No. 24-774

IN THE

Supreme Court of the United States

REGINALD K. CLARK,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court violates a defendant's Sixth and Fourteenth Amendment rights when it erroneously denies a for-cause challenge to a racially biased prospective juror.

PARTIES TO THE PROCEEDING

Reginald K. Clark, petitioner on review, was the appellant below. The State of Colorado, respondent on review, was the appellee below.

RELATED PROCEEDINGS

All proceedings directly related to this Petition include:

- *Clark* v. *People*, No. 22SC313 (Colo. 2024)
- *People* v. *Clark*, No. 19CA0340 (Colo. App. 2022)
- *People* v. *Clark*, No. 17CR193 (Colo. D. Ct.—Gilpin County)

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Reginald K. Clark respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court in this case.

OPINIONS BELOW

The Colorado Supreme Court's decision (Pet. App. 1a-44a) is reported at 553 P.3d 215 (Colo. 2024). The Colorado Court of Appeals decision (Pet. App. 45a-88a) is reported at 512 P.3d 1074 (Colo. App. 2022).

JURISDICTION

The Colorado Supreme Court entered judgment on July 1, 2024. Justice Gorsuch granted an extension of time to file a petition for writ of certiorari up to and including December 17, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides:

> 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 defence.

U.S. Const. amend. VI.

The Fourteenth Amendment to the Constitution provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1.

INTRODUCTION

"[T]his Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system

in particular." *Ramos* v. *Louisiana*, 590 U.S. 83, 128-129 (2020) (Kavanaugh, J., concurring) (quoting *Pena-Rodriguez* v. *Colorado*, 580 U.S. 206, 221 (2017)). To that end, this Court has held that—regardless of the impartiality of the individual jurors that are ultimately seated in a case—a trial court violates a defendant's constitutional rights when it permits the elimination of prospective jurors from the venire through racially biased peremptory strikes. *See Batson* v. *Kentucky*, 476 U.S. 79, 89 (1986). How the jurors are selected matters just as much as who ultimately serves; "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers* v. *Mississippi*, 588 U.S. 284, 301 (2019).

A grave error occurred in the jury selection process below. Reginald Clark, a black man, was charged with kidnapping and sexually assaulting a white woman in Gilpin County, Colorado. Gilpin County's population is over 90% white and less than 2% black. During voir dire, Clark was the only black person in the room—a fact commented on by several prospective jurors. Several jurors acknowledged the persistence of racial bias against black people, especially in Gilpin County. Prospective Juror K, however, volunteered that he did not want to live near black people, explaining that he had moved to Gilpin County because he "didn't want diversity." Pet. App. 97a. He emphasized that his perspective was immutable: "I hear the things, that diversity makes us stronger and things like that. I don't quite believe it in life from what my personal experiences are. And I can't change that. * * * I can't change that -- when I walked in here seeing a black gentleman

here." *Id.* Yet the trial court denied Clark's for-cause challenge to Juror K.

Facing a racially biased juror on his presumptive panel, Clark used a peremptory strike to remove Juror K, and the Colorado Supreme Court relied on that fact to affirm his conviction. To the Colorado court, there was no harm, no foul; it sees no reversible error in a trial court's denial of a defendant's for-cause challenge to a racially biased prospective juror, provided that the defendant uses a peremptory strike to remove the prospective juror from the pool. The defendant's use of a peremptory strike supposedly "cure[s] the trial court's error" such that there is no violation of the defendant's Sixth Amendment right to an impartial jury, and no "purposeful discrimination" in violation of the defendant's Fourteenth Amendment right to equal protection. Pet. App. 19a.

In so holding, the Colorado Supreme Court has announced a new rule that permits trial courts to endorse racial discrimination in the jury selection process. That is wrong. The "Constitution prohibits *all* forms of purposeful racial discrimination in the selection of jurors." *Batson*, 476 U.S. at 88 (emphasis added). In qualifying a racially biased juror, the trial court put "its power, property and prestige" behind Juror K's discriminatory remarks to the detriment of Clark, the integrity of the proceedings, and the jury process as a whole. *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624 (1991). And it broadcast to the members of the petit jury that such bias was permissible as they sat in judgment.

Colorado has also broken with other state courts of last resort, which acknowledge the constitutional

error in a trial court's failure to dismiss a racially biased prospective juror, even if the juror is not ultimately seated. In Kentucky, Massachusetts, and New York, the exact same series of events—the denial of a for-cause challenge to a juror who displays racial bias, followed by a defendant's exclusion of that juror—constitutes reversible error. In Colorado and South Carolina, however, it does not.

This Court's intervention is warranted. The question presented is critically important. The Constitution guarantees to a defendant an "impartial jury that can view him without racial animus." *Georgia* v. *McCollum*, 505 U.S. 42, 58 (1992). When voir dire reveals such animus, it is the duty of the trial court to ensure it does not infect the jury; "[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties" using their peremptory strikes. *Id.* at 53. This case is also a good vehicle. It arrives at this Court on direct appeal from Clark's conviction, where the question presented was fully ventilated and outcome-determinative. Moreover, the State conceded and the reviewing courts accepted that Juror K displayed racial animus. The Court can cleanly resolve what the Constitution requires of the trial court in this circumstance.

This Court should grant the petition and reverse.

STATEMENT OF THE CASE

A. Legal Background

1. The Sixth Amendment provides that "[i]n 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." U.S. Const, amend. VI. This right is rooted in the English common law. *See* 4 William Blackstone, COMMENTARIES *344 (jury is a "sacred bulwark" of liberty); 3 Blackstone, *supra*, at *379 ("the most transcendent privilege which any subject can enjoy, or wish for, [is] that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals"). And it was of paramount importance to the Framers, who viewed it as a central feature of a system of ordered liberty. *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 97 (1998) (The "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.").

A key feature of the Sixth Amendment jury trial right—and one that is reinforced by the Fourteenth Amendment's guarantees of due process, equal protection, and the privileges or immunities of citizenship—is the jury's impartiality. *See* U.S. Const, amend. VI ("the right to a speedy and public trial, by an *impartial* jury") (emphasis added); *see also* amend. XIV. At common law, prospective jurors could be "challenged propter affectum, for suspicion of bias or partiality." 3 Blackstone, *supra*, at *363. Such bias was viewed as antithetical to the role of a juror. *Pettis* v. *Warren*, 1 Kirby 426, 427 (Conn. Super. Ct. 1788) (requiring that "jurors have no interest of their own affected, and no personal bias, or prepossession, in favor or against either party"). The Framers embraced that view as well. *See United States* v. *Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (Marshall, C.J., sitting by designation) (explaining that "[t]he great value of the trial by jury certainly consists in its fairness and impartiality," a

value undermined by a juror's "strong and deep impressions which will close the mind").

Although the Sixth Amendment's Framers' original understanding of impartiality focused on jurors who had a personal interest in the case, *see* 3 Blackstone, *supra*, at *363, the Fourteenth Amendment's Framers' understood the impartiality requirement to likewise prohibit jurors whose racial biases would affect their ability to dispassionately assess the trial evidence, *see* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 926-927 (2004). In the post-war South, "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites * * * against blacks and Republicans," *id.* at 909-910, and the Framers believed that "the recently passed Fourteenth Amendment's equal protection mandate, combined with the reality of racial prejudice" required the elimination of racial bias from juries, *id.* at 929; *see also* Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress, 39th Cong., *Testimony Regarding Va., N.C., and S.C.* 33 (1866).

Indeed, "just 12 years after ratification of the Fourteenth Amendment," "the Court ruled that [a] West Virginia statute excluding blacks from jury service violated the Fourteenth Amendment." *Flowers*, 588 U.S. at 294 (citing *Strauder* v. *West Virginia*, 100 U.S. 303 (1879)). And in that case, the Court explained that "[t]he very idea of a jury is a body * * * composed of the peers or equals of the person whose rights it is selected or summoned to determine" and "[t]he framers of the constitutional amendment must have known full well the existence of [racial] prejudice and its likelihood to continue against the manumitted slaves and

their race, and that knowledge was doubtless a motive that led to the amendment." *Strauder*, 100 U.S. at 308-309.[1]

2. Consistent with the Sixth and Fourteenth Amendments' Framers' views, this Court has jealously guarded the right to jury impartiality through decisions that permit the parties and the courts to challenge suspected racial bias in the jury selection process.

For example, following *Strauder*, the Court struck down a number of similar laws that excluded particular groups from jury service. The Court "has long recognized that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury * * * from which all persons of his race or color have, solely because of that race or color, been excluded by the State." *Castaneda* v. *Partida*, 430 U.S. 482, 492 (1977) (internal quotation marks omitted). Excluding members of a particular race from the grand jury "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" and "strikes at the fundamental values of our judicial system and our society as a whole." *Rose* v. *Mitchell*, 443 U.S. 545, 555-556 (1979); *see also Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986) (reaffirming *Rose* and calling "intentional

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[1] The right to an impartial jury is similarly protected by the Fourteenth Amendment's Privileges or Immunities Clause. *See Ramos*, 590 U.S. at 132 (Thomas, J., concurring) (opining that the right to an impartial jury "applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause").

discrimination in the selection of grand jurors" a "grave constitutional trespass").

For similar reasons, this Court has held that, under certain circumstances, defendants must be permitted to question jurors regarding racial biases during voir dire. In *Aldridge* v. *United States*, 283 U.S. 308 (1931), the defense sought to question prospective jurors about racial attitudes after learning that in an earlier trial of the same case, a white juror had expressed that the interracial nature of the crime "perhaps somewhat influenced her." *Id.* at 310. Despite this revelation, the judge forbade the defense from asking any questions about race. This refusal violated the defendant's constitutional rights: "[I]f any * * * [juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Id.* at 314; *see also, e.g.*, *Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973); *Ristaino* v. *Ross*, 424 U.S. 589, 596 (1976).

Likewise, this Court has long and repeatedly held that parties can object to the discriminatory use of peremptory challenges. *See Batson*, 476 U.S. 79. In *Batson*, a prosecutor used his peremptories "to strike all four black persons on the venire." *Id.* at 83. This Court explained that, although a prosecutor can "ordinarily" exercise peremptory challenges "for any reason at all," "the Equal Protection clause forbids" excluding a juror "solely on account of their race." *Id.* at 89 (internal quotation marks and citations omitted). "In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision," taking care to guard "against any backsliding" in the principle *Batson* set out. *Flowers*, 588 U.S. at 301.

3. Because jury impartiality is "a central foundation of our justice system and our democracy," this Court treats claims of racial bias in the jury selection process with "added precaution." *Pena-Rodriguez,* 580 U.S. at 210, 225. Indeed, the constitutional protection against racial bias in jury selection often operates an exception to more general procedural rules.

For example, while voir dire is usually left to the "sound discretion" of trial courts, *Ristaino*, 424 U.S. at 594, a trial court must question prospective jurors specifically about racial prejudice when there is "a significant likelihood that racial prejudice might infect [a defendant's] trial." *Id.* at 598. Similarly, while "peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked," "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers*, 588 U.S. at 293, 303. And although states can lawfully prohibit admission of juror testimony to impeach a criminal jury verdict, *see Tanner* v. *United States*, 483 U.S. 107 (1987), those rules must "give way in order to permit the trial court to consider the evidence" that the jury "relied on racial stereotypes or animus to convict a criminal defendant," *Pena-Rodriguez*, 580 U.S. at 225.

That is because "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose*, 443 U.S. at 555. Such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Id.* at 556 (quoting *Smith* v. *Texas*, 311 U.S. 128, 130 (1940)).

B. Factual Background

1. Petitioner Reginald Clark met AB when he saw her walking to catch a bus and offered to give her a ride. Pet. App. 5a. The two started driving and made several stops on the way to a surrounding mountain town, where they separated. Trial Tr. (Oct. 9, 2018), pg. 169-173.

Later that day, a passerby found AB lying on the side of the road, high on methamphetamine, and in possession of Clark's phone; the passerby called 911 to get her help. *Id.* at 175-176. When the police arrived, AB accused Clark of raping her. *Id.* at 177. Clark was later arrested and charged with sexual assault.

Clark asserted that the sexual relations were consensual, but that AB falsely accused him of assault to divert police attention away from her misdeeds, including using methamphetamine and stealing his phone. *Id.* at 182-183. His defense centered on several inconsistencies in AB's story, including: AB's changing story of where the sexual assault took place; her representation at trial that Clark threatened to kill her versus her day-of denial when the police asked her point-blank whether he threatened her life; and the discrepancy between AB's representations that she called 911 and the lack of any record of such a call. *Id.* at 176-179.

2. The case was tried in Gilpin County, Colorado, whose population is over 90% white and less than 2% black.[2] During voir dire, Clark was the only black

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[2] *Gilpin County, CO QuickFacts: July 1, 2023 Estimates*, US CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/gilpincountycolorado/PST045223 (last visited Nov. 21, 2024).

person in the room—a fact noticed and commented on by several prospective jurors. Pet. App. at 92a-93a. One prospective juror went as far as to remark that "if I were in" Clark's "shoes * * * I would like to see a little more diversity." *Id.* at 93a. If she didn't see diversity in the juror pool, she explained, "I might have some reservations" about whether "I would get a fair trial." *Id.* at 94a.

Another prospective juror, Juror K, explained that he was personally biased against black people. After "apologiz[ing] for some of [his] thoughts," Juror K volunteered that he moved to Gilpin County because he "didn't want diversity." *Id.* at 97a. His explanation emphasized the immutability of his perspective: "I hear the things, that diversity makes us stronger and things like that. I don't quite believe it in life from what my personal experiences are. *And I can't change that*. I can look and judge what is being said by your side and their side and be fair, but *I can't change that – when I walked in here seeing a black gentleman here*." *Id.* (emphasis added). Defense counsel thanked Juror K for candidly sharing thoughts that are "not easy to say." *Id.* at 98a.

Defense counsel challenged Juror K for-cause, but the trial court judge refused to exclude him. With the challenge on the table, the judge questioned Juror K about whether he would have any trouble convicting if the prosecution proved its case or acquitting if it did not. *Id.* at 101a. But the judge neither asked Juror K about his expressions of racial bias, nor probed his repeated insistence that he could not change his perspective. The judge later explained that he considered Juror K's comments to be "political views" and did not "think [it was] appropriate * * * to inquire into those

things," because Juror K could hold "offensive views and still apply the law." *Id.* at 113a-114a.

Having denied the for-cause challenge to Juror K, the trial court judge instructed the venire that "at this point now, we go to the exercise of the peremptory challenges." *Id.* at 104a. The judge explained to the prospective jurors that both sides could use peremptory strikes "without stating a reason" and cautioned them not to take any offense to being removed through a peremptory strike. *Id.* Defense counsel then used the first of his peremptory challenges against Juror K. *Id.* at 105a. Defense counsel exhausted all of his six peremptory challenges before the full jury was empaneled. *Id.* at 107a.

The trial began later that day, and at the conclusion of the evidence, the jury deliberated for three days. *Id.* at 8a. The jury ultimately convicted Clark of second degree kidnapping and sexual assault caused by threat of imminent harm. *Id.* The court sentenced Clark to 30 years in prison. *Id.*

3. Clark appealed his conviction, arguing that the trial court's refusal to remove the racially biased juror was structural error and seeking a new trial. The Court of Appeals affirmed the conviction by a 2-1 vote, with all three panel members writing separately. *Id.* at 9a.

Judge Fox, authoring the lead opinion, concluded that any error in the trial court's denial of the for-cause challenge was cured by Clark's "choice to exercise the statutorily allotted peremptory strikes." *Id.* at 56a. Judge Fox recognized that Juror K's statements evinced racial bias and that the trial court abused its discretion by not removing Juror K for cause. *Id.* at

47a. But Judge Fox explained that "the error was harmless," relying "heavily on a series of United States Supreme Court cases concluding that peremptory strikes are rooted in state law and thereby lack constitutional grounding." *Id.* at 53a-57a. She homed in on "a crucial aspect" of that precedent: the idea that a defendant who is erroneously denied a challenge for cause is effectively 'forced' to use a peremptory strike to remove the problematic juror." *Id.* at 54a (quoting *United States* v. *Martinez-Salazar*, 528 U.S. 304, 313-314 (2000)).

Judge Dailey concurred only in the judgment. He disagreed that there was error in the trial court judge's failure to excuse Juror K for cause, but joined Judge Fox in concluding that any error that occurred was "necessarily harmless." *Id.* at 54a.

Judge Schutz dissented. In his view, "[w]hen a trial court wrongfully permits a racially biased prospective juror to continue to remain on the panel, a defendant is denied equal protection of the law." *Id.* at 86a-87a. Judge Schutz also concluded that the district court's refusal to strike a racially biased juror was a structural error, necessitating a new trial. *Id.* at 84a.

4. The Colorado Supreme Court granted review and affirmed in another divided decision.

Justice Márquez, writing for the majority, concluded that "because any error by the trial court was made in good faith and because the juror never actually sat on the jury, Clark's Sixth Amendment right to an impartial jury was not violated," and "because no state actor purposefully discriminated against Clark (or anyone else) on the basis of race, no equal protection violation occurred either." *Id.* at 4a. With respect to Clark's

Sixth Amendment challenge, the majority explained that Clark's argument that "the trial court's error deprived him of a peremptory challenge because he was forced to use one to cure the trial court's error" was "foreclosed by * * * the [United States] Supreme Court's decision in *Martinez-Salazar*, which expressly rejected this argument." *Id.* at 19a-20a. And with respect to Clark's Fourteenth Amendment challenge, the majority concluded that "[b]ecause Clark's argument does not concern purposeful discrimination in the selection of jurors, his reliance on the *Batson* framework is misplaced." *Id.* at 23a. Having found that there was no violation of Clark's federal constitutional rights, the majority also concluded that any error was not structural. *Id.* at 4a.

Justice Hood, joined by Justice Gabriel, dissented. The dissent focused on the two structural harms created by the trial "court's error in excusing overt, in-court racism." *Id.* at 37a. First, the error threatened Clark's "rights to equal protection and a fair trial." *Id.* In the dissent's view, "[b]y failing to release Juror K after he expressed racial bias, the court tacitly allowed the remaining venire members to cling to similar prejudices while deciding Clark's fate." *Id.* at 39a. Second, the error "impugned the integrity of the justice system." *Id.* at 42a. In the dissenting Justices' view, the trial court's "inaction * * * made it[] a party to and placed its power, property and prestige behind Juror K's racial bias." *Id.* at 43a (internal citations and alterations omitted). The error, the dissent added, was "an affront to basic equal protection principles and does great harm to the public's perception of the justice system." *Id.*

The Colorado Supreme Court denied Clark's timely petition for rehearing. Pet. App. 89a.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Colorado Supreme Court has held that a trial court does not violate a defendant's right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution when it wrongly denies a for-cause challenge to a racially biased prospective juror. That ruling conflicts with this Court's decisions interpreting the constitutional guarantee of an impartial jury and the "duty to confront racial animus in the justice system." *Pena-Rodriguez*, 580 U.S. at 222. It also conflicts with the decisions of other state courts of last resort, several of which have recognized that such error violates the federal constitution. Finally, this case presents a clean vehicle for the Court to decide what the Constitution requires when voir dire uncovers racial bias in the jury pool. This Court should therefore grant certiorari to review the Colorado Supreme Court's decision.

I. THE COLORADO SUPREME COURT'S DECISION IS INCORRECT.

The decision below errs in its interpretation of the Sixth and Fourteenth Amendments. When it qualified a racially biased juror, the trial court broadcast to the members of the petit jury that such bias would be appropriate as they sat in judgment. That open acceptance of bias, moreover, introduced to the proceeding the very type of discrimination the Equal Protection Clause is designed to prevent. The Colorado Supreme Court's contrary conclusion failed to grapple with core constitutional principles. Namely, it applied

a line of precedent holding that a deprivation of *state* law rights resulting from the denial of a for-cause challenge has no constitutional dimension. But that precedent reserves the scenario presented here—where the state court error also violates the *federal* constitution.

A. A Trial Court's Erroneous Denial Of A For-Cause Challenge To A Racially Biased Prospective Juror Violates The Sixth And Fourteenth Amendments.

In its cases implicating racial bias in jury selection, this Court has articulated two constitutional tests. The first, applied in the *Batson*-line of cases, asks whether the state conducts the "selection of the petit jury" in a manner giving rise to an inference of purposeful discrimination. *Batson*, 476 U.S. at 96. The second, applied in other cases implicating racial bias in the voir dire process, asks whether a judge conducted voir dire in a way that created "a constitutionally significant likelihood that" the petit jury was not impartial. *Ristaino*, 424 U.S. at 596. But no matter how you approach the question, the answer remains the same: The trial court's erroneous denial of Clark's for-cause challenge to Juror K, based on Juror K's racial bias, violated the Equal Protection Clause and Clark's right to an impartial jury.[3]

1. When considering whether a particular jury selection practice violates a defendant's Sixth and

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[3] This same error contravenes the Privileges or Immunities Clause because these rights also apply "against the States" through that clause. *See, e.g.*, *Ramos*, 590 U.S. at 132 (Thomas, J., concurring); *McDonald* v. *City of Chicago*, 561 U.S. 742, 809-812 (2010) (Thomas, J., concurring).

Fourteenth Amendment rights, this Court considers, *first*, whether the challenged practice "inflicts the harms addressed by *Batson*"—including the harm to an "individual defendant[] from discrimination," "the harm done to the 'dignity of persons,' " and "to the 'integrity of the courts,' " *McCollum*, 505 U.S. at 48 (quoting *Powers* v. *Ohio*, 499 U.S. 400, 402 (1991)); and *second*, whether it is attributable to "state action," *id.*, (extending *Batson* to a defendant's use of peremptory challenges based on race). Both considerations reinforce the conclusion that Clark's rights were violated here.

First, the *Batson*-type harm was evident in this case. As Justice Hood explained, the trial court's refusal to dismiss Juror K for cause "broadcasted to all who remained" that "a prospective juror could sit in judgment of a person against whom he had an acknowledged racial bias." Pet. App. 39a (Hood, J., dissenting) (quotation marks omitted). Moreover, the trial court's error introduced the risk that the jurors who were ultimately seated "may have felt comfortable—or worse, empowered—to make judgments rooted in bias against the only 'Black gentleman' in the room." *Id.* (brackets omitted). That airing of bias "in open court at the outset of the proceedings" cast doubt "over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial." *Powers*, 499 U.S. at 412. And the harm extended beyond Clark to "the entire community," *Batson*, 476 U.S. at 87, because the trial court's acceptance of bias in the jury pool "undermine[d] public confidence in the fairness" of the jury system, itself, *Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009). Indeed, there is "no surer way" to "bring the process of justice into disrepute" than to

permit the "thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors." Pet. App. 43a (Hood, J., dissenting) (quoting *Aldridge*, 283 U.S. at 315) (internal quotation marks and alteration omitted). The harm stems from the trial court's refusal to strike this juror for cause, a constitutional violation by itself regardless of whether the defendant was forced to use a preemptory strike.

Second, that harm is attributable to the state—indeed, it is all the more "pernicious" because it comes from the very body charged with the equal administration of justice secured to Clark by the Sixth and Fourteenth Amendments. *Rose*, 443 U.S. at 555. An inference of purposeful discrimination can be gleaned from the use of peremptory strikes to exclude jurors of a certain race, *Batson*, 476 U.S. at 94, or even "more subtle" acts by a prosecutor that question the "dignity of a witness," *Powers*, 499 U.S. at 412. But no such inference is needed here. Juror K openly voiced racial bias in front of Clark, other prospective jurors, and the officers of the court. The trial court's denial of Clark's resulting for-cause challenge sent a clear message: "Even after expressing racial bias, Juror K was fit to serve"—an impediment to a fair trial that Mr. Clark had to bear on account of his race. Pet. App. 40a (Hood, J., dissenting). In that way, the state " 'made itself a party to' and 'placed its power, property, and prestige behind' Juror K's racial bias." *Id.* (quoting *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (alterations adopted)). That is sufficient to raise an inference of purposeful discrimination under *Batson*.

2. In other cases implicating racial bias in the voir dire process, this Court has protected the right to an impartial jury by examining "whether under all the

circumstances * * * there was a constitutionally significant likelihood that" as a result of the court's error, "the jurors would not be 'indifferent as (they stand) unsworne.' " *Ristaino*, 424 U.S. at 596 (quoting Coke on Littleton 155b (19th ed. 1832)) (considering whether a trial court should have questioned jurors on racial bias). Instead of rooting out "any racial prejudice [the jury] might entertain," *Ham*, 409 U.S. at 527, the court suggested that such bias was *permissible*, not only for Juror K, but also the individuals who served on the petit jury. There was therefore a "significant likelihood" that the petit jury would not be indifferent during the subsequent trial. *Ristaino*, 424 U.S. at 596.

B. *Ross*, *Martinez-Salazar*, And *Rivera* Are Not A Bar To Relief.

In lieu of this Court's precedents regarding racial bias in the voir dire process, the Colorado Supreme Court applied a line of precedent derived from this Court's decisions in *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988), *United States* v. *Martinez-Salazar*, 528 U.S. 304, 316 (2000), and *Rivera* v. *Illinois*, 556 U.S. 148, 157 (2009). Pet. App. 17a-20a.

In those cases, this Court held that, as a general matter, the erroneous denial of a state criminal defendant's peremptory challenge—or the forced use of such a challenge—does not infringe on his constitutional rights. In *Martinez-Salazar*, the Court held that a defendant could not assert a due process violation when "the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause." 528 U.S. at 317. In *Rivera*, the Court extended that rule to a situation where a trial judge denies a peremptory strike to an objectionable juror as a

result of a "good-faith" misapplication of *Batson*. 556 U.S. at 160. And in *Ross*, the Court similarly held that no constitutional harm arises because a defendant is forced to use a peremptory "to achieve the end of an impartial jury." 487 U.S. at 88.

This Court refused to find a constitutional violation in *Martinez-Salazar*, *Rivera*, and *Ross* because peremptory challenges are "state-created"—or auxiliary—and thus "not constitutionally protected." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.7 (1994) (citation omitted). Each case involved the denial of a right that did not *itself* infringe on a constitutional guarantee. *See, e.g.*, *Rivera*, 556 US. at 161; *see also United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986) (explaining that a state-law error violates the Constitution only if it "results in prejudice so great as to deny" the defendant the "right to a fair trial").

By contrast, the right against racial bias in jury selection is *federal* in nature and therefore *is* constitutionally protected. The trial court's erroneous refusal to exclude Juror K independently violated that right, setting this case apart from *Martinez-Salazar*, *Rivera*, and *Ross*. This right is not about who ultimately sits on the jury. Indeed, in *Batson*, each member of the petit jury may well have been impartial. The problem instead was that the "overt wrong" in jury selection "cast[] doubt over the obligation of the parties, the jury, and * * * the court to adhere to the law." *McCollum*, 505 U.S. at 49 (quoting *Powers*, 499 U.S. at 412). The use of a peremptory challenge does nothing to cure those harms. Peremptory challenges are permitted "for any reason at all." *Batson*, 476 U.S. at 89 (quotation marks omitted). Courts often instruct—as the trial court did here—that they carry no negative

inference about the individual juror. Pet. App. 40a (Hood, J., dissenting). In no sense does the defendant's exercise of such a challenge remedy "the State's participation" in "perpetuat[ing]" such bias, on the record, for all to view. *See J.E.B.*, 511 U.S. at 140.

The constitutional harm in this case turned on the denial of a for-case challenge to Juror K. But even if Clark was *only* deprived of a state law right, the Colorado Supreme Court ignored that state-created rights can take on a constitutional dimension when their deprivation or use turns on race. Thus although states traditionally have "wide discretion" in compiling grand jury rosters, *see, e.g.*, *Norris* v. *Alabama*, 294 U.S. 587, 593 (1935), they may not "purposefully * * * exclude[]" "members of a racial group," *Rose*, 443 U.S. at 556. While voir dire is usually left to the "sound discretion" of trial courts, *Ristaino*, 424 U.S. at 594, this Court has recognized that a trial court must question prospective jurors specifically about racial prejudice when there is "a significant likelihood that racial prejudice might infect [a defendant's] trial." *Id.* at 598. The common-law "rule against admission of jury testimony to impeach a verdict," *Tanner*, 483 U.S. at 121, must likewise "give way" where a juror "relied on racial stereotypes or animus to convict a criminal defendant," *Pena-Rodriguez*, 580 U.S. at 225. Similarly, a prosecutor's unfettered use of peremptory challenges must yield where the exclusion of jurors is based on race. *Batson*, 476 U.S. at 89.

This case is to *Ross* as *Rose* is to *Norris* or *Pena-Rodriguez* is to *Tanner*. Juror K's racial bias introduced an independent, federal, constitutional error to the trial court's erroneous denial of a for-cause challenge.

The resulting harm is categorically distinct from the mere denial of a state-created right.

II. THE DECISION BELOW IMPLICATES A DIVISION OF AUTHORITY AMONG STATE COURTS OF LAST RESORT.

State courts of last resort have divided on this issue. Three have held that the erroneous denial of a for-cause challenge to a juror who voices racial bias, which causes a defendant to expend a peremptory strike, constitutes reversible error. In each of those jurisdictions, Clark would have obtained a new trial as a result of the trial court's refusal to exclude Juror K. In contrast, the Colorado Supreme Court and one other state high court hold that the exact same error has no constitutional dimension.

1. Some states find reversible error in the trial court's denial of a for-cause challenge to a racially biased juror, even if a defendant ultimately prevents the juror from being seated with a peremptory strike.

The Kentucky Supreme Court, for example, reversed a black defendant's murder conviction after the trial court failed to exclude for cause two prospective jurors—one of whom stated "he was racially biased" and one who expressed "racist ideas" about interracial marriage. *Gamble* v. *Commonwealth*, 68 S.W.3d 367, 373 (Ky. 2002). That error, *Gamble* explained, struck at the guarantee of impartiality secured by the Sixth and Fourteenth Amendments. *Id.* (citing, inter alia, *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936)). Moreover, for the defendant to succeed, it was "not necessary that an unqualified juror actually sat on the jury." *Id.* at 374. Rather, a distinct line of state-court precedent held that a defendant simply had to

"exhaust his peremptory challenges." *Id.*; *see also Alexander* v. *Commonwealth*, 862 S.W.2d 856, 865 (Ky. 1993), *overruled in part on other grounds Stringer* v. *Commonwealth*, 956 S.W.2d 883 (Ky. 1997) (finding a "reasonable inference of [racial] bias" on the part of two jurors and stating that "[b]ecause both venirepersons should have been stricken for cause, the trial court committed reversible error).

Massachusetts's Supreme Judicial Court has likewise found reversible error in a trial court's refusal "to excuse for cause a juror who demonstrated racial prejudice against African-Americans." *Commonwealth* v. *Clark*, 846 N.E.2d 765, 768 (Mass. 2006). In that case, a prospective juror had commented during voir dire that she believed "African-Americans were more likely to commit crimes than other groups." *Id.* at 773. Yet the trial court found the juror "to be indifferent notwithstanding her view." *Id.* That "expression of racial stereotyping"—even if it came across as "ambiguous" to some—"could have affected the outcome of the case." *Id.* at 774. The result was to impede the defendant's right to "a jury capable and willing to decide the case solely on the evidence before it." *Id.* (quoting *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982)); *id.* at 773-774 (explaining a judge "must 'be zealous to protect the rights of an accused' " (citing *Wainwright* v. *Witt*, 469 U.S. 412, 430 (1985))). Although the defendant later excluded the prospective juror with a peremptory challenge, reversal was "required without a showing of prejudice." *Id.* at 773.

The New York Court of Appeals reached a similar result in *People* v. *Blyden*, 432 N.E.2d 758 (N.Y. 1982). A prospective juror in a trial involving a black defendant "voiced hostility to racial minorities." *Id.* at 758.

Yet the trial court denied the ensuing for-cause challenge even after the juror "repeated [those] misgivings under questioning by the prosecutor." *Id.* at 759. The defendant, like those in *Gamble* and *Clark*, later removed the juror with a peremptory strike. The New York Court of Appeals held that the for-cause challenge denial constituted reversible error and remanded for new trial. *Id.* Key to that determination was the defendant's "fundamental" right to "be tried by a fair and impartial jury." *Id.* (citing *Reynolds* v. *United States*, 98 U.S. 145, 155 (1878)). Proper voir dire questioning, *Blyden* explained, was "crucial to the selection of an impartial jury." *Id.* For support, it analogized this fact pattern to one where a judge erroneously refuses to question the jurors on racial bias. *Id.* (citing *Aldridge*, 283 U.S. 308). There, as here, the court's error "permit[s] it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors"—"[n]o surer way could be devised to bring the process of justice into disrepute." *Aldridge*, 283 U.S. at 314-315.

2. In sharp contrast, Colorado and South Carolina hold that a trial court's failure to remove a racially biased juror for cause has no constitutional dimension so long as the defendant expends a peremptory challenge. In the view of these courts, neither their own state law, nor the United States Constitution, is violated when the trial court fails to remove a racially biased prospective juror.

In this case, the Colorado Supreme Court assumed—and Colorado did not contest—that the trial court erred in failing to exclude Juror K after he displayed racial bias. Pet. App. 13a. But it held that this error did not implicate Clark's constitutional rights. The

Colorado Supreme Court determined that this Court's Fourteenth Amendment jury-selection precedent beginning with *Batson* was not designed to address the type of harm presented in this case. *Id.* Rather, it narrowed that precedent to the context of "the discriminatory use of peremptory challenges." *Id.* at 11a. In lieu of that framework, the Colorado Supreme Court applied a line of Sixth Amendment precedent drawn from *Martinez-Salazar*, 528 U.S. at 316, and *Ross*, 487 U.S. at 85. Pet. App. 15a. It explained that "no Sixth Amendment violation" occurs, either, where a juror "evinces racial bias" but "does not ultimately serve on the jury." *Id.* at 3a.

South Carolina reached a similar result in *Green* v. *Maynard*, 564 S.E.2d 83 (S.C. 2002). There, the trial court erroneously refused to excuse for cause a juror whose voir dire responses "indicated racial prejudice," after which a black defendant was convicted of murder and sentenced to death. *State* v. *Green*, 392 S.E.2d 157, 159 (S.C. 1990) (considering the defendant's direct appeal). The defendant later sought habeas relief on "due process and equal protection" grounds. *Green*, 564 S.E.2d at 83. Yet, like the Colorado Supreme Court, the South Carolina Supreme Court concluded that the case was governed by Sixth Amendment precedent. *Green*, 564 S.E.2d at 86-87. Because the defendant had used a peremptory strike, "no biased juror sat," and he was not "deprived of any rule-based or constitutional right." *Id.* (quoting *Martinez-Salazar*, 528 U.S. at 307).

* * *

Had Clark's trial occurred in Kentucky, Massachusetts, or New York, he would have obtained a new trial based on the trial court's error. In those states, the

denial of a for-cause challenge to a racially biased juror is reversible error; in Colorado and South Carolina, it is not.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT.

A. A Trial Court's Sanction Of Open Racial Bias Undermines The Voir Dire Process.

The question presented goes to the heart the Constitution's guarantee of a trial by an "impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*, 505 U.S. at 58.

If the trial court refuses to remove a prospective juror who has openly expressed racial animus from the venire, voir dire cannot serve its "critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981). The Court has recognized that "[v]oir dire is an effective method of rooting out * * * bias, especially when conducted in a careful and thoroughgoing manner." *Patton* v. *Yount*, 467 U.S. 1025, 1038 n.13 (1984) (quoting *In re Application of Nat'l Broad. Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981)). Indeed, the Constitution protects defendants' right to use voir dire to root out racial bias "[w]henever there is a significant likelihood that racial prejudice might infect [a defendant's] trial." *Ristaino*, 424 U.S. at 598. In such cases, "the essential fairness required by the Due Process Clause of the Fourteenth Amendment" mandates that defendants "be permitted to have the jurors interrogated on the issue of racial bias." *Ham*, 409 U.S. at 527.

The Court has yet to specify what the Constitution requires at the next step, after such constitutionally protected questioning succeeds in exposing a juror's "acknowledged bias against nonwhite people like defendant." Pet. App. at 50a (App. Ct. Op.). Colorado and South Carolina believe it doesn't require much: so long as the trial court allowed the defendant to investigate the venire for racial bias, no constitutional violation stems from refusing to remove the racially biased juror. That cannot be correct.

B. The Improper Denial Of A Defendant's Peremptory Challenge To A Racially Biased Juror Is Likely A Structural Error.

This Court divides constitutional errors into two classes: "trial errors" and "structural errors." Errors that occur "during the presentation of the case to the jury" fall in the former bucket and are susceptible to harmless error review, meaning they are "quantitatively assessed in the context of other evidence presented." *Arizona* v. *Fulminante*, 499 U.S. 279, 307-308 (1991). "Structural defects," by contrast " 'defy analysis by harmless-error standards' because they 'affec[t] the framework within which the trial proceeds.' " *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307-308). Any effort to evaluate the evidence to determine guilt or innocence in light of a structural error amounts to ignoring the error, rather than ensuring that it did not distort the outcome. *Cf. Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against [defendant], he had the right to have an impartial judge.").

This Court has described the discriminatory use of peremptory strikes in just such terms—an "overt wrong, *often apparent* to the entire jury panel, [that] casts doubt" "throughout the trial" which "may pervade all the proceedings that follow." *Powers*, 499 U.S. at 412-412 (emphasis added). Thus, the *Batson* line of cases addressing these defects are "automatic reversal precedents." *Rivera*, 556 U.S. at 161; *see also* 2 Charles Alan Wright, Arthur R. Miller & Peter J. Henning, Federal Practice and Procedure: Criminal § 384 (4th ed. July 2024 update) ("If there has been a *Batson* violation, there must be reversal * * * because it is a 'structural' error.") The need for reversal flows from the "defendant's right to equal protection" as well as what the error means for "our system of justice." *Rivera,* 556 U.S. at 161 (quoting *Batson*, 476 U.S. at 86-87); *Gray* v. *Mississippi*, 481 U.S. 648, 660-668 (1987); *Peters* v. *Kiff*, 407 U.S. 493, 505 (1972); *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961) (pretrial publicity calling into question jury's impartiality). Even when bias precedes the trial itself, like in the selection of the grand jury, this Court adheres to a rule of mandatory reversal. The rationale at both stages is the same: There is no way to assess how bias "infect[ed] the framing of the indictment" or the "proceedings to come." *Vasquez*, 474 U.S. at 263.

The error below fits squarely within that tradition. It implicates the same class of constitutional error and defies harmless error analysis for the same reason. As Justice Hood explained, the bias Juror K introduced "during voir dire lingered in the background of the entire trial." Pet. App. 41a. The effect on the trial of qualifying Juror K is certainly hard to pin down—but that is "precisely why the error is structural." *Id.* Put

another way, it would be impossible to guarantee that the court's stamp of approval on Juror K's bias had *no* effect on the impartiality of the remaining jurors.

The Colorado Supreme Court's prior holding that the error was harmless was based on its understanding that there was no "federal constitutional dimension" to Petitioner's claim. Pet. App. at 17a (internal quotation marks omitted). Once this Court confirms that there is, the Colorado Supreme Court would likely find the error in this case to be structural and require a new trial for Clark. The key precedents underlying both analyses are the same. *Compare supra* at 18 (discussing error and citing, inter alia, *Batson* and *Powers*) and 29 (discussing structural nature of error and citing *Batson* and *Powers*).[4]

IV. THIS CASE IS THE IDEAL VEHICLE.

First, this case cleanly tees up the question of the trial court's obligations when there is open racial bias in the jury pool. There is no disagreement that Juror K's statements expressed his racial bias towards defendant: The State conceded the point on appeal, Pet. App. 67a n.1 (App. Ct. Op.); the Colorado Court of Appeals described Juror K as holding "acknowledged bias against nonwhite people like defendant," *id.* at 50a; and the Colorado Supreme Court described the point as "undisputed." *Id.* at 37a n.1 (Hood, J., dissenting). Because of this consensus, this Court need not wade into sensitive and potentially contentious questions of what types of comments show racial bias. The Court can focus solely whether the refusal to excuse a

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[4] Alternatively, the Court can address the question of structural error itself and order that Petitioner receive a new trial.

concededly biased juror violates a defendant's constitutional rights.

Second, this case arises on direct review of Clark's convictions. As a result, it possesses none of the complications that often accompany criminal appeals of state convictions which reach the Court through habeas petitions, while minimizing federalism concerns. *See, e.g.*, *Flowers*, 588 U.S. at 303-304 ("Because this case arises on direct review, we owe no deference to the Mississippi Supreme Court.").

Third, the question presented was preserved and fully ventilated below. Clark properly presented his constitutional claim in the state court system. Both the Colorado Court of Appeals and the Colorado Supreme Court engaged in a robust discussion on the merits, presenting competing legal perspectives.

Fourth, the question presented is outcome determinative. If the Court recognizes a federal constitutional violation when the state erroneously denies a for-cause challenge to a racially biased juror, it will remove the basis of the judgment below. At that point, it can remand to the Colorado Supreme Court to determine in the first instance whether that violation represents structural error. *Supra* 30.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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