No. 24-513

IN THE

Supreme Court of the United States

DARRYL CARTER, THERESA HAWTHORNE, AND DIANE JOHNSON,

Petitioners,

v.

JAMES E. STEWART, SR., IN HIS OFFICIAL CAPACITY,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Respondent admits that "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* [*v. Ohio*, 499 U.S. 400 (1991)] or via third-party standing under *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)]."[1] But Respondents are silent about the effect of the district court's skepticism, if not outright hostility, to that proposition on its ruling on summary judgment or the Fifth Circuit's affirmance of that ruling.

And even having made that concession, Respondent fails to engage the second question presented, "must such claims be adjudicated in the same manner as other § 1983 lawsuits, including the submission of genuine issues of material fact to a jury?"[2]

Instead, Respondent asserts on multiple occasions that an alleged fact was "established" or "undisputed" in the litigation, citing only the evidence and testimony which supported Respondent's version of the facts and omitting those which traversed that version. As a result, Respondent's argument, as in the lower courts, is patterned from the defense of a criminal appeal in which the defendant's *Batson* objection was overruled by the trial court. In that situation, however, the trial judge is the ultimate finder of fact and weighs the evidence presented by the parties; by contrast, in this § 1983 case, a Federal

[1] Brief in Opposition (BIO) 8.
[2] Pet. 2.

jury plays that role, unless there are no genuine issues of material fact to be decided.

The failure to observe that distinction was a crucial component of the rulings of the lower courts in this case. This Court can make the distinction clear by granting certiorari on the second question.

I. The lower courts have paid no more than lip service to this Court's pronouncement that prospective trial jurors who allege they were excluded on account of their race have a viable § 1983 claim for violation of their Fourteenth Amendment rights.

With respect to the first question presented in the petition, Respondent states "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* [*v. Ohio*] or via third-party standing under *Batson* [*v. Kentucky*]."[3] But as shown by the opinions cited by Respondent, this proposition has been uniformly honored in the breach.[4] Even so, the opinions of the district court and Fifth Circuit in this case, bypassing jury consideration of Petitioners' claims in the face of genuine issues of material fact, are arguably the most egregious

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[3] BIO 8.

[4] BIO 14 n.41 (citing *Shaw v. Hahn*, 56 F.3d 1128 (9th Cir. 1995) (excluded jurors' claims precluded by ruling of trial court in the underlying case); *Hall v. Valeska*, 509 F. App'x 834 (11th Cir. 2012) (injunction claim dismissed on abstention grounds); (*Attala Cty. v. Evans*, 37 F.4th 1038 (5th Cir. 2022) (injunction claim dismissed for lack of standing).

example of judicial hostility to this Court's pronouncements on the rights of excluded jurors.

Given the importance of the rights of citizens such as Petitioners not to be excluded from jury service on account of their race,[5] and the Fifth Circuit's rejection of Petitioners' claims in a way that conflicts with relevant decisions of this Court, plenary review or summary reversal by this Court is appropriate.[6]

II. The court of appeals neither cited nor applied the summary judgment standard, but rather adjudicated issues of material fact properly committed to juries.

In opposing certiorari on the second question presented, Respondent asserts that:

> The second question, whether the summary judgment standard governs causes of action under *Powers*, has also not been disputed by any lower court as all applied the normal summary judgment standard.[7]

Similarly, Respondent asserts that "[t]he lower courts appropriately applied the summary judgment standard, finding that there was not a disputed fact, and that Petitioners did not establish a constitutional violation."[8]

On the contrary, other than acknowledging that it conducted *de novo* review on appeal of a district court grant of summary judgment,[9] the Fifth Circuit

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[5] *See generally* Pet. at 13-19.
[6] Sup. Ct. R. 10(c).
[7] BIO 8.
[8] *Id*. at 11.
[9] App. 3a.

neither cited nor applied the established standard for adjudicating such motions. Under that standard, "[s]ummary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'"[10] Thus, "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'"[11]

In its opinion, the Fifth Circuit panel never held that there was no genuine issue of material fact with respect to Petitioners' *Monell*[12] claim. The phrase "general issue of material fact" makes no appearance in the opinion.[13] And whether using that phrase or not, the Court of Appeals conducted no analysis that could be considered consistent with the summary judgment standard.

A. Contrary to Respondent's assertions, the post-hoc explanations of the trial prosecutors for their exercise of peremptory strikes against Petitioners were neither "uncontested" nor "established."

Respondent states that the record "establishes" that each Petitioner was struck based on racially-neutral reasons."[14] This is wrong, as the record

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[10] *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (quoting Fed. R. Civ. P. 56(a).
[11] *Id.* at 656 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).
[12] *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978).
[13] App. 1a-7a.
[14] BIO 1.

reveals genuine issues of material fact regarding the actual reasons for these peremptory challenges.

1. Contrary to multiple references in the BIO, neither of the lead prosecutors in the two trials during which Petitioners were excluded (Jason Brown, who struck Petitioners Carter and Johnson, and Holly McGinness Pailet, who struck Petitioner Hawthorne) claimed to recall the reasons for the strikes they made in those cases.[15] Rather, they extrapolated possible reasons from the incomplete documents that existed from those trials.[16]

2. Respondent claims that in *voir dire*, Petitioner Carter stated that he "may know the criminal defendant charged with second-degree murder," and that prosecutor Brown asked all venire-members about any relationship with the defendant.[17] Carter, however, testified that he was the only juror on his panel asked if he knew Odums, the Black defendant in the case, and that he responded in the negative.[18]

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[15] ROA.5299:9-12 (Brown); ROA.5775:9-22 (McGinness Pailet)

[16] A records preservation demand was served on then-Acting D.A. Cox in August 2015, mere months after the two trials. ROA.5654. However, the proceedings of the day of *voir dire* where Brown questioned Carter and Johnson were not transcribed, and no contemporaneous notes or tapes could be found to transcribe that session of court. ROA.1103-05. Further, McGinness Pailet discarded her handwritten notes of jury selection from the trial in which Hawthorne was excluded, ROA.5732:24-5733:11, and a PowerPoint jury selection outline from the same case was subsequently lost. ROA.5746:10-5748:17.

[17] BIO 3.

[18] ROA.5673:4-19. As this Court has established, "if the use of disparate questioning is determined by race at the outset, it is likely [that] a justification for a strike based on the resulting divergent views would be pretextual. In this context the

3. Respondent asserts that Petitioner Johnson "did not think race played a serious factor in her non-selection."[19] But her testimony was in answer to a question about Johnson's impression "at the time when you left the courthouse."[20] It was uncontested that in Caddo Parish, no prospective jurors are present when peremptory challenges are exercised.[21] Consistent with this, Johnson testified that "they didn't tell us, you know, why" some jurors were rejected.[22] Instead, Johnson stated that the "jury documents or records" would prove her allegations of racial discrimination.[23]

4. Further, the *Odums* defense attorney testified about a white juror who had similar characteristics to Plaintiff Johnson, but who was accepted by the prosecutor.[24]

5. As in the lower courts, Respondent asserts here that Respondent's trial prosecutors allowed some Black prospective jurors to serve in the *Odums* and *Carter* trials.[25] As Petitioner has previously pointed out, because "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many,"[26] the acceptance of some Black prospective

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differences in the questions posed by the prosecutors are some evidence of purposeful discrimination." *Flowers v. Miss*., 588 U.S. 284, 308 (2019) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003) (*Miller-El I*))

[19] BIO 2 (citing ROA.2325).

[20] ROA.2325.

[21] ROA.5345:10-12.

[22] ROA.2325:15-16.

[23] ROA.2325:7-11.

[24] ROA.4795, ¶9.

[25] BIO 3-4 (*Odums* trial); BIO 5 (*Carter* trial).

[26] *Flowers*, 588 U.S. at 298; *see also id*. at 311 ("the Constitution

jurors by Respondent's trial prosecutors is not material in determining whether the strikes against Petitioners were substantially motivated by their race, or the larger question whether Respondent's office had a practice of such racially-motivated peremptories.[27]

6. As with Johnson, Respondent argues that Petitioner Hawthorne stated she did not believe race played a role in her exclusion from the jury and that she had no evidence that she was discriminated against.[28] In reality, Hawthorne testified that she did not know from her own experience if her strike was based on race,[29] but that her race was the only reason she could think of for her exclusion.[30]

7. Respondent asserts that prosecutor McGinness Pailet struck Petitioner Hawthorne because Hawthorne's answer to a voir dire question "may taint a conviction."[31] In her deposition, however, McGinness Pailet said that, in retrospect, Hawthorne's answer was "problematic," but that "I can't tell you what I thought on that date" regarding

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forbids striking even a single prospective juror for a discriminatory purpose").

[27] Moreover, Respondent mis-states the racial composition of the jury empaneled after Petitioners Carter and Johnson were struck, claiming that (including alternates) it encompassed seven white jurors and five non-white jurors. BIO 3 (citing ROA.2300-03). In the district court, however, the parties agreed that the records of the *State v. Odums* trial showed nine white jurors, one East Indian juror, and four Black jurors. ROA.1947 (Respondent's Statement of Uncontested Material Fact 25); ROA.4376 (Petitioner agrees).

[28] BIO 4 (citing ROA.2187-88).

[29] ROA.2187:11-14.

[30] ROA.2187:20-2188:5.

[31] BIO 4-5.

Hawthorne's *voir dire* responses.[32] Neither McGinness nor defense counsel moved to challenge Hawthorne for cause.[33] Nor did defense counsel exercise a peremptory challenge against Hawthorne.[34]

B. The statistical data and analysis of Caddo Parish jury trials from 2003-2015 was similar to that relied upon by this Court in multiple cases regarding racial discrimination.

Respondent claims that the statistical data and analysis conducted by Professor Shari Diamond of Northwestern University and Professor Joshua Kaiser of the University of Massachusetts (Amhurst) "was not helpful to the courts' analysis" and was irrelevant to the issues before the lower courts.[35] This argument is flawed.

1. Respondent claims that the two experts "did not specifically review the case files from the cases in which Petitioners were struck."[36] This is wrong. Dr. Diamond testified that she did not look at evidence of "prosecutorial behavior,"[37] but she did look at the case files of the two trials, concluding that the patterns of prosecutorial peremptories in both were consistent

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[32] ROA.5782:5-14.
[33] ROA.5783:4-10.
[34] The First Judicial District of Louisiana uses "simultaneous peremptory challenges." ROA.5261:22-5263:9. Therefore, if defense counsel in the Carter case believed that Hawthorne's voir dire testimony indicated a lack of impartiality, then Hawthorne would not have been designated by the deputy clerk as having been removed on a state peremptory challenge.
[35] BIO 5-7.
[36] BIO 5 & n. 25 (citing ROA.4547 and ROA.4727-29).
[37] ROA.4547:2-8.

with her overall analysis.[38] Dr. Kaiser likewise testified that "[w]e also looked at the patterns of strikes against prospective jurors in those cases briefly," to make sure "they matched the overall systematic patterns we found."[39]

2. Respondent relies heavily on the observations of the Fifth Circuit that the statistical analysis "omits any controls for reasons a juror might be excused,"[40] and of the district court that the analysis "shows only general numbers."[41] But the district court's discovery rulings blocked Petitioners from obtaining voir dire transcripts and prosecutors' notes from trials other than the two in which Petitioners were struck.[42] The lower courts' rejection of the Diamond-Kaiser Report because it did not analyze data which the district court erroneously barred Petitioners from discovering is a classic "Catch-22" that should not be credited by this Court.

3. Further, the analysis conducted by Drs. Diamond and Kaiser is comparable, if not more

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[38] ROA.4542:2-10; ROA.4544:1-9.

[39] ROA.4729:1-17.

[40] BIO 6 & n. 27 (citing Pet. App. 6a).

[41] BIO 6 & n. 28 (citing Pet. App. 19a).

[42] *See* Pet. 24-25 & nn. 94-95. This limitation directly contravened this Court's ruling in *Flowers* that "*Batson* did not preclude [criminal] defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed. After *Batson*, the defendant may still cast *Swain's* 'wide net' to gather 'relevant' evidence." *Flowers*, 588 U.S. at 304-05 (citing *Miller-El v. Dretke*, 545 U.S. 231, 239-40 (2005) (*Miller-El II*) and *Batson*, 476 U.S. at 96–97).

exacting, than the statistical analyses accepted by this Court as sufficient to create a *prima facie* case of racial discrimination.[43] Moreover, this Court's *Batson* precedents repeatedly acknowledge the relevance of evidence of the prosecutor's past practices to the inquiry of racial discrimination.[44] Finally, as stated in the Petition, Respondent's own expert testified that the statistical analysis of the Diamond-Kaiser Report was properly conducted according to a methodology that he himself used in other cases.[45]

4. Under these circumstances, Respondent's objections to the Diamond-Kaiser Report went to its weight, not its admissibility, and should have been evaluated by a jury. The refusal of the lower courts to consider the Report as evidence that a jury could consider at the trial of this case is entirely consistent with the notion that those courts did not adjudicate Respondent's summary judgment motion in the manner required by this Court.

5. Respondents argue that the paucity of *Batson* challenges in the 395-case set "reveals the [Diamond-Kaiser] Report's inherent flaws."[46] Although there are any number of reasons why a defense attorney may choose not to object to a prosecutor's strikes under *Batson*, a significant one is found in this record. Dale Cox, the First Assistant District Attorney and then Acting District Attorney for several years before the 2015 trials in which Petitioners were excluded,

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[43] *See* Pet. 25-26 & nn. 96-100.
[44] *Flowers*, 588 U.S. at 302 (citing *Foster v. Chapman*, 578 U.S. 488 (2016), *Snyder v. La.*, 552 U.S. 472 (2008), *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005)).
[45] *See* Pet. 9.
[46] BIO 12.

threatened post-trial sanctions on attorneys who dared to allege racial discrimination in jury selection, saying "the Defense [sic] has once again accused me personally of systematically excluding African Americans based on their race alone . . . I bitterly resent, once again, the allegations made in Counsel's Motion 37A. I'll give notice that, at the conclusion of this trial, I will seek a hearing date on Motion [sic] for sanctions and such other relief . . ."[47]

6. It can hardly be doubted that such threats from the highest level of Respondent's office would dampen the enthusiasm of defense counsel in Caddo Parish cases from making *Batson* objections in their trials.

III. Respondent's vehicle argument is insubstantial and based on an argument not presented to the district court on summary judgment.

Respondent's final argument is that this case does not present an appropriate vehicle for this Court's review because of "[a]n ancillary issue which was not addressed by the lower courts [which] would need to be decided by this Court."[48] But that issue, namely whether the ruling of the judge in the *Odums* case on that defendant's *Batson* motion has any preclusive effect in this action, was not presented to the district court in Respondent's summary judgment motion.[49] It is not properly before this Court on the issue whether

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[47] ROA.3594-95. Cox authenticated this transcript in his deposition. ROA.5119-20.

[48] BIO 17.

[49] ROA.1951-77 (Respondent's Memorandum in Support of Summary Judgment); ROA.6247-6294 (Respondent's Reply Memorandum in Support of Summary Judgment).

summary judgment was properly granted to Respondent.

CONCLUSION

Petitioners respectfully request that this court summarily reverse the Fifth Circuit's opinion, and remand this case with instructions that summary judgment shall be denied and this case set for jury trial.

Respectfully submitted,

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