No. 24-774

In the Supreme Court of the United States

REGINALD KEITH CLARK,

Petitioner,

v.

COLORADO,

Respondent.

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

BRIEF OF *AMICI CURIAE* COLORADO HISPANIC BAR ASSOCIATION, ASIAN PACIFIC AMERICAN BAR ASSOCIATION, SOUTH ASIAN BAR ASSOCIATION OF COLORADO, AND SAM CARY BAR ASSOCIATION IN SUPPORT OF PETITIONER

Kendra N. Beckwith
Counsel of Record
Kenneth F. Rossman, IV
WOMBLE BOND DICKINSON (US) LLP
1601 19th Street, Suite 1000
Denver, CO 80202
(303) 623-9000
kendra.beckwith@wbd-us.com

February 20, 2025 *Counsel for Amici Curiae*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The Colorado Supreme Court's Outcome-Driven Approach to Curing Racial Bias Improperly Places the Onus on Defendants to Fulfill *Batson*'s Promise 5

II. A Racially Biased Juror Is a Toxin in the Judicial System That Cannot Be Rehabilitated ... 10

III. Forcing a Defendant to Use a Peremptory Challenge Merely to Secure an Impartial Jury Threatens the Democratic Principles on Which America's Judicial System Is Built 15

IV. Colorado's History of Racial Bias Demonstrates the Importance of This Issue .. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Batson v. *Kentucky*,
476 U.S. 79 (1989) 2, 5, 6, 7, 12, 16, 18, 19, 21

Duncan v. *State of Louisiana*,
391 U.S. 145 (1968) 16

Georgia v. *McCollum*,
505 U.S. 42 (1992) 3, 7, 8, 17

Gray v. *Mississippi*,
481 U.S. 648 (1987) 8

Ham v. *South Carolina*,
409 U.S. 524 (1973) 17

Mattaranz v. *State*,
133 So.3d 473 (Fla. 2013) 14

O'Dell v. *Miller*,
565 S.E.2d 407 (W. Va. 2002) 12

Peña-Rodriguez v. *Colorado*,
580 U.S. 206 (2017) 16, 17, 18, 22, 23

People v. *Clark*,
512 P.3d 1074 (Colo. App. 2022) 7, 8, 9, 10, 23

People v. *Novotny*,
320 P.3d 1194 (Colo. 2014) 7

Rosales-Lopez v. *United States*,
451 U.S. 182 (1981) 17

United States v. *Burr*,
25 F. Cas. 49 (C.C.D. Va. 1807) 11, 13

United States v. *Martinez-Salazar*,
528 U.S. 304 (2000) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. *Scott*,
437 U.S. 82 (1978) 9

United States v. *Wood*,
299 U.S. 123 (1936) 14

Vigil v. *People*,
455 P.3d 332 (Colo. 2019) 7

Walls v. *Kim*,
549 S.E.2d 797 (Ga. 2001) 13

CONSTITUTIONAL PROVISIONS

Colo. Const. art. 6, § 10 15

Colo. Const. art. II, § 16 8

Colo. Const. art. II, § 25 8

U.S. Const. amend. V 8

U.S. Const. amend. VI 3, 4, 5, 8, 9, 16, 19, 22

U.S. Const. amend. XIV 3, 4, 8, 9

STATUTES

Colo. Rev. Stat. § 16-10-103(1)(b) 12

Colo. Rev. Stat. § 16-10-103(1)(j) 12

JUDICIAL RULES

Colo. R. Crim. P. 24(b)(II) 12

Colo. R. Crim. P. 24(b)(X) 12

Colo. R. Crim. P. 24(b)(XII) 12

Sup. Ct. R. 10(a) 10

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

Col. Senate Bill 22-128 (2022) 21

OTHER AUTHORITIES

Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994) 16

Alexander Hamilton, THE FEDERALIST NO. 83 15

Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55 (2020) 20

Andrew Johnson, Speech, Cong. Globe, 42d Cong., 2d Sess. 157 (1867) 20

Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013) 20

Anne Bowen Poulin, *The Limits of Double Jeopardy: A Course into the Dark? The Example: Commonwealth* v. *Smith*, 39 VILL. L. REV. 627 (1994) 10

Brian Willie et al., *Chilling interactive map shows 1920s Denver was rife with KKK members*, Rocky Mtn. PBS (Apr. 28, 2021) 21

TABLE OF AUTHORITIES – Continued

Page

Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471 (2003) 13

David Yokum, Christopher T. Robertson & Matt Palmer, *The Inability to Self-Diagnose Bias*, 96 DENVER L. REV. 869 (2019) 11

Duane A. Smith, THE BIRTH OF COLORADO (U. Okla. Press 1989) 20

Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI. KENT L. REV. 1033 (2003) 18

Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY AND SOC. PSYCH. BULL., 369 (Mar. 2022) 15

Eugene H. Berwanger, RISE OF THE CENTENNIAL STATE 113 (2007) 21

Geoffrey Hunt, *The Civil War in Colorado*, COLORADO ENCYCLOPEDIA (October 26, 2022) 22

Hon. Bruce M. Selye, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909 (1996) 18

Irving W. Stanton, SIXTY YEARS IN COLORADO 160 (1922) 21

TABLE OF AUTHORITIES – Continued

Page

James Forman, Jr.,
Juries and Race in the Nineteenth Century, 113 YALE L.J. 895 (2004)..... 15, 16

Jessica M. Salerno et al.,
The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases, 45 LAW & HUM. BEHAV. 336 (2021)..... 11, 14

Kathleen Hall Jamieson & Michael Hennessy,
Public Understanding of and Support for the Courts: Survey Results, 95 GEO. L.J. 899 (2007) 17

Matthew Levendusky et al.,
Has the Supreme Court Become Just Another Political Branch? Public Perceptions of Court Legitimacy and Approval in a Post-Dobbs World, 10 SCI. ADVANCES 1 (2024) 18

Michael J. Klarman,
Mistrials Arising from Prosecutorial Error: Double Jeopardy Protection, 34 STAN. L. REV. 1061 (1982) 10

Neal Bush,
The Case for Expansive Voir Dire, 2 LAW & PSYCHOL. REV. 9 (1976)..... 13

Patricia D. Devine et al.,
Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention, 48 J. EXPER. SOC. PSYCHOL. 1267 (2012) 11

TABLE OF AUTHORITIES – Continued

Page

Ralph Gregory Elliot,
Public Trust Is A Fragile Bond,
77 CONN. B.J. 41 (2003) 18

Richard Delgado & Jean Stefancic,
Home-Grown Racism: Colorado's Historic Embrace—And Denial—of Equal Opportunity in Higher Education,
70 U. COLO. L. REV. 703 (1999) 21, 22

Richard Gabriel, John G. McCabe & Rebecca C. Ying, *Redefining Bias in Criminal Justice*, 36-SUM CRIM. JUST. 18 (2021) 11

Shawn Patterson Jr. et al.,
The Withering of Public Confidence in the Courts, 108 JUDICATURE 23 (2024) 18

Thomas Ward Frampton,
For Cause: Rethinking Racial Exclusion and the American Jury,
118 MICH. L. REV. 785 (2020) 15, 18, 19

William T. Pizzi & Morris B. Hoffman,
Jury Selection Errors on Appeal,
38 AM. CRIM. L. REV. 1391 (2001) 19

INTEREST OF THE *AMICI CURIAE*[1]

The COLORADO HISPANIC BAR ASSOCIATION serves Colorado and promotes justice by advancing Hispanic interests and issues in the legal profession and seeking equal protection for the Hispanic community before the law.

The ASIAN PACIFIC AMERICAN BAR ASSOCIATION represents the interests of the Asian Pacific American community, speaks on behalf of, and advocates for that community's interest, and provides a vehicle for unified expression of opinions and positions by the organization's members upon current social and legal matters or events of concern to its members.

The SOUTH ASIAN BAR ASSOCIATION OF COLORADO serves Coloradans and promotes equity by advancing South Asian interests—alongside the interests of other minority voices—through substantive programming, community outreach, diverse allyship, and advocacy. It has a vested interest in ensuring that all Coloradans, diverse or otherwise, are treated equally under the law.

The SAM CARY BAR ASSOCIATION promotes the administration of justice; to promote the well-being of the Black community; to secure proper legislation; and to promote professionalism, fellowship, and harmony within the Black legal profession in Colorado and beyond.

---

[1] No counsel for a party authored this *amici* brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution to fund the production of the brief. All parties received timely notice of this filing.

Collectively, these organizations seek to end racial prejudice in Colorado's judicial system and are aligned with the goals of their national counterparts to do the same. The Colorado Supreme Court's split decision in *Clark* v. *People*, 553 P.3d 215 (Colo. 2024), threatens this commitment and places an already fragile system at peril. It leaves the promise in *Batson* v. *Kentucky*, 476 U.S. 79 (1989), of an impartial jury pool unfulfilled for persons of color in Colorado, excusing Colorado courts from their obligation to protect against it.

SUMMARY OF THE ARGUMENT

Reginald Keith Clark was the only Black man in the courtroom when he appeared on kidnapping and sexual assault charges in a rural Colorado county where Blacks comprise less than 2% of the county's population. During voir dire, a potential juror voluntarily shared in open court not only that he was racially biased, but that his views were immutable. The district court denied Mr. Clark's challenge for cause because the juror represented he could still hold the State to its burden of proof and his racial bias was a mere political belief he could set aside. Mr. Clark was then forced to use one of his peremptory challenges simply to secure the unbiased jury to which he was already entitled, placing him at a disadvantage to the State (which benefited from all its challenges). The Colorado Supreme Court affirmed his conviction, concluding Mr. Clark's "choice to exercise a peremptory challenge" to remove the racially biased juror made any error harmless. *Clark*, 553 P.3d at 227.

This outcome is fundamentally at odds with the tenets of fairness and due process on which this country's judicial system is built. Defendants of color should not be forced to choose to secure what they are already promised under the Constitution: "an impartial jury that can view him without racial animus." *Georgia* v. *McCollum*, 505 U.S. 42, 58 (1992). Mr. Clark's petition for a writ of certiorari should therefore be granted. *Amici* provide further background, explaining why this case warrants review for these reasons:

First, erroneously denying a for-cause challenge to a racially biased prospective juror deprives a defendant of his Sixth and Fourteenth Amendment rights to an impartial jury. This deprivation of a constitutional right is structural error and should result in automatic reversal. The Colorado Supreme Court's decision to instead force defendants to "choose" to either seat a racist juror or use a peremptory challenge to remove an impartial juror is unacceptable. *Clark*, 553 P.3d at 227. It allows Colorado's courts to abdicate their "constitutional responsibilities by delegating a public function to private parties." *McCollum*, 505 U.S. at 53.

Second, *Clark* assumes error in refusing to dismiss Juror K for cause, addressing only whether the error requires automatic reversal or a showing of harm. This makes this case an ideal vehicle to address this issue, as Mr. Clark demonstrates. Pet. 30. But it also means trial courts may attempt to rehabilitate jurors in misguided efforts to protect against racial bias. Rehabilitation is impossible. Rather, recognition that a defendant's Sixth and Fourteenth Amendment rights are violated when a racially biased juror is not stricken for cause, resulting in structural error, should be the only remedy available.

Third, foisting on to defendants of color the obligation to choose to secure the impartial jury promised them under the Sixth and Fourteenth Amendment is untenable. It taints the judiciary with tacit approval of racial bias, creating a public perception that racial bias is an individual's obligation to correct, rather than an institutional problem against which courts are to guard.

Fourth, Colorado's history of racial bias demonstrates the need for strict incentives to protect against institutionalized racism. Absent a recognition that a defendant's right to an impartial jury is of a constitutional magnitude, protecting against racial bias in Colorado's judicial system will continue to prove difficult, if not impossible.

ARGUMENT

The inseparable connection between liberty and trial by jury is enshrined in the Sixth Amendment and guaranteed by the Fourteenth Amendment's promise of due process and equal protection under the law. A defendant has the right to an impartial jury selected through nondiscriminatory means without losing his right to peremptory challenges. The Colorado Supreme Court has abdicated its role to protect this basic safeguard of American liberty in Colorado.

This abdication comes at great cost. It creates a perverse incentive—to allow a biased jury to convict a criminal defendant so the conviction may be reversed and the defendant's rights to both an impartial jury and peremptory challenges restored. It places a cost on jury impartiality—to be purchased with a peremptory strike. And it does violence to the tenets of impartiality and fairness on which the American judicial system is built.

This Court should grant Mr. Clark's petition.

I. The Colorado Supreme Court's Outcome-Driven Approach to Curing Racial Bias Improperly Places the Onus on Defendants to Fulfill *Batson*'s Promise.

1. Gilpin County is a rural Colorado county in which 90% of the population is white. Mr. Clark was the only Black man in the courtroom. During jury selection, Mr. Clark's counsel addressed this head-on with prospective jurors, asking if anyone had stereotypes about Black men, acknowledging that these types of conver-

sations can be awkward and uncomfortable to have in front of everyone. One juror commented if she were in Mr. Clark's position, she might "doubt the fairness of the trial and 'would like to see a little more diversity.'" *Clark*, 553 P.3d at 221.

Juror K shared no such lament. Instead, he volunteered, unprompted—to counsel, the court, and all prospective jurors in the courtroom—that he had moved to Gilpin County because he "didn't want diversity." *Id.* "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." *Id.* Juror K then confirmed the firmness of his belief: "And *I can't change that*. I can look and judge what is being said by [the defense] side and be fair, *but I can't change that*—when I walked in here seeing a black gentleman here." *Id.* at 221-22 (emphases added).

Mr. Clark's counsel challenged Juror K for cause because Juror K's statements demonstrated actual racial bias. *Id.* at 222. The trial court further questioned Juror K in open court. *Id.* The court asked whether Juror K would be capable of finding Mr. Clark not guilty if "the prosecution hasn't proven its case" or guilty if the "prosecutor has proven his case." *Id.* Juror K responded affirmatively to both questions. *Id.* Juror K was never asked if he could set aside the belief he had spontaneously shared.

The trial court denied Mr. Clark's challenge, determining that Juror K's opinion was only a "political view" and that "a person can certainly have offensive views and still apply the law." *Id.* The court viewed these "two things [as] really separate in [its] mind." *Id.* Mr. Clark was then forced to use his first peremptory

strike to remove Juror K. Mr. Clark then exhausted his remaining peremptory strikes. *Id*.

2. Mr. Clark was convicted and subsequently appealed, arguing he was entitled to a new trial because the trial court's erroneous denial of his for-cause challenge was reversible error. The appellate division's analysis fractured in three directions, ultimately with the majority affirming the district court. *See People* v. *Clark*, 512 P.3d 1074 (Colo. App. 2022).

3. The Colorado Supreme Court granted review and, in a divided opinion, affirmed the appellate court's decision. The supreme court's majority decision relied on two Colorado Supreme Court cases, neither of which involved a prospective juror who expressed racial bias—*People* v. *Novotny*, 320 P.3d 1194 (Colo. 2014) (involving denial of a for-cause challenge to an assistant attorney general in the jury pool as a compensated employee of a law enforcement agency), and *Vigil* v. *People*, 455 P.3d 332 (Colo. 2019) (involving denial of a for-cause challenge in a burglary trial where the prospective juror knew the victim's family and might do work for the victim's father in the future). The majority concluded that so long as Mr. Clark received his statutorily allowed number of peremptory challenges and Juror K did not sit on the jury, error (if any) in denying the challenge for cause was harmless "absent bad faith" by the trial court. *Clark*, 553 P.3d at 220, 226-27 (citing *McCollum*, 505 U.S. at 58). Had the trial court erroneously denied the for-cause challenge and Juror K remained on the jury, only then would his constitutional right to an impartial jury have been violated, warranting a new trial. *Id*. at 224-26.

The dissent, characterizing the case as "difficult and troubling," disagreed. *Id*. at 233 (Hood, J., dis-

senting). "The district court's error in excusing overt, in-court racism as nothing more than legitimate political opinion, produced at least two harms." *Id.* The first, the "risk that some remaining venire members were emboldened to act on similar but unvoiced biases," and the second, "the whole unseemly exercise leaves our system of criminal justice diminished in the eyes of the public." *Id.* "[F]idelity to precedent doesn't leave us powerless to address" these harms, the dissent articulated. *Id.* These harms resulted in structural error, the dissent held, and should have entitled Mr. Clark to a new trial. *Id.* at 236.

4. The outcome of *Clark* is disturbing. Even the State agrees the trial court's denial of Mr. Clark's for-cause challenge was error. *Id.* at 224. Yet, faced with the indisputable reality that an immutably racist juror was not removed for cause, the majority *still* finds these circumstances harmless. *Id.* at 226-27. It does so by giving itself comfort that, in this case, the error ultimately "did not result in a biased juror participating in [Mr.] Clark's trial" because Mr. Clark chose to remove him. *Id.* at 227 (further observing there was no "otherwise deliberate" error or bad faith).

This is cold comfort to Mr. Clark. And it provides little comfort to *Amici*. The right to an impartial jury is well established. *United States* v. *Martinez-Salazar*, 528 U.S. 304, 316 (2000). It is a key element of a defendant's federal and state constitutional right to a fair trial. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25. It is of the character of rights that are "so basic to a fair trial that their infraction can never be treated as harmless," *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987); *see also Martinez-Salazar*,

528 U.S. at 316 (seating of biased juror results in structural error).

The Colorado Supreme Court now deems otherwise, choosing to pass the responsibility to defendants of color to secure their own impartial jury. It does so on a reading of this Court's precedent that the deprivation of peremptory challenges is "not of federal constitutional dimension." *Clark*, 553 P.3d at 226. Mr. Clark argues, with force, this is incorrect. The Sixth and Fourteenth Amendment rights to an impartial jury should not attach only where a defendant elects not to use a peremptory challenge to remove a racially biased juror. The use of a peremptory challenge to ensure these rights are protected should also rise to the level of structural error and automatic reversal should follow. Pet. 29-30. Absent this Court's review, defendants of color must allow the racially biased juror to actually serve for these rights to attach and reversal to follow.

The practical realities of these situations make it highly unlikely defendants of color will be willing to risk a second trial to vindicate their Sixth and Fourteenth Amendment rights. The emotional and financial cost alone of doing so is unimaginable, to say nothing of the drain on judicial resources. It also places these defendants at a distinct disadvantage at the second trial—memories will fade, witness may disappear, and evidence will go stale. *See, e.g.*, *United States* v. *Scott*, 437 U.S. 82, 105, 105 n.4 (Brennan, J., dissenting) (describing the "agony and risks attendant upon undergoing more than one criminal trial for any single offense" and observing that a retrial "enhances the risk" that a criminal defendant will be found guilty); *see also* Michael J. Klarman, *Mistrials Arising from*

Prosecutorial Error: Double Jeopardy Protection, 34 STAN. L. REV. 1061, 1064 n.16 (1982) (describing disadvantages of retrials to criminal defendants); *cf.* Anne Bowen Poulin, *The Limits of Double Jeopardy: A Course into the Dark? The Example: Commonwealth* v. *Smith*, 39 VILL. L. REV. 627, 650 (1994) (noting a defendant's "strong interest in avoiding the stress, expense and anxiety of the second trial"). These realities also mean defendants of color will consistently approach jury selection already one step behind the State, which will effectively benefit from more peremptory challenges than the defendant to shape the jury.

It is untenable to *Amici* to place defendants of color in this situation simply to realize their constitutional promise of an impartial jury. This inflicts the very harm about which the dissent expressed concern. Indeed, observing, as the prospective jurors did here, a trial court condone service of a racially biased juror who repeatedly confirmed he could not change his views emboldens other jurors to serve despite similarly toxic biases. And it imputes to the judicial system tacit acceptance of these views.

This is unacceptable and presents compelling reasons to grant Mr. Clark's petition. Sup. Ct. R. 10(a).

II. A Racially Biased Juror Is a Toxin in the Judicial System That Cannot Be Rehabilitated.

As an unintended consequence of *Clark*, trial courts and counsel may still attempt to rehabilitate a racially biased juror in a good faith effort to address racial bias. Any approach other than striking a racially biased prospective juror for cause is ineffective.

1. Jurors—like most people—struggle to identify their biases. *See, e.g.*, David Yokum, Christopher T.

Robertson & Matt Palmer, *The Inability to Self-Diagnose Bias*, 96 DENVER L. REV. 869, 913 (2019). Even assuming jurors could accurately and reliably identify their biases, it is a fallacy to assume that jurors can then set them aside. Richard Gabriel, John G. McCabe & Rebecca C. Ying, *Redefining Bias in Criminal Justice*, 36-SUM CRIM. JUST. 18, 18-23 (2021). Most jurors will *say* they can set them aside. But there is no way of knowing this is true. *See* Patricia D. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPER. SOC. PSYCHOL. 1267, 1268 (2012) (overcoming biases requires "the application of considerable goal-directed effort over time"); *see also* Jessica M. Salerno et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 LAW & HUM. BEHAV. 336, 336 (2021), discussed *infra*.

A juror's self-assessed ability to set aside bias cannot and should not be the basis upon which a trial court refuses to dismiss a juror for cause. And where, as here, a juror *expressly proclaims that he cannot and will not* set aside his racial views, the exercise is futile. The preservation of the judicial institution, and this country's repeated promise of racial equity, demands that the trial court act to remove this toxin for cause.

As Chief Justice Marshall articulated over two centuries ago, a juror's biases constitute a just challenge for cause because "the individual who is under their influence is presumed to have a bias on [h]is mind which will prevent an impartial decision of the case, according to the testimony." *United States* v. *Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). "He may declare that

notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; *but the law will not trust him*." *Id.* (emphasis added). The trust the trial court placed in Juror K to fairly judge Mr. Clark despite his immutable racial bias was misplaced.

Colorado law compels trial courts to sustain challenges for cause on the mere appearance or assumption of certain biases—including employment with a public law enforcement agency or public defender's office, or relationship to a party. Colo. R. Crim. P. 24(b)(II),(XII); Colo. Rev. Stat. § 16-10-103(1)(b),(j). Jurors who have explicitly stated they are affirmatively racially biased—unapologetically and irreversibly so, no less—presents a far greater danger to *Batson*'s promise than presumed biases resulting from employment or personal friendships. It is irrational to assume these jurors can be rehabilitated to set this bias aside.

Put differently, a court should never be "satisfied" that a racially biased juror "will render an impartial verdict based solely upon the evidence and the instructions of the court," *see* Colo. R. Crim. P. 24(b)(X), because a solidified racial bias can never be set aside. Trial judges should not attempt to "rehabilitate" prospective jurors with expressed racial animus with questions designed to elicit a response that the juror promises to be fair and impartial, when all of the facts and circumstances demonstrate the contrary. Trial judges "must resist the temptation to 'rehabilitate' prospective jurors simply by asking the 'magic question,'" *i.e.*, "can you set aside your preconceptions and decide this case solely on the evidence and the law." *O'Dell* v. *Miller*, 565 S.E.2d 407, 412, 412 n.1 (W. Va. 2002). This is because "[n]ot so remarkably, jurors confronted with this question from the bench almost

inevitably say 'yes,'" *Walls* v. *Kim*, 549 S.E.2d 797, 799 (Ga. 2001). "Two major concerns arise in the rehabilitation of a juror who has already admitted to a prejudice against one of the parties." Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1497 (2003).

First, the juror "recants his prejudice for a reason other than the true ability to judge the case fairly." *Id.* Often, this can happen because potential jurors simply do not want to upset the judge. *See id.* at 1498. This pressure is amplified when a judge pressures a juror by interrupting an attorney's voir dire, in open court, to try and rehabilitate them. *See id.* "The juror's ultimate response may be viewed as an effective rehabilitation when actually the juror was merely intimidated by the circumstances." *Id.*; *see* Neal Bush, *The Case for Expansive Voir Dire*, 2 LAW & PSYCHOL. REV. 9, 17 (1976) (noting that potential jurors view judges as authority figures and usually offer responses to please the judge, instead of focusing on truthfulness). Other times, a juror may change his position to avoid a negative perception from the strangers in the courtroom.

"Second, even if the juror honestly believes he can decide the case from the evidence, the effects of bias may still play a part in his decision making." Cosper, 37 GA. L. REV. at 1497. A juror's racist beliefs are the lens through which the juror will view the evidence presented and will inhibit their ability to be fair and impartial. *See Burr*, 25 F. Cas. at 50 (a biased juror will "listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment

is not made up in the case"). Those beliefs will permeate into the deliberation process. A juror bold enough to openly admit his racial prejudices at the beginning of a trial, in front of a room full of strangers and to attorneys he has never met, will have no reservations with expressing them to his fellow jury members in the privacy of the deliberation room.

"Impartiality is not a technical conception. It is a state of mind." *United States* v. *Wood*, 299 U.S. 123, 145 (1936). It is a "preposterous conclusion that the human capacity for rational reflection is but a light switch that can be flipped on or off, and a trial court may thereby procure a juror who mere minutes before expressed unacceptable bias and partiality, is suddenly objective and neutral[.]" *Mattaranz* v. *State*, 133 So. 3d 473, 488 (Fla. 2013) (internal alterations and citations omitted).

It is therefore impossible to rehabilitate a juror with explicitly expressed racial animus. A recent research study underscores this concern. *See* Salerno et al., 45 LAW & HUM. BEHAV. at 336. When study participants acting as prospective jurors were asked by a judge (via a short video) if they could set aside their biases, nearly all said they would. *Id.* at 339, 351. After judicial rehabilitation, many of them reported that they believed that their biases had "no impact at all" or a "tiny impact" on their judgments. *Id.* at 351. "[T]he rehabilitation procedure seems to have given mock jurors a false sense of security that their judgments would no longer be biased by their preexisting attitudes. Judicial rehabilitation might have increased mock jurors' 'bias blindspot.'" *Id.* (citing Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28

PERSONALITY AND SOC. PSYCH. BULL., 369, 370). Notably, the topic of the Salerno study covered only common biases in civil cases and did not deal with racial biases. *Id.* at 342-43. Given racial biases are among the most pernicious in society, it makes sense that racial biases would be even more difficult, if not impossible, for a judge to rehabilitate.

2. Moreover, under the Colorado Constitution, a trial court judge must reside in the county in which the judge serves. Colo. Const. Art. 6, § 10. This requirement inherently increases the risk that, particularly in more racially homogenous counties such as Gilpin, the judge is likely to be a part of the racial majority in that county and may be less inclined to view racial bias as a particular issue or worse, share in racially biased views. *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 832 (2020) (describing research studies on judicial rehabilitation and describing how judges' rulings on challenges for cause might be "skewed" by judges' own "class, race, sex, and status biases").

III. Forcing a Defendant to Use a Peremptory Challenge Merely to Secure an Impartial Jury Threatens the Democratic Principles on Which America's Judicial System Is Built.

1. Criminal trial by jury is a bulwark of American democracy. James Forman, Jr., *Juries and Race in the Nineteenth Century,* 113 YALE L.J. 895, 909 (2004). A criminal defendant's right to be tried by an unbiased jury is a "barrier to the tyranny of popular magistrates in a popular government." THE FEDERALIST NO. 83, at 451 (Alexander Hamilton).

America's trust in the jury system can be traced back to the nation's origin. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994). With the Sixth Amendment's guarantee of community participation in determining criminal culpability, "[f]ear of unchecked power, so typical of our State and Federal Governments in other respects, found expression." *Duncan* v. *State of Louisiana*, 391 U.S. 145, 156 (1968). The jury's role as a sentinel of freedom only crystalized in the centuries that followed.

In the antebellum era, the right to jury trial was significant to abolitionists seeking to check the power of the federal government over enslaved persons. Forman, 113 YALE L.J. at 909. Abolitionists believed that "jurors would understand that the law of God opposed slavery, even if the federal government did not." *Id.*

The jury is at the center of our democracy, "a tangible implementation of the principle that the law comes from the people." *Peña-Rodriguez* v. *Colorado*, 580 U.S. 206, 210 (2017). It is a venerable and evolving institution that this Court has a responsibility to protect.

But for a jury to operate as the safeguard it was intended to be, it *must* be unbiased. *Batson*, 476 U.S. at 86. Particularly important is the absence of racial bias, which "implicates unique historical, constitutional, and institutional concerns." *Peña-Rodriguez*, 580 U.S. at 224. It is "a familiar and recurring evil that, if left unaddressed, would risk *systemic injury* to the administration of justice." *Id.* (emphasis added).

"[A] defendant has the right to 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. A defendant therefore has a right to explore the potential racial bias of their jury. *See Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973). True, peremptory challenges provide an important mechanism to act on any racial bias uncovered during that exploration. *McCollum*, 505 U.S. at 59. A defendant could form an impression as to the racial bias of a prospective juror bereft of specifics. But a defendant should not need to exercise a peremptory challenge if a juror's racial bias is explicit and unapologetic, plain for the court to see. *Cf. Peña-Rodriguez*, 580 U.S. at 225. These circumstances instead implicate a trial court's for-cause dismissal. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 193 (1981).

Racial bias in the judicial system threatens the integrity of this institution. Racial bias is a unique threat, distinguishable from other types of bias both in its severity and institutionalized history. Respectfully, the trial court's open acceptance of the fact of immutable racial bias in rejecting Mr. Clark's for-cause challenge is necessarily prejudicial and reversible without more. *Amici* ask that this Court clarify and confirm that the law does not permit otherwise.

2. Public trust in the judiciary is unraveling: "[M]any . . . believe that the nation's courts favor the wealthy and politically connected, that judges are motivated by political and personal biases, and that they are influenced by campaign fundraising." Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 899 (2007); *see* Hon. Bruce

M. Selye, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 911 (1996); Shawn Patterson Jr. et al., *The Withering of Public Confidence in the Courts*, 108 JUDICATURE 23, 27 (2024); Matthew Levendusky et al., *Has the Supreme Court Become Just Another Political Branch? Public Perceptions of Court Legitimacy and Approval in a Post-Dobbs World*, 10 SCI. ADVANCES 1, 10 (2024). This is more so now than perhaps ever before within modern memory. Creating a system in which the gatekeepers are alleviated from responsibility to protect constitutional rights deepens and furthers this crisis.

3. Jury verdicts are not immune from this crisis in perception: racial bias in the administration of criminal justice presents a singular challenge to preserving it. Such bias systemically undermines public confidence in jury verdicts. *See Peña-Rodriguez*, 350 P.3d at 224. As Frampton states, "we know from decades of scholarship that unrepresentative juries 'threaten the public's faith in the . . . legal system and its outcomes.'" Frampton, 118 MICH. L. REV. at 834 (quoting Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI. KENT L. REV. 1033, 1038 (2003)).

In *Batson,* this Court attempted to combat this. 476 U.S. at 99. *Batson* remains a bastion against public mistrust, assuring that a jury reaches its verdict "with impartiality, without prejudice, and in good faith." Ralph Gregory Elliot, *Public Trust Is A Fragile Bond*, 77 CONN. B.J. 41, 43 (2003); *cf. Peña-Rodriguez,* 350 P.3d at 294 (arguing that prohibiting defendants from introducing specific evidence of racial bias affecting

their verdict detrimentally impacts public confidence in Colorado's jury trial system).

Batson's promise is illusory if the system fails to ensure that defendants of color may vindicate it. And, in Colorado, such defendants are already more likely to be referred to the state for potential criminal charges than their white counterparts. These defendants are also more likely to be convicted by an all-white jury. Forman, 113 YALE L.J. at 909; Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 182 (2015). Studies have shown that the presence of even "one African-American . . . in the jury pool" eliminates this injustice. *Id*. at 182. It logically follows that one racially biased juror can equally impact the verdict to the detriment of defendants of color.

It is offensive to basic principles of fairness and justice to adopt a system that forces a defendant to use a peremptory challenge to remove a juror who proclaims—in open court—*both* his racial bias *and* that it cannot be changed. Frampton describes how this effectively "invit[es] defense lawyers . . . to intentionally infect the jury with a biased juror" rather than using a peremptory challenge, so the defendant might then make a Sixth Amendment challenge on appeal. Frampton, 118 MICH. L. REV. at 819 (quoting William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1398 (2001)). Encouraging this immense inefficiency and waste in judicial resources, as well as the outward perception that no one will act to remove a racially biased juror despite their known presence, is a meaningless substitute for *Batson*'s promise. The message this sends about racism in the judicial system, its perpetuation,

and who owns the responsibility to protect against it, is untenable.

IV. Colorado's History of Racial Bias Demonstrates the Importance of This Issue.

Colorado is still recovering from a history of racial biases. This makes the need for this Court's exercise of its supervisory power more compelling.

1. Colorado's early political leadership recognized the right of every citizen to sit on a jury, regardless of race. Cong. Globe, 42d Cong., 2d Sess. 157 (1867) (speech from President Andrew Johnson explaining he would grant Colorado statehood, in part, because the governor had vetoed bill prohibiting Black persons from sitting on juries). Coloradans have long understood the important role an unbiased jury plays in protecting their freedom. *See* Duane A. Smith, THE BIRTH OF COLORADO 124-25 (1989) (discussing Coloradans' demand for a grand jury process to obtain indictment).

Colorado continues to demonstrate this long-established commitment. Colorado was ahead of the curve in protecting the right for individuals with criminal convictions to sit on juries. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595-99 (2013) (noting Colorado and Maine as the only two out of forty-eight surveyed states without policies excluding jurors based on criminal convictions). This reform positively impacted jurors who are persons of color. Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 73 (2020).

And last year, Colorado lawmakers introduced legislation listing presumptively invalid reasons for peremptory challenges linked to a juror's race. Col. Senate Bill 22-128 (2022). An introduction of this legislation illustrates Colorado lawmakers' and constituents' desire to address racial bias in courtrooms despite the legislation's current interruption.

2. Yet, robust enforcement of *Batson* is still needed to ensure its promise is realized. Colorado—like every other state—has struggled with the intersection of race, criminal justice, and juries. Persons of color in Colorado have long protested that they "were punished more severely [by the criminal justice system] than Anglo offenders." Eugene H. Berwanger, RISE OF THE CENTENNIAL STATE 113 (2007). The disparity was particularly stark during the antebellum period, when people of color accused of crimes were "tried" by ad hoc "People's Courts"—which meted out sentences via gallows—rather than the nascent criminal courts established by the territory's legislature. *Id.* at 103; Irving W. Stanton, SIXTY YEARS IN COLORADO 160 (1922).

By the 1920s, Colorado boasted one of the largest Klan organizations in the United States. Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—And Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 726-35 (1999) (discussing historical reputation of Colorado and describing historical exclusion of minority members); *see* Brian Willie et al., Rocky Mtn. PBS, *Chilling interactive map shows 1920s Denver was rife with KKK members* (Apr. 28, 2021). The Klan had a direct effect on defendants of color's right to impartial juries. Its supporters attacked the institution, tampering with juries to "clean up" Colorado by incar-

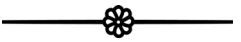
cerating and forcibly removing people of color. Delgado, *supra* at 726-35; *see* Geoffrey Hunt, *The Civil War in Colorado*, COLORADO ENCYCLOPEDIA (October 26, 2022) (recognizing several Colorado towns as "'Sundown towns'—places where Black people were not welcome and would be run out of town at sundown").

This period "left a lasting legacy" in certain areas of Colorado, where racial animus hardened. Delgado, *supra* at 773. In the decades that followed, Colorado courts continued to find a pattern of systematic exclusion of persons of color from Colorado's jury rolls. *Id.* at 772, n.463.

3. In 2017, Colorado's complicated relationship with race and jury rolls was on display in *Peña-Rodriguez*. A jury found *Peña-Rodriguez* guilty of sexually assaulting two teenage girls. *Peña-Rodriguez*, 580 U.S. at 211. Affidavits offered by two jurors post-verdict revealed that Peña-Rodriguez's race and ethnicity—Latino/Hispanic—was explicitly considered and weighed heavily in the jury's calculus. *Id.* at 212. Jurors also called Peña-Rodriguez's credibility into question based on his immigration status. *Id.* at 213.

The Colorado Supreme Court affirmed Peña-Rodriguez's conviction over a vigorous dissent raising many of the same points above. *Peña-Rodriguez*, 350 P.3d at 294 (Márquez, J., dissenting). This Court reversed, holding that, faced with a "clear statement that indicates [a juror] relied on racial stereotypes or animus to convict a criminal defendant," the Sixth Amendment requires consideration of that evidence and "any resulting denial of the jury trial guarantee." *Peña-Rodriguez*, 580 U.S. at 225.

Peña-Rodriguez and this case demonstrate that Colorado still needs robust enforcement by this Court of the right to an impartial jury. As it presently stands, *Clark* sanctions that a juror's racial animus is a defendant's, rather than an institutional, problem. This undercuts the promises of Colorado's early political leadership and sullies the trust of Colorado's contemporary citizens.



CONCLUSION

Amici respectfully urge this Court to grant Mr. Clark's petition for a writ of certiorari.

Respectfully submitted,

Kendra N. Beckwith
Counsel of Record
Kenneth F. Rossman, IV
WOMBLE BOND DICKINSON (US) LLP
1601 19th Street, Suite 1000
Denver, CO 80202
(303) 623-9000
kendra.beckwith@wbd-us.com

Counsel for Amici Curiae

February 20, 2025