No. 18-6286

IN THE

Supreme Court of the United States

LISA JO CHAMBERLIN,
Petitioner,

v.

PELICIA E. HALL,
Commissioner, Mississippi Department of Corrections,
Respondent.

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

BRIEF FOR RETIRED STATE COURT JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are ten former state court judges and justices who believe that ending racial discrimination in jury selection is critical to the integrity of our judicial system and whose interest is in ensuring *Batson* remains a useful tool in accomplishing that end.

Lisa Van Amburg served as a circuit court judge on the 22nd Judicial Circuit Court of Missouri from 2003 until her appointment as a judge on the Eastern District of the Missouri Court of Appeals. Judge Van Amburg retired from the bench in August 2018. Judge Van Amburg is currently a Professor of Practice at St. Louis University School of Law.

Charles E. Atwell is a former circuit judge for the 16th Judicial Circuit in Missouri. Judge Atwell joined the bench in 1996 and served for more than 16 years. During that time, he also served as a special judge in the Missouri Court of Appeals and in the Missouri Supreme Court. In 2007, he was voted by the lawyers of the State of Missouri as the "Best Circuit Judge" in the State.

Fred L. Banks, Jr. was a member of the Mississippi House of Representatives until 1985, when he was appointed as a circuit judge on the Seventh Circuit Court District of Mississippi. In 1991, he was appointed, and later elected, to serve on the Supreme Court of Mississippi. He retired from the Court in 2001 and has since practiced at Phelps Dunbar LLP as a partner.

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Susan Block retired from the bench after 25 years of judicial service. She served, from 1979 to 1995, as an associate circuit judge, and from 1995 through 2003, as a circuit judge in St. Louis County Circuit Court. She also served as the Administrative Judge of St. Louis County Family Court, from which she retired in December 2003. Judge Block is currently an attorney with Paule, Camazine & Blumenthal P.C.

Oliver E. Diaz, Jr. is a former presiding justice on the Supreme Court of Mississippi. Justice Diaz served in the Mississippi House of Representatives for seven years from 1988 to 1994. He was then elected to the Mississippi Court of Appeals in November 1994 and served in that position until March 2000, at which time he was appointed to the Supreme Court of Mississippi. Justice Diaz retired from the Supreme Court of Mississippi in January 2009.

Joseph Raymond Grodin is a former presiding justice of the California Court of Appeal and an associate justice of the Supreme Court of California. In 1979, Justice Grodin was appointed as an associate justice of the California Court of Appeal; in 1981, he was elevated to presiding justice of that court. In 1982, Justice Grodin was appointed as an associate justice of the California Supreme Court, a position he held until January 1987.

James Robertson served as a justice on the Supreme Court of Mississippi between 1983 and 1992, during which he authored opinions in capital cases. Justice Robertson retired from the Court in 1992, and has since practiced at Wise Carter Child & Caraway, P.A., initially as a shareholder and now as of counsel. He is an active Life Member of the American Law Institute.

Gary Saul Stein is a former associate justice of the Supreme Court of New Jersey. He served on New Jersey's Supreme Court for 17 years from 1985 to 2002. Upon retirement from the bench, he joined Pashman Stein Walder Hayden P.C. where he is currently Counsel to the firm.

Marsha Ternus was the chief justice of the Supreme Court of Iowa. Justice Ternus was appointed to the Court in 1993 by Governor Terry Branstad. In 2006, she became the first woman to serve as the chief justice in the history of Supreme Court of Iowa. She served on the bench until 2010.

Michael A. Wolff is a former chief justice of the Supreme Court of Missouri. He served on the Supreme Court between 1998 and 2011, and as Chief Justice from 2005 to 2007. After his retirement from the bench, he returned to the faculty of Saint Louis University and became dean of the law school in 2013, serving until 2017.

SUMMARY OF ARGUMENT

In the 1986 landmark decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Supreme Court sought to redress jurisprudence that "left prosecutors' use of peremptories 'largely immune from constitutional scrutiny.'" *Miller-El* v. *Dretke*, 545 U.S. 231, 239 (2005) ("*Miller-El II*") (quoting *Batson*, 476 U.S. at 92-93). The Court set forth a three-part test for "ferreting out" racial discrimination in the jury selection process. *Id.* at 238. Under the *Batson* test, if the defendant establishes a prima facie case of discrimination, the burden then shifts to the prosecutor to provide "a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98, n.20. At that point, the burden shifts back to the defendant to demonstrate that the prosecutor's reasons were pretextual. *Id.* at 100. Only if the defendant satisfies his burden at the first and third steps can he succeed on a *Batson* challenge. *Id.*

As this Court has recognized, under *Batson* and *Miller-El II*, one of the most "powerful" ways a defendant can demonstrate pretext is through a side-by-side comparison of panelists who were struck and panelists who were selected for the jury, commonly known as comparative juror analysis. *Miller-El II*, 545 U.S. at 241. In *Miller-El II*, which reversed a decision by the Fifth Circuit, the Court provided further guidance on *Batson* challenge evidence. The Court explained that a prosecutor must "state his reasons" for exercising a peremptory strike "as best he can and stand or fall on the plausibility of the reasons he gives." *Id.* at 252. The reasons relevant for purposes of *Batson* are "the reasons initially given to support the challenged strike, not additional reasons offered after the fact." *United*

States v. *Taylor*, 636 F.3d 901, 905 (7th Cir. 2011); *see Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003) (*Miller-El I*) ("[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."); *see also Miller-El II*, 545 U.S. at 252. ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

The Fifth Circuit's en banc decision in *Chamberlin* v. *Fisher*, 885 F.3d 832 (5th Cir. 2018) ignores the Court's decision in *Miller-El II* and threatens to undermine *Batson*. The comparative juror analysis conducted here plainly demonstrates the use of racially-discriminatory peremptory strikes. As far as the prosecution was concerned at the time of Lisa Jo Chamberlin's trial—when it exercised its peremptory challenges—there was no meaningful difference between the African-American venire members who were struck and the white juror who was accepted on the panel. *See Id.* at 840-841. Only by allowing appellate counsel to develop, *for the first time on postconviction review*, new bases for distinguishing a white juror, could the Fifth Circuit en banc court reconcile its decision with such compelling evidence of racial discrimination. *See id.* at 841 ("The Court's rationale [in *Miller-El II*], however, does not extend to preventing the prosecution from later supporting its originally proffered reasons with additional record evidence, especially if a defendant is allowed to raise objections to juror selection years after a conviction and to allege newly discovered

comparisons to other prospective jurors."). That approach directly contradicts the Supreme Court's decision in *Miller-El II* and unmoors what happens in the trial court from constitutional adjudication on appeal. The Court should not allow that decision to stand.

Today—more than thirty years after the Court's decision in *Batson*—race discrimination in jury selection remains a serious and very difficult to constrain problem. Notwithstanding empirical and anecdotal evidence demonstrating that racial discrimination in jury selection is common across the country, and, in particular, in states in the Fifth Circuit, *Batson* challenges rarely succeed. Comparative juror analysis, however, is an important tool for enforcing *Batson* and exposing race discrimination in juror selection. The Fifth Circuit's decision creating a safe harbor for the government to invent new reasons on appeal to justify its peremptory strikes, threatens to gut comparative juror analysis long after those strikes were used.

As this Court recognized in *Miller-El II*, "the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, … and undermines public confidence in adjudication." 545 U.S. at 238 (internal quotation marks omitted). In light of the serious issues at stake in this case, the Court should grant the petition for a writ of certiorari.

ARGUMENT

I. RACIAL DISCRIMINATION IS A SERIOUS PROBLEM IN JURY SELECTION

A. Racial Discrimination Continues To Plague Jury Selection Today

Three decades after the Supreme Court's seminal decision in *Batson*, race discrimination remains a serious problem in jury selection. As Mississippi Supreme Court Justice James E. Graves has lamented, "[w]hile the *Batson* test was developed to eradicate racially discriminatory practices in selecting a jury, prosecuting and defending attorneys alike have manipulated *Batson* to a point that in many instances the voir dire process has devolved into 'an exercise in finding race neutral reasons to justify racially motivated strikes.'" *Flowers* v. *State*, 947 So. 2d 910, 937 (Miss. 2007) (quoting *Howell* v. *State*, 860 So. 2d 704, 766 (Miss. 2004) (Graves, J., dissenting)). Indeed, jurists from numerous courts have recognized that racial discrimination continues to plague jury selection. *See, e.g.*, *Miller-El II*, 545 U.S. at 268-269 (Breyer, J., concurring) (citing studies and anecdotal reports detailing widespread race discrimination in jury selection); *State* v. *Saintcalle*, 309 P.3d 326, 329 (Wash. 2013) (en banc) ("Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection."), *abrogated by City of Seattle* v. *Erickson*, 398 P.3d 1124 (Wash. 2017); *State* v. *Rashad*, 484 S.W.3d 849, 860 (Mo. Ct. App. 2016) (Van Amburg, C.J., concurring) ("Missouri courts cannot ignore, however, the growing body of evidence that racial bias, whether purposeful or unconscious, impacts jury selection to the detriment of citizens of color and the integrity of our justice system.").

Studies and empirical research confirm the courts' observations, finding that racial discrimination persists in juror selection. A study of eight states—including Louisiana and Mississippi—by the Equal Justice Initiative found that "[r]acially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases." Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 5 (Aug. 2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf ("EJI Report"); *see also* Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425, 1427 n.1 (2012) (collecting articles discussing the continued prevalence of race discrimination in jury selection); Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 Chi.-Kent L. Rev. 1061, 1062 (2003) ("Empirical research on jury selection in criminal cases demonstrates the continued use of race in the exercise of peremptory challenges." (collecting articles)); Diamond et al., *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 Cornell J.L. & Pub. Pol'y 77, 80 (1997) (discussing evidence that race-based discrimination continues to be a problem in jury selection).

In the years following *Batson*, district attorneys' offices in jurisdictions across the country have been exposed for training prosecutors on how to disguise racially-based peremptory strikes. *See Miller-El II*, 545 U.S. at 263-264 (explaining that "for decades … prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries"

pursuant to "'a formal policy to exclude minorities from jury service'" known as the Sparling Manual); *Wilson* v. *Beard*, 426 F.3d 653, 658 (3d Cir. 2005) (describing a video recorded by the District Attorney in Philadelphia teaching prosecutors how to evade *Batson* challenges when striking black jurors and quoting the District Attorney as stating, "my advice would be in that situation is when you do have a black jur[or], you question them at length. And on this little sheet that you have, mark something down that you can articulate [at a] later time if something happens"); *Jackson* v. *Thigpen*, 752 F. Supp. 1551, 1554 (N.D. Ala. 1990) (noting that "the standard operating procedure of the Tuscaloosa County District Attorney's Office at the time of petitioner's trial was to use the peremptory challenges to strike as many blacks as possible from the venires in cases involving serious crimes"), *aff'd in part*, *rev'd in part sub nom. Jackson* v. *Herring*, 42 F.3d 1350 (11th Cir. 1995); *Goggins* v. *State*, 529 So. 2d 649, 651-652 (Miss. 1988) (prosecutor "candidly admitted that black jurors were excused because the defendant was black" and because he believed black jurors would be more favorable to the defense based on information learned during "classes in jury selection that were given pursuant to the continuing legal education requirements conducted by the University of Mississippi School of Law"); *People* v. *Randall*, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996) ("Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'").

B. Discrimination In Jury Selection Is Especially Prevalent In States In The Fifth Circuit

Although discrimination in jury selection plagues courts "nationwide," *Saintcalle*, 309 P.3d at 334, judges

at both the state and federal levels have recognized that race discrimination disproportionately affects jury selection in states in the Fifth Circuit. As Judge Costa noted in dissent, "a high proportion of recent cases in which the Supreme Court has found a *Batson* violation come from states in our [the Fifth] circuit." *Chamberlin*, 885 F.3d at 845-846. The Texas Supreme Court has remarked not only that "Batson challenges are far more frequent here than anywhere else," but that problems such as "discriminating against minorities, disrupting trial, and discarding perfectly good jurors—are particularly acute in Texas." *Davis* v. *Fisk Elec. Co*., 268 S.W.3d 508, 531 (Tex. 2008) (Brister, J., concurring) (counting 1,364 *Batson* cases in Texas state courts compared to 676 cases in California—the state with the next highest number—and 90 cases in Florida). And the Mississippi Supreme Court has threatened to consider abolishing peremptory challenges altogether "if the attorneys of this State persist in violating the principles of *Batson* by racially profiling jurors." *Flowers*, 947 So. 2d 939; *see also* EJI Report 5, 14 ("The high rate of exclusion of racial minorities in Jefferson Parish, Louisiana, has meant that in 80% of criminal trials, there is no effective black representation on the jury.").

Despite the known prevalence of such discrimination, *Batson* is rarely enforced in the Fifth Circuit, which for decades has imposed a "formidable … hurdle" on defendants invoking *Batson*. *Chamberlin*, 885 F.3d at 838. Out of the hundreds of *Batson* challenges brought in the Fifth Circuit, only *two* have ever been found to be discriminatory. *See id.* at 845 (Costa, J., dissenting); *see also Davis*, 268 S.W.3d at 524 ("Despite its laudable goal, *Batson* has been difficult to enforce."). In both of those cases, the evidence of discrimination was overwhelming. In *Hayes* v. *Thaler*, 361 F. App'x

563, 564 (5th Cir. 2010), the prosecutor used eight of its eleven peremptory strikes to exclude all eligible African-American potential jurors from the panel that was ultimately seated. And in *Reed* v. *Quarterman*, 555 F.3d 364, 368 (5th Cir. 2009), prosecutors used peremptory challenges to exclude the only five eligible venire members who were African American. In other words, the Fifth Circuit has only found discrimination in jury selection where prosecutors used peremptory challenges to strike *all* eligible African-American venire members.

The problem is particularly acute in the Fifth Circuit "given the number of these claims raised … often in capital cases." *Chamberlin*, 885 F.3d at 861 (Costa, J., dissenting). And with Mississippi's requirement of a unanimous jury to impose the death penalty, every peremptory strike holds importance. In circumstances such as these, little weight should be accorded to the Fifth Circuit's admonishment against allowing *Batson* to "captur[e] too many false positives." *Id.* at 843.

Here, too, there was clear, contemporaneous evidence of a violation elicited by the trial court. Although two African Americans were ultimately seated on the panel, the prosecution struck seven of the first eight African-American potential jurors. *Chamberlin*, 885 F.3d at 847 (Costa, J., dissenting). Prosecutors accepted two African-American jurors only after defense counsel raised *Batson* objections—and one of whom was "only accepted in a moment of confusion when the prosecutor believed the juror had already been struck." *Id.* By contrast, prosecutors accepted seven of the first eight white venire members. *Id.* As this Court has believed, statistical analysis confirms that "'[h]appenstance is unlikely to produce this disparity.'" *Miller-El II*, 545 U.S. at 241 (quoting *Miller-El I*, 537

U.S. at 342). The prosecutor struck nearly twice as many African-American jurors as he accepted while accepting more than four times as many white jurors as he struck. Simply put: "a black juror was more than seven times as likely to be struck as a white one and the random chance that so many blacks would be struck is a remote 1 in a 100." *Chamberlin*, 885 F.3d at 849 (Costa, J., dissenting). The Fifth Circuit waved off all of this as "bare statistics." *Id.* at 840. That conclusion is incompatible with *Miller-El II*. As the Court recognized, a statistical pattern revealed by comparative juror analysis can unveil the motive for race-based strikes. *See supra* pp. 11-12. Accordingly, dismissing the record cannot be squared with the Court's recitation of the "remarkable" numerical comparisons between the treatment of white and black potential jurors in *Miller-El II*. *See, e.g.*, *Miller-El II*, 545 U.S. at 240 ("The numbers describing the prosecution's use of peremptories are remarkable.").

II. COMPARATIVE JUROR ANALYSIS IS NECESSARY TO COMBATTING DISCRIMINATION IN JURY SELECTION

A. As Demonstrated Here, Comparative Juror Analysis Is A Critical And Workable Tool

Comparative juror analysis is a crucial tool for ferreting out racial discrimination in jury selection. It goes beyond statistical inquiry and enables the court to uncover motive by comparing a prosecutor's reason for distinguishing between like jurors. The central dispute here is whether or not the Fifth Circuit is right in its assessment of "what the Supreme Court meant" by the statement: "'when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.'" *Chamberlin*, 885 F.3d at 841 (quot-

ing *Miller-El II*, 545 U.S. at 252). According to the Fifth Circuit, the "stand or fall" principle "does not extend to preventing the prosecution from later supporting its originally proffered reasons with additional record evidence." *Id.* Indeed, the opinion below goes further, the Fifth Circuit reads *Miller-El II* to sanction a post hoc justification of prosecutor's strikes.

The Fifth Circuit's reasoning contravenes this Court's clear direction that, "[i]f [a prosecutor's] stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II*, 545 U.S. at 252. Untethering the inquiry from the clearest evidence of the prosecutor's motive for strikes to invite after the fact conjecture of appellate counsel or courts would relegate an important constitutional guardrail to irrelevancy. We submit that it is unworkable for judges at any level to engage in such an exercise while at the same time conducting, as they are directed to do, "an evaluation of the prosecutor's credibility" during step three of the *Batson* inquiry. *Snyder* v. *Louisiana*, 552 U.S. 472, 477 (2008).

As this Court has repeatedly instructed, where "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El II*, 545 U.S. at 241; *see also Foster* v. *Chatman*, 136 S. Ct. 1737, 1750 (2016) ("explanations given by the prosecution" undercut by "willingly accept[ing] white jurors with the same traits that supposedly rendered [a potential black juror] an unattractive juror"). The Fifth Circuit has (at times) embraced this instruction as a "principle[] to guide us": "If the State asserts that it struck a black juror with a

particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects." *Reed* v. *Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) (citing *Miller-El II*, 545 U.S. at 241). Accordingly, *Chamberlin* presents a straightforward example of this Court's principle in action because (1) the prosecutor's only proffered reasons for striking two African-American venire members, Sturgis and Minor, were their responses to questions 30, 34, and 35 on the juror questionnaires; and (2) a white juror named Cooper was accepted by the prosecutor despite offering identical responses to those very three questions.

Rather than adhere to *Miller-El II*'s guiding principle and affirm that Chamberlin's evidence, including the statistics described *supra* pp. 11-12, pointed to a *Batson* violation, the en banc court instead attacked the completeness of the comparative evidence, holding that "if Cooper … gave other responses that materially differentiated him from Sturgis and Minor … then [Chamberlin's habeas grant] does not follow." *Chamberlin*, 885 F.3d at 840. The court pointed to an "example" of what *it* thought differentiated Cooper: the white juror's response to what the court deemed a "key question," question 53, which varied from the responses Sturgis and Minor gave to that question. *Id.* The court thus concluded, contrary to the reason proffered by the prosecutor, that "the most logical explanation for … not striking Cooper was not because he was white … but because Cooper was a more favorable juror *based on his answers to other questions*." *Id.* at 841 (emphasis added).

The problem, of course, is that while "questions 30, 34, and 35 were not the *only* questions Sturgis, Minor,

and Cooper had to answer," *Chamberlin*, 885 F.3d at 840, they were the only questions identified by the prosecutor in justifying his strikes. This remained true even after Chamberlin challenged the prosecutor's justification; when asked by the trial court for additional argument for striking Sturgis and Minor beyond what he had proffered, the prosecutor unequivocally stated, "[n]one other than what we made[.]" *Chamberlin* v. *Fisher*, 2015 WL 1485901, at *21 (S.D. Miss. Mar. 31, 2015). The en banc court's "substitution" of its post-hoc reasoning "does nothing to satisfy the prosecutor['s] burden of stating a racially neutral explanation for [his] own actions." *Miller-El II*, 545 U.S. at 252.

B. The En Banc Decision Is An Outlier That Would Render *Batson* Toothless

As the dissent recognized, "[i]f this case in which the compared jurors are identical with respect to the reasons stated at trial is not enough" then "it is difficult to see how comparative analysis will ever support a finding of discrimination." *Chamberlin*, 885 F.3d at 846 (Costa, J., dissenting). Indeed, despite unequivocal direction from this Court that a "*Batson* challenge does not call for a mere exercise in thinking up any rational basis," *Miller-El II*, 545 U.S. at 252, that is precisely what the Fifth Circuit's *Chamberlin* decision countenanced. Unlike a legislature, which need "never … articulate," for example, "its reasons for enacting a statute," *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), this Court has stated time and again that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising [peremptory] challenges." *Batson*, 476 U.S. at 98 n.20.

Other circuits have rightfully concluded that *Miller-El II* "instructs that when ruling on a *Batson* chal-

lenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact." *United States* v. *Taylor*, 636 F.3d 901, 905 (7th Cir. 2011); *see also Love* v. *Cate*, 449 F. App'x 570, 572 (9th Cir. 2011) (prosecutor's reason for dismissing black venire member because she was a social worker was pretext where prosecutor had not dismissed non-black venire members within same category); *McGahee* v. *Alabama Dep't of Corr.*, 560 F.3d 1252, 1269-1270 (11th Cir. 2009) (concluding that the "Court of Criminal Appeals' reasoning does not substitute for the State's lack of explanation" where the "State never offered such a full explanation for its strike"). The Fifth Circuit stands apart in its deviation and *Chamberlin* present a ready vehicle for realignment.

C. Holding Prosecutors To The Reasons Provided At Trial Does Not Impose An Undue Burden

Batson was "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process" by asking prosecutors "a simple question." *Johnson* v. *California*, 545 U.S. 162, 172 (2005) (citations omitted). This Court has intervened when the requisite simple question has not been asked of the prosecution at all. *See id.* at 165-166. We submit that intervention is likewise needed where the prosecutor's answers are later eschewed in favor of the sort of "judicial speculation" this Court has deemed "needless and imperfect." *Id.* at 172-173; *see also id.* at 172 ("[I]t does not matter that the prosecutor might have had good reasons ...[;] [w]hat matters is the real reason[.]" (quoting *Paulino* v. *Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004))).

When evaluated alongside this Court's "emphasis on the particular reasons a prosecutor might give," *Miller-El II*, 545 U.S. at 240, it is hard to see what precisely is "manifestly unfair" to prosecutors about either the *Batson* inquiry or its application here, *Chamberlin*, 885 F.3d at 842. Indeed, the district court found several other instances where the prosecutor's stated reasons for strikes *did not* constitute a pretext for racial discrimination. *Chamberlin*, 2015 WL 1485901, at *18-20. For example, Chamberlin argued that Burks, another black venire member, had been improperly struck based on the fact that Burks had responded the same way as several white jurors to question 30. *Id.* at *19-20. The district court declined to take such a narrow focus, however, considering instead the entirety of the prosecutor's proffered reasons for striking Burks—*i.e.*, the venire woman's answers to six different questions plus the fact that she had a family member with a drug charge—in reaching the conclusion that "although these jurors had an answer to one question in common, the totality of the circumstances surrounding the strikes do not give rise to a finding of pretext." *Id.*

The application here belies the en banc court's depiction of some "unjust [and] impractical" "burden" whereby, in order "to protect against future comparative juror analysis, the prosecution … will have to explain why it kept *every* white juror." *Chamberlin*, 885 F.3d at 843-844. Not "every" white member of Chamberlin's jury answered questions 30, 34, and 35 identically to Sturgis and Minor—only one, Cooper, did. Consequently, the prosecutor's proffered reasons for striking Sturgis and Minor were shown to be a pretext in light of the fact that the same logic did not extend to Cooper. "Two peremptory strikes on the basis of race

are two more than the Constitution allows." *Foster*, 136 S. Ct. at 1755.

III. Meaningfully Rooting Out Jury Discrimination Is Essential To The Integrity Of The Criminal Justice System

"[R]acial discrimination in jury selection [is] perhaps the greatest embarrassment in the administration of our criminal justice system[.]" *Wilkerson* v. *Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari). Defendants have a right to be tried by a jury representative of the community; prospective jurors have a right to sit on the jury.

But the harm of race discrimination in jury selection extends well beyond those directly affected. Such discrimination puts at stake the integrity of the criminal justice system. *See Buck* v. *Davis*, 137 S. Ct. 759, 778 (2017) ("'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" (quoting *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979))); *Miller-El II*, 545 U.S. at 238 (Discrimination "'casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial[.]'"); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) ("Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."); *Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."); *Strauder* v. *West Va.*, 100 U.S. 303, 308 (1880) (Race discrimination is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that

equal justice which the law aims to secure to all others.").

To preserve confidence in our criminal justice system, we must eradicate not only actual discrimination, but even its mere appearance. *See Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *see also* Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research*, 2 Soc. Issues & Pol'y Rev. 65, 80 (2008) ("[P]eople's satisfaction with a [judicial] decision is strongly related to their perceptions of the fairness of the procedures used to reach it."). And because "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation … or that the 'deck has been stacked' in favor of one side," *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (quoting *Powers* v. *Ohio*, 499 U.S. 400, 413 (1991)), race discrimination, whether it be actual or apparent, has no place in jury selection. Race discrimination, particularly in capital cases, "'poisons public confidence' in the judicial process." *Buck*, 137 S. Ct. at 778. Without course correction, the public would be discouraged from participating in the process, which is "critical to public confidence in the fairness of the criminal justice system." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975).

The Court's intervention here is crucial because the protection against race discrimination must be enforced uniformly across the country. The Fifth Circuit should not be permitted to stand apart regarding a Constitutional imperative so consequential in cases where the government seeks to end the defendant's life. The Fifth Circuit's decision, which countenances discrimination against jurors based on race, "is an affront to jus-

tice[.]" *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) (rejecting "argu[ment] that a fair trial includes the right to discriminate against a group of citizens based upon their race").

Batson may "not end the racial discrimination that peremptories inject into the jury-selection process." *Batson*, 476 U.S. at 102-103 (Marshall, J., concurring). But without *Batson* and *Miller-El II*'s comparative juror analysis, racial discrimination in jury selection would be effectively unchecked. Accordingly, we urge the Court to reaffirm its holdings in *Batson* and its progeny, and to grant the cert petition to bring the Fifth Circuit into line with other circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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