination can be shown because the fact remains that each Petitioner displayed traits in jury selection, unrelated to their race, which the prosecution concluded made them poor candidates to sit on a criminal jury. These traits were shown through the uncontradicted testimony of the ADAs making the peremptory strikes, and their contemporaneous notes from the criminal trials. By example, ADA Brown was a voracious notetaker, fully documenting the jury selection process. He found no fewer than four reasons to strike Petitioner Carter and multiple reasons to strike Petitioner Johnson. Despite his well-supported reasons for exercising a peremptory challenge, this case has entered its ninth year of litigation, pending certiorari from this Court. Still, at no point was *Powers* questioned.

B. Petitioners' true complaint is the lower court's application of the summary judgment standard, which is not worthy of this Court's review as it entails an utterly routine application of settled law.

At the heart of Petitioners' dispute with the lower courts' ruling is a perceived misapplication of the summary judgment standard. This is not a worthy reason for this Court to grant review.[30] Petitioners cited to *Tolan v. Cotton*, 572 U.S. 650 (2014), which was the rare case where this Court considered the misapplication of the appropriately stated standard of review. Even then, Justice Alito expressed skepticism that such review was the best use of this Court's limited resources. *See, Tolan*, 572 U.S. at 661 (Alito, J., concurring). Review of this nature is "utterly routine" in the court of appeals. *Id*.

Throughout the Petition, Petitioners assert that the lower courts "weighed" evidence in evaluating the Diamond-Kaiser Report.[31] In truth, the lower courts correctly reviewed the purported expert report and determined it would not be helpful to determining the merits in this case regarding whether the Petitioners were the victim of discriminatory non-selection. The lower courts reached such a conclusion because it was stipulated that the Diamond-Kaiser Report did not

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[30] Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of…the misapplication of a properly stated rule of law."); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice §5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari")

[31] Pet. App. 35.

address Petitioners—the particular struck jurors bringing claims—nor did it ever consider the specific reasons each Petitioner was not-selected.[32] Petitioners asked the lower courts to draw tenuous inferences in their favor in order to overcome summary judgment.[33] However, the lower courts found that such inferences were not appropriate in the face of concrete evidence to the contrary—specifically that each ADA had multiple, articulated race-neutral reasons for striking each Petitioner.

The lower courts appropriately applied the summary judgment standard, finding that there was not a disputed fact, and that Petitioners did not establish a predicate constitutional violation. Even so, if the lower courts may have erred, such an error should not invoke this Court's review as application of the summary judgment standard is utterly routine.

II. THE PETITION PRESENTS A FACT-BOUND DISPUTE AND IS A POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

A. Petitioners' chief argument to this Court is a factbound dispute concerning the lower court ruling on Respondent's motion in limine to exclude statistical data which is not worthy of review by this Court.

Petitioners dispute the District Court's suppression of statistical data, which the District Court found was not helpful to the determination of this matter. To

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[32] Pet. App. 6a.

[33] Pet. App. 32-34.

squarely rule, this Court would have to adjudicate and reverse certain motions to strike the statistical report and other summary judgment submissions, granted by the District Court and affirmed on appeal.[34]

The centerpiece of Petitioners' *Powers* claim is a statistical study purporting to show an elevated number of peremptory strikes against potential Black jurors compared to potential white jurors. Petitioners' claims would lead a reader to believe that countless *Batson* challenges were raised and granted in Caddo Parish during the operative time of Petitioners' statistical analysis. Yet, the truth is starkly different: between 2003 and 2015, there were 385 records of criminal trials and in 369 of the trial records, no *Batson* challenge was raised.[35] Of the remaining 16 trials where a *Batson* challenge was raised, the challenge was denied in 14 trials, leaving only two trials where *Batson* challenges were granted.[36] The appellate state criminal records fared no better: only two cases were reversed for *Batson* violations during that period—one in favor of the state and one in favor of the defense.[37] While the Diamond-Kaiser Report attempts to cast a grim light on jury selection in Caddo Parish, the juxtaposition with reality reveals the Report's inherent flaws.

Further, a deeper examination of the Diamond-Kaiser Report shows a fundamental misunderstanding of peremptory challenges. Peremptory challenges are permitted to "increase judicial legitimacy by allowing parties an unchecked power to shape who will decide their dispute and thus minimizing *perceived* bias."

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[34] Pet App. 20a.

[35] ROA.6316.

[36] ROA.6316.

[37] ROA.6316.

Richard Lorren Jolly, *The Constitutional Right to Peremptory Challenges in Jury Selection*, 77 Vand. L. Rev. 1529, 1534 (emphasis in original). The Fifth Circuit stated the Diamond-Kaiser Report "critically omits any controls for individualized reasons a juror might be excused."[38] In particular, the Diamond-Kaiser Report "shows only general numbers, with no nuance to tell us whether the struck jurors shared characteristics other than race with Plaintiffs—characteristics (like bias) that might provide a race-neutral basis for a peremptory strike."[39] The Diamond-Kaiser Report has an obvious blind spot for the purpose of peremptory challenges: minimizing perceived bias which does not reach the level of a cause challenge. For these reasons, every Court which has reviewed the Report has excluded it.

For this Court to squarely rule on the Petition, it would need to fully examine particulars of the Diamond-Kaiser Report and the actual evidence of *Batson* challenges in Caddo Parish to make a finding on the admissibility of the expert report, which was excluded by the District Court. Such an adjudication on a motion in limine is generally not the duty of this Court.

B. Because the *Powers* cause of action is unexplored, it has not had adequate opportunity to percolate through lower courts, making review by this Court premature.

As noted by Petitioners, this matter appears to be the inaugural case where consideration of Fourteenth Amendment discrimination claim brought by excluded

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[38] Pet. App. 6a.

[39] Pet. App. 6a.

jurors on their own behalf has ever reached the summary judgment stage of litigation.[40] The other three cases to consider this cause of action were all dismissed for failure to state a claim.[41] Further refinement of the *Powers* cause of action is not warranted at this time as the issue has not had adequate opportunity to percolate through lower courts to provide complete and competent review by this Court. At this time, the circuit courts of this country have not been permitted adequate opportunity to address the *Powers* cause of action, to examine the outer bounds of the cause of action, and most importantly, to determine the effects thereof. As the District Court in this matter and Justice Scalia in his dissent in *Powers* noted, would a successful claim under *Powers* serve as a collateral attack on the underlying criminal prosecution?[42] Would, as Petitioners initially sought,[43] an entire class of previously excluded jurors need to be certified?

Apart from the downstream effects of a successful decision in favor of Petitioners, this case also uncovered unanswered questions regarding how this cause of action should be litigated. In the future, would a plaintiff requesting every criminal record from twelve (12) years of criminal case files from a District Attorney be upheld? The District Court in this matter found such a request was overreaching,[44] but could a

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[40] Pet. App. 37.

[41] *See, Shaw v. Hahn,* 56 F.3d 1128 (9th Cir. 1995); *Hall v. Valeska*, 509 F. App'x 834 (11th Cir. 2012); *Attala Cty. v. Evans*, 37 F.4th 1038 (5th Cir. 2022).

[42] Pet. App. 59a-60a.

[43] ROA.84.

[44] ROA.932 (Magistrate Judge's Order), ROA.1932 (Order affirming Magistrate Judge's Order).

credulous judge attempting to legislate peremptory strikes away from the bench not permit such discovery?

All of the foregoing questions remain unanswered because of the relative newness of the *Powers* cause of action. Respondent suggests that if the Court wishes to consider the plethora of unanswered questions, further development in lower courts is warranted to winnow out at least some of these concerns, which have come about in this case.

C. State Legislatures' shifting attitudes toward peremptory challenges make review of this case premature.

The procedural issues of litigating a *Powers* cause of action notwithstanding, a groundswell of state-level legislation is currently in the works for addressing peremptory challenges and juror removal, which militates against review at this time.

Arizona passed a law in 2022 which eliminated peremptory strikes completely. *See* Ariz. R. Crim. P. 18.4; Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020, 1, 3, 5 (Ariz. 2021). California and New York have both seen bills introduced to eliminate the peremptory strike in criminal trials. *See*, S.B. 212 (Cal. 2021) (failed senate bill which would have repealed AB3070 and abolished peremptory challenges in criminal trials); S.B. S6066 (N.Y. 2023) (introduced but stalled in committee).

Other states, such as Washington in 2018, altered the *Batson* framework, permitting a court to invalidate a peremptory strike if race played any role

in the strike (eschewing the need for establishing a prima facie case and a later finding of "purposeful discrimination"). Wash. Ct. Gen. R. 37. In addition to restructuring the *Batson* framework, Washington also established a list of reasons which are presumptively invalid for striking a juror. Wash. Ct. Gen. R. 37(h). In 2022, four other states have passed peremptory challenge curtailment legislation while nine other states are in the process of reviewing legislation to that effect. *See,* Colleen P. Graffy, et al., *First Twelve in the Box: Implicit Bias Driving the Peremptory Challenge to the Point of Extinction*, 102 Or. L. Rev. 355, 393 (California, Colorado, Connecticut, and New Jersey have recently passed legislation eliminating the first step of *Batson* while Iowa, Kansas, Massachusetts, Mississippi, Montana, New York, North Carolina, Oregon, and Utah are considering such a change in the 2024 legislative sessions).

In all, since 2018 and most since only 2022, fifteen states have either passed legislation aimed at curtailing or eliminating peremptory challenges or have considered such legislation. If this Court were to grant the Petition and review the case, it is possible that the decision reached by this Court will be mooted by state-legislature action in amending the *Batson* and peremptory challenge framework. Such is not the function of this Court.

D. Even if this Court grants certiorari and reverses the lower court, Respondent will likely prevail on other grounds which were not necessary to be reached by the lower courts.

An ancillary issue which was not addressed by the lower courts and would need to be decided by this Court if certiorari was granted, was left unaddressed by Petitioners: in *Odums*, the case in which Petitioners Carter and Johnson were struck, a *Batson* challenge was filed and subsequently denied by the state trial court.[45] At least one Court of Appeal has held that a prior *Batson* challenge is preclusive of a *Powers* cause of action. *Shaw v. Hahn*, 56 F.3d 1128, 1132 (9th Cir. 1995). The District Court and Fifth Circuit did not reach thepreclusion issue, instead finding that Petitioners could not establish a predicate constitutional violation.[46] If this Court were to grant review to Petitioners, it is likely that this Court would first have to address the ancillary matter of issue preclusion of a *Powers* cause of action when a *Batson* challenge was denied at the trial court.

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[45] ROA.2296-99 (ADA Brown's testimony), ROA.1994-98 (Motion and order denying *Batson* challenge).

[46] Pet. App. 4a.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for the reasons set forth herein.

Dated: January 6, 2025

Respectfully Submitted By:

/s/ Allison A. Jones
ALLISON A. JONES, Bar #16990*
Counsel of Record
MARCUS D. SANDIFER, Bar # 39326
DOWNER, JONES, MARINO & WILHITE
401 Market Street, Suite 1250
Shreveport, Louisiana 71101
Tel: 318-213-4444
Fax: 318-213-4445
ajones@dhw-law.com
msandifer@dhw-law.com

Counsel for Respondent