No. _____

In the
Supreme Court of the United States

ERNEST GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal trial, does the right to an impartial jury, guaranteed by the Sixth Amendment, require a defendant of a minority race to be afforded *voir dire* of prospective jurors' racial bias if requested?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ernest Green, by and through counsel, Mark A. Foti, respectfully petitions that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, denying Mr. Green's direct appeal, appears at Appendix A to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals for the Second Circuit decided Mr. Green's case on October 15, 2024. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the state and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(Emphasis added.)

STATEMENT OF THE CASE

Over forty years ago, this Court issued a split decision in *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), where the majority found that although "it is usually best to allow the defendant to… mak[e] the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued… "[f]ailure to honor his request… will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Id*. at 191.

Obviously, our understanding of the reality of racial prejudice, including implicit bias, has developed substantially over the last four decades, particularly due to empirical data demonstrating the existence of such bias and some means to mitigate against it.

Ernest Green was an African American defendant in the Western District of

New York, a predominantly white district. Despite requests to *voir dire* on issues of potential racial bias, the trial court declined to do so. Thus, this case presents an opportunity to revisit the important question of whether a defendant of a minority race is afforded the right to an impartial jury as guaranteed by the Sixth Amendment by requiring, at a minimum, some *voir dire* of prospective jurors' racial bias?

The facts relevant to the question presented are reviewed in two sections below: (1) the proceedings at the district court; and (2) the direct appeal argued and decided at the Court of Appeals for the Second Circuit.

Proceedings in the Trial Court

Ernest Green was charged in a single-count indictment charging Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1) and U.S.C. § 924(a)(2) for allegedly unlawfully possessing a firearm on or about July 26, 2020. Mr. Green was arraigned on August 6, 2020.

In the approach of trial, Mr. Green proposed *voir dire* which included questions directly addressing opinions on racial bias, such as "[d]o any of you think the fact that the defendant is Black will have some impact on your decision-making in this case?" A request was made to the District Court to ask each question and then follow-up with any individual juror who answers the question affirmatively.

Mr. Green also requested that prospective jurors be shown a video on implicit bias which had been produced by the U.S. District Court for the Western District of

Washington and had been used nationally, including other cases in the Western District of New York.

At a pretrial conference, the District Court Judge responded to the request to show prospective jurors the implicit bias video: "I've had that application in the past and I denied that application. I believe my instructions and *voir dire* cover any issues along those lines."

Mr. Green filed a written memorandum on the issue, noting that based on "the demographics in the Western District of New York, the prospective jury pool will be predominantly white" and they would be selected to sit in judgment of Mr. Green without any assistance in recognizing implicit racial bias.

In a written Decision and Order, the District Court denied the request: "[t]he Court addressed this request at the pretrial conference and explained that the Court's *voir dire* will extensively cover implicit bias."

Jury selection took place on April 11, 2022. On that date, the District Court conducted *voir dire* of the prospective jury panel. The District Court Judge declined to ask any of the questions requested by Mr. Green regarding racial bias.

The District Court Judge did not ask any questions regarding racial bias.

The District Court Judge did not ask any questions regarding implicit bias.

The District Court Judge did not survey the prospective jurors regarding whether any of them may allow their judgment to be influenced by the fact that Mr.

Green is African American.

The jury was selected without any exploration of potential racial bias, and the trial commenced on April 12, 2022. Mr. Green was convicted, and the final judgment was entered on December 12, 2022.

The Direct Appeal

Mr. Green brought an appeal of the sentence and final judgment before the Court of Appeals for the Second Circuit.

Mr. Green prepared a brief arguing multiple issues, including the lack of *voir dire* regarding racial bias, as addressed in this petition, and other points related to evidentiary rulings and sentencing decisions.

In Mr. Green's brief, he addressed the reasonable possibility of racial bias among potential jurors by reviewing information and material that has become available in the four decades following the decision in *Rosales-Lopez*. *See e.g.*, Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J. Forum 406 (2017) ("Ever-growing scholarship, much of it empirical, has identified, confronted, and sought to address how implicit bias operates in nearly every criminal justice context—especially in policing, prosecuting, judging, and juror decision-making"); *see also* Jerry Kang at al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1136-42 (2012) (describing empirical proof of implicit bias against African Americans); *id*. at 1142 (describing the "general research consensus" establishing

that white jurors show bias against Black defendants).

Moreover, it was noted that The Department of Justice had publicly recognized the existence of implicit-bias. *See* U.S. Dep't of Justice, Memorandum for All Department Law Enforcement Agents and Prosecutors (June 27, 2016), available at https://tinyurl.com/DOJ-MEMO (last accessed on January 13, 2025). In an FAQ on the Department of Justice website, it is explained that "[a] large body of research indicates that individuals can reduce their implicit biases or mitigate their effects in part simply by acknowledging they exist." U.S. Dep't of Justice, *FAQ on Implicit Bias*, available at https://tinyurl.com/DOJ-FAQ-BIAS (last accessed on January 13, 2025).

When the case was heard by the Court of Appeals, the focus of oral argument was primarily related to the issue relevant to this petition: whether Mr. Green could have been guaranteed his right to an impartial jury when there was no effort to explore potential racial bias among any of the prospective jurors?

Not surprisingly, at oral argument, the discussion quickly turned to *Rosales-Lopez*. The question was posed by Panel: "How can we rule in your favor and be consistent with *Rosales-Lopez*?"

Counsel acknowledged that *Rosales-Lopez* indicated no *per se* rule requires *voir dire* on potential racial bias in every instance that the defendant is of a minority race, but counsel also pointed to the standard established in *Rosales-Lopez* that it is

reversible error not to do so "where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Rosales-Lopez*, 451 U.S. at 191.

Counsel argued, generally, that information made available in the forty years following the decision in *Rosales-Lopez* supports the conclusion that there is a reasonable possibility that racial or ethnic prejudice might influence a jury in any criminal case involving a minority defendant.

Thus, while the Court of Appeals could not overturn the existing precedent set by this Court, counsel argued that the Court of Appeals could make a finding that the "reasonable possibility" standard is informed by the substantial data regarding racial prejudice, including implicit bias, which has been gathered in the intervening decades since the decision in *Rosales-Lopez*, and accordingly, the Court of Appeals could find that every minority defendant is entitled to some *voir dire* exploring racial bias among potential jurors.

Ultimately, in light of the existing precedent, the Court of Appeals disagreed.

> Green bears the burden of establishing "substantial indications" that racial prejudice likely affected the jury. Other than noting that Green is black in a predominantly white district and conclusorily citing to a few articles about inherent bias, Green points to nothing in the record reflecting that there was systemic or pervasive bias in the venire. Accordingly, we cannot say that the district court abused its discretion when it denied Green's *voir dire* requests.

Appendix A at 12 (internal citations omitted).

Mr. Green could not explore racial bias during the course of jury selection because the trial judge declined to do so, and if this Court does not grant the writ of certiorari, Mr. Green and other minority defendants are left hoping that the Sixth Amendment guarantee of an impartial jury are afforded them without any inquiry of the juror's partiality based on racial bias.

REASONS FOR GRANTING THE WRIT

The Constitution promises a defendant in a criminal trial "an impartial jury." U.S. Const. Amend. VI.

This Court directly weighed into the necessity to protect defendants in criminal courts from partiality derived from racial bias of prospective jurors as far back as 1931, stating:

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.
>
> *Aldridge v. Untied States*, 283 US 308, 314-315 (1931).

Following the decision in *Aldridge*, a substantial majority of Circuits held that in criminal cases involving a defendant of a minority race, there was a clear requirement that trial courts must conduct or allow some inquiry into possible racial or ethnic prejudice unrelated to the specific facts of the case. *See Frasier v. United States*, 267 F. 2d 62, 66 (CA1 1959); *King v. United States*, 124 U. S. App. D. C. 138, 139, 362 F. 2d 968, 969 (1966); *United States v. Gore*, 435 F. 2d 1110, 1111-1113 (CA4 1970); *United States v. Carter*, 440 F. 2d 1132, 1134-1135 (CA6 1971);

United States v. Bamberger, 456 F. 2d 1119, 1129 (CA3 1972), *cert. denied sub nom. Crapps v. United States*, 406 U. S. 969; *United States v. Robinson*, 466 F. 2d 780, 781-782 (CA7 1972); *United States v. Booker*, 480 F. 2d 1310, 1310-1311 (CA7 1973); *United States v. Powers*, 482 F. 2d 941, 944 (CA8 1973), *cert. denied*, 415 U. S. 923; *United States v. Robinson*, 485 F. 2d 1157, 1158-1160 (CA3 1973); *United States v. Johnson*, 527 F. 2d 1104, 1106-1107 (CA4 1975); *United States v. Bell*, 573 F. 2d 1040, 1042-1043 (CA8 1978); *United States v. Bowles*, 574 F. 2d 970, 971-973 (CA8 1978); United States v. Williams, 612 F. 2d 735, 736-737 (CA3 1979), *cert. denied*, 445 U. S. 934. *Cf. Kuzniak v. Taylor Supply Co.*, 471 F. 2d 702, 703 (CA6 1972); *United States v. Grant*, 494 F. 2d 120, 122-123, and n. 6 (CA2 1974), *cert. denied*, 419 U. S. 849; *United States v. Bear Runner*, 502 F. 2d 908, 911-913 (CA8 1974).

Then, in 1981, the majority in *Rosales-Lopez* did away with that requirement.

The majority did recognize the excerpt from *Aldridge*, quoted above, "remain[ed] true" and noted "it is usually best to allow the defendant to mak[e] the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued." *Rosales-Lopez*, 451 U.S. at 191.

However, the majority did away with what it identified as a per se rule, and instead indicated that a it "will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice

might have influenced the jury". *Id*.

Justice Stevens authored a dissent, which was joined by Justice Brennan and Justice Marshall.

In the dissent, it was noted that up to that point, "federal law has required that a racial or ethnic prejudice inquiry be made when requested by the defendant, regardless of the presence or absence of special circumstances indicating that there is a reasonable possibility that prejudice will influence the jury." 196. Indeed, it was "not surprising that the overwhelming majority of Federal Circuit Judges who have confronted the question presented in this case have interpreted Aldridge as establishing a firm rule entitling a minority defendant to some inquiry of prospective jurors on *voir dire* about possible racial or ethnic prejudice unrelated to the specific facts of the case." *Rosales-Lopez*, 451 U.S. at 201 (Stevens, J., dissenting).

Specifically, the dissent addressed that that bias, including racial bias, is not limited by the specific facts of a case.

> [B]ias can arise from two principal sources: a special reaction to the facts of the particular case, or a special prejudice against the individual defendant that is unrelated to the particular case. Much as we wish it were otherwise, we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a whole.
>
> *Rosales-Lopez*, 451 U.S. at 196-197 (Stevens, J., dissenting).

The dissent found that because the defendant perceived a risk of prejudice simply based on his race, "his request for a specific question concerning it should have been granted." *Rosales-Lopez*, 451 U.S. at 202-203 (Stevens, J., dissenting).

Despite the arguments advanced by Judge Stevens in the dissent, the decision in *Rosales Lopez* resolved the circuit split regarding the requirement to inquire into potential racial bias in favor of the position that has been held by the minority of Circuits.

As a result of that decision, defendants of minority races have been precluded from exploring potential racial biases among jurors who would be selected to sit in judgement of them unless the trial court agreed to conduct or allow such an inquiry. This has left defendants without means to identify jurors who would discriminate against them based on their races.

While this Court has not recently revisited the requirements associated with *voir dire* regarding racial bias, it did address discriminatory action during jury selection as it pertains to preemptory strikes by prosecutors. *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019).

In that decision, this Court reviewed a history of racial discrimination during jury selection, focused on the exclusion of minority jurors. In that context, the Court observed that "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Id*. at 2242.

Although this Court was addressing a different issue, the statement rings true here and in any case where a defendant of minority race requests the opportunity to inquire as to racial bias and secure some assurance that none among the prospective jurors harbor feelings towards the defendant's race that encroach on the defendant's right to an impartial jury.

Unless this Court revisits the issue, minority defendants remain without any true recourse to explore potential racial bias among prospective jurors.

Indeed, as noted *supra*, the Court of Appeals in this case indicated that defendants will "bear[] the burden of establishing 'substantial indications' that racial prejudice likely affected the jury," a burden that is generally unattainable if *voir dire* does not explore racial bias in the first instance, particularly because in some districts, including the Western District of New York, the parties are generally precluded from interviewing jurors at the conclusion of trial without court permission.

Furthermore, the Court of Appeals in this case cast aside material cited by Mr. Green which indicated that the possibility of racial bias has generally been established by empirical data to exist in every case as conclusory and instead suggested that Mr. Green was required to establish that "there was systemic or pervasive bias in the venire." Appendix A at 12.

The requirement of identifying systematic or pervasive bias in the venire is

nearly impossible when *voir dire* avoids any inquiry into those topics. An individual with racial prejudices is unlikely to speak up as to those opinions without some prompting by the Court.

Moreover, requiring a defendant to identify systematic or pervasive bias goes further than the ruling in *Rosales-Lopez*. This Court merely established a "reasonable possibility" test, and the analysis associated with that test was clearly different in 2022 than it was over forty years earlier in 1981.

To the extent that *Rosales-Lopez* established a "reasonable possibility" test, it is erroneous for an appellate court to now move the goal posts and require a defendant, often one of indigent means, to establish "systematic or pervasive bias in the venire." That requirement moves defendants of minority races further away from having assurances that they are guaranteed an impartial jury and instead leaves the door open for the possibility of racial bias in almost every criminal case involving an African American or other minority defendant such as Mr. Green.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated: January 13, 2025

Mark A. Foti
Attorney for Petitioner