No. 20-489

IN THE
Supreme Court of the United States

PEDRO M. BESS,
HOSPITAL CORPSMAN PETTY OFFICER SECOND CLASS,
UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Pedro Bess—a Black servicemember—asked a simple question when he saw the members the Convening Authority (CA) hand-selected for his court-martial panel: "Why aren't there any Black people?"[1] His lawyer stood and objected to the panel on equal protection grounds.[2] He demanded the opportunity to make a record and moved for discovery.[3] But the judge rejected the objection out of hand, denied discovery, conducted no hearing, and twice "noted the issue for the record."[4]

Racial disparities exist in the military justice system, which negatively impacts public confidence in the Department of Defense's "commit[ment] to a military justice system that is fair and just."[5] Yet rather than acknowledge the repeated and demonstrated racial disparity here, respondent minimizes it, legitimizing the public's negative view.

The decision below leaves Bess's question unanswered. And respondent defends it, diminishing the equal protection rights of all servicemembers, deflecting blame for the CA's repeated use of all-White

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[1] CAAF J.A. 110; Pet. App. 40a.
[2] CAAF J.A. 110-11, 192-98.
[3] *Id.* at 196.
[4] *Id.* at 196-98.
[5] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-648T, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL DISPARITIES, 14-15 (2020) (hereinafter "GAO Report").

panels, and holding Bess "accountable" for the judge's refusal to allow Bess to develop the record.[6]

Respondent's complaints about the record are unfounded and misplaced. Just like *Batson v. Kentucky*,[7] the issue here is one of *access* to equal protection of the laws. In *Batson*, like here, the trial judge rejected the defendant's equal protection challenge to the jury out of hand and conducted no hearing. James Batson, like Bess, was denied *access* to equal protection of the laws. And the Court used *Batson* to explain fundamental equal protection principles. It should do the same here.

ARGUMENT

Respondent contends this case is a "poor vehicle," claiming the decision from the Court of Appeals for the Armed Forces (CAAF) "does not conflict with any decision of this Court" and that the petition requests "factbound error correction."[8] Respondent is wrong on both counts. The petition presents an ideal vehicle to resolve important equal protection issues for all servicemembers.

I. The lower court's decision conflicts with this Court's precedent.

The decision below conflicts with "the fundamental equal protection principles espoused in

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[6] Brief in Opposition (BIO) 23. A trial judge owes a duty to all accused to "prevent racial discrimination from seeping into the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019).

[7] 476 U.S. 79 (1986).

[8] BIO 13, 21.

Batson."[9] The dissenting judges observed as much, and respondent's argument reinforces the point.[10]

In arguing that a CA's member selection decision deserves a presumption of regularity, respondent equates CAs to prosecutors.[11] Yet respondent also argues that CAs are exempt from *Batson*'s "evidentiary framework" because they are not prosecutors.[12] Respondent cannot have it both ways. The Court should view respondent's nod to a CA's prosecutorial role as demonstrating an obvious point—the difference between CAs and prosecutors is meaningless when it comes to the equal protection rights in jeopardy here.

"*Batson* lowered the evidentiary burden for defendants to contest prosecutors' use of peremptory strikes and made clear that demonstrating a history of discriminatory strikes in past cases was not necessary."[13] Yet the judge put that burden on Bess, requiring him to prove a "pattern of discrimination by excluding minority members" on "other panels."[14] The

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[9] Pet. App. 53a.
[10] *Id.*
[11] BIO 15-16.
[12] BIO 17-21. Respondent also contends Bess waived the argument that seeks to tailor *Castaneda v. Partida*, 430 U.S. 482 (1977) to the military justice system. BIO 19. Respondent is wrong. As Bess has always argued, just like the dissenting judges below, absent some measure of tailoring, the "constitutional right to equal protection" becomes "essentially unenforceable in the military . . . ." Pet. App. 53a. The procedures involved in seating a military panel require this tailoring.
[13] *Flowers,* 139 S. Ct. at 2244-45.
[14] CAAF J.A. 197.

CAAF's affirmance made this incorrect ruling binding in all military cases.[15]

The CAAF majority's endorsement of the evidentiary burden that *Batson* rejected hinged on its claim that CAs are not prosecutors.[16] But as respondent implicitly acknowledges, this distinction is one without a difference. Whether prosecutors or CAs impermissibly exclude cognizable racial groups from panels, the equal protection rights of accused servicemembers are violated just the same. Accordingly, the higher evidentiary burden the CAAF imposed below conflicts with the equal protection principles this Court espoused in *Batson*.[17]

II. The petition presents an ideal vehicle to resolve important questions of federal law that have not been, but should be, settled by this Court.

The petition presents important questions that will determine whether the Fifth Amendment protects servicemembers from a CA's impermissible exclusion of eligible court-martial members based on their race. Bess does not seek "factbound error

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[15] Pet. App. 23a.

[16] *Id.* at 18a.

[17] *Batson*, 476 U.S. at 94-99; *see also Flowers*, 139 S. Ct. at 2244 (citing *Foster v. Chatman*, 136 S. Ct. 1737 (2016)) ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose."); *Castaneda*, 430 U.S. at 493 (quoting *Washington v. Davis*, 426 U.S. 229, 241 (1976)) ("'A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community . . . .'").

correction,"[18] and his request for a hearing under *United States v. DuBay*,[19] does not diminish the questions presented.

Bess asks this Court to determine the legal criteria that are necessary to make a prima facie case when objecting to the CA's hand-selection of members under the equal protection component of the Fifth Amendment.[20] The CAAF majority refused to decide this issue, claiming Bess's argument had "no support in the law . . . ."[21] This decision placed a CA's hand-selection of members outside the Fifth Amendment's reach *in all cases*, which carries "grave and broad implications . . . ."[22]

Reviewing the questions presented here will have a significant impact on the military justice system. Minority servicemembers already face prosecution at twice the rate of White servicemembers.[23] Now, the fundamental fairness of their more frequent trials is at stake. The Court's review will determine whether the Fifth Amendment protects minority servicemembers' courts-martial from a CA's impermissible exclusion of "cognizable racial group[s]."[24]

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[18] BIO 13.
[19] 37 C.M.R. 411 (1967).
[20] Pet. 31-38.
[21] Pet. App. 13a. Respondent's claim that the CAAF "unanimously" found no equal protection violation is mistaken. BIO 14. The dissenting judges did not reach that conclusion, causing a 2-1-2 split in the decision.
[22] Pet. App. 42a.
[23] GAO Report.
[24] *Batson*, 476 U.S. at 96; *Castaneda*, 430 U.S. at 494.

Moreover, Bess's request for a *DuBay* hearing does not impugn the adequacy of the record or change the significance of the constitutional questions. A *DuBay* hearing is a "simple" judicial mechanism for vindicating constitutional rights.[25] CAAF precedent set a "clear-cut mandate" to use it here, but the CAAF majority ignored it.[26]

In any event, this Court is under no obligation to rely on the *DuBay* hearing procedure. It can remand for a new trial or dismiss with prejudice. Whatever the remedy, it must first vacate the CAAF's "fundamentally and egregiously" wrong decision and restore servicemembers' equal protection rights.[27]

III. The record here is like *Batson*.

Bess's case is an ideal vehicle. But for the added role of the CA and some military idiosyncrasies, the record here is the same as *Batson*—a case the Court used to explain fundamental equal protection principles.

In *Batson*, the prosecutor removed "all four black persons on the venire."[28] Batson "could see" that "everybody in the courtroom was white," except for him.[29] He recalled saying, "They struck all the blacks

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[25] Pet. App. 55a.
[26] *Id.* (citing *United States v. Riesbeck*, 77 M.J. 154 (2018)).
[27] *Id.*
[28] *Batson*, 476 U.S. at 83.
[29] Nancy S. Marder, Batson v. Kentucky *Reflections Inspired by a Podcast*, 105 KY. L.J. 621, 628 (2016) (recounting an interview with James Batson).

off the jury pool. It ain't right. I told my lawyer, I said object to that . . . ."[30]

Here, the CA hand-selected an all-White panel *before* the members entered the courtroom for voir dire. Just like Batson, Bess could see everyone in the courtroom was White, except for him.[31] And when he saw the hand-selected, all-White panel walk in, he turned to his defense counsel—just like Batson—and identified the issue. Bess asked, "Why aren't there any black people?"[32]

Batson's lawyer objected and requested a hearing, citing "equal protection of the laws."[33] Bess's lawyer objected, moved for the precursor to a hearing—additional discovery—and cited *Batson*.[34] He argued the CA was "preventing [African Americans] from representation on the panel so that [the prosecution] can avoid a *Batson* challenge . . . ."[35]

In both cases, the judge "flatly rejected the objection" and moved on with trial.[36] Both Batson and Bess petitioned this Court to review the trial judge's *flat rejection* of their equal protection objections. Over three decades ago, this Court granted Batson's petition in order to define the threshold showing required for a prima facie equal protection violation when "a criminal defendant" objects to the removal of

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[30] *Id.*
[31] CAAF J.A. 110.
[32] *Id.*
[33] *Batson*, 476 U.S. at 83.
[34] Pet. App. 40a-41a.
[35] *Id.* at 41a.
[36] *Batson*, 476 U.S. at 100.

"members of his race from the petit jury."[37] Contrary to respondent's distorted claims about the record here,[38] neither the absence of a hearing nor the factual basis for the challenge in *Batson*—the trial participants' visual observations of race—served as barriers to this Court's review.[39]

Bess now seeks to bring the military practice of CAs hand-selecting members into line with this Court's precedent, using the same type of record as *Batson*. While Bess's objection to a CA's exclusion of Black court-martial members differs from challenging a prosecutors' use of peremptory challenges, the differences are in nuance only. If anything, they make Bess's case more compelling. Peremptory challenges pose a danger of permitting "'those to discriminate who are of a mind to discriminate.'"[40] But at least they occur in a courtroom. CAs can exclude Black members behind closed doors before the public, the accused, or the judge see the venire. The CA's actions are more permissive of discriminatory intent—and thus more dangerous.

The CAAF's decision placed the CA's selection of members outside the Fifth Amendment's reach, allowing CAs who are of a mind to discriminate to do so with impunity. And it will stay that way unless this Court grants review.

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[37] *Id*. at 82.
[38] BIO 13-17, 21-23.
[39] Joint Appendix, *Batson v. Kentucky*, 1985 U.S. S. Ct. Briefs LEXIS 1403, at *4.
[40] *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

A. Respondent's criticism of the record is misplaced.

Relying on the counter-factual claim that Bess failed to prove "his panel did not include any black members,"[41] respondent argues this case "presents no opportunity to consider" the equal protection issues at hand due to a "lack of record support."[42] Respondent is wrong.

The record is clear. Bess is Black, something the CA and judge knew.[43] The judge considered Bess's objection, looked at the panel's racial make-up, and said, "I agree . . . I don't see anyone who I think is obviously of the same race as your client . . . ."[44] The prosecution sat silent. No one disputed what the judge described: a panel with no Black members. After the judge denied Bess's objection and discovery motion, she twice ordered the parties to move on,[45] foreclosing Bess from taking the additional record-building steps respondent now complains about.[46]

Defying the judge's first summary order, Bess's lawyer demanded the opportunity to "make a quick record."[47] He explained this was "the second time in a row" where the prosecutor, the judge, and the defense counsel had an "all-white panel" with a Black

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[41] *Id.* at 22.
[42] BIO 17-21.
[43] CAAF J.A. 195, 808; Pet. App. 10a.
[44] CAAF J.A. 195; *cf.* Joint Appendix, *Batson v. Kentucky*, 1985 U.S. S. Ct. Briefs LEXIS 1403, at *4 ("In looking at them, yes; it's an all white jury.").
[45] CAAF J.A. 197-98.
[46] *Id.* at 192-98; BIO 7-8, 22-23.
[47] CAAF J.A. 197.

accused.[48] Remaining silent, the prosecutor offered no dispute.[49]

Now respondent fills the prosecutor's silence with two dubious claims. First, despite an entrenched history of White Americans excluding Black Americans from jury service based on their skin color,[50] respondent defends the three judges below who said it was impossible to observe race when a Black man sought a trial free of unlawful racial discrimination.[51] Second, unlike this Court in *Batson*, respondent defends the CAAF majority's claim that what the trial participants saw—and recorded in the record—no longer constitutes "competent evidence" for purposes of a Black man's equal protection challenge.[52] Not only do respondent's claims mischaracterize the record, they are untethered to this Court's equal protection principles, which do not impose such an insurmountable burden.[53]

Respondent goes on to cite Judge Maggs's concurrence as evidence of an inadequate record. Even though the trial judge twice "noted" Bess's equal protection challenge "for the record,"[54] Judge Maggs

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[48] *Id.* at 197-98. The defense counsel's supervisor later confirmed in a sworn declaration that the panel was all-White. Pet. App. 40a; CAAF J.A. 809-813.
[49] CAAF J.A. 197-98.
[50] *See, e.g.*, Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018) (recounting the entrenched history of excluding Black citizens from jury service).
[51] BIO 17-22.
[52] BIO 16; *cf.* Joint Appendix, *Batson v. Kentucky*, 1985 U.S. S. Ct. Briefs LEXIS 1403, at *4.
[53] *See Flowers*, 139 S. Ct. at 2244-45; *Batson*, 476 U.S. at 94-99; *Castaneda*, 430 U.S. at 493.
[54] CAAF J.A. 196-97.

asserted that Bess "waived" it.[55] That is not how waiver works, as respondent knows.[56] Now respondent claims Judge Maggs meant "forfeiture" when he said "waiver" and cites his concurrence as evidence of Bess failing to timely assert his equal protection rights.[57]

Respondent is wrong, again. Judge Maggs meant "waiver" when he said "waiver." His concurrence misapplied the waiver doctrine and misread the record. It provides respondent's arguments with no support. Bess, in fact, preserved his equal protection objection and made an ideal record—just like *Batson*—for this Court's review.

B. The repeated selection of all-White panels is not a regular practice this Court should endorse.

Citing only inapposite authority, respondent argues that CAs, like prosecutors, are entitled to a "presumption of regularity."[58] No such presumption is warranted here.[59] Indeed, if selecting all-White panels

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[55] Pet. App. 35a-36a.

[56] BIO 22 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

[57] BIO 22-23.

[58] BIO 15-16.

[59] *Compare Flowers*, 139 S. Ct. at 2244-45 (observing the *Batson* rule lowers the evidentiary burden for defendants to contest a prosecutor's discriminatory strikes) *with* BIO 15-16 (citing *Hartmann v. Moore*, 547 U.S. 250 (2006) (recognizing a presumption of prosecutorial regularity in a *Bivens* action); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (recognizing a presumption of lawful prosecutorial action in civil immigration suits); *United States v. Armstrong*, 517 U.S.

constitutes a regular practice, then respondent's argument is *further evidence* of the need for this Court's review.

CAs must ascertain personal information about eligible members *before* making a selection decision.[60] This requirement, in practice, significantly narrows the pool of potential members, something respondent overlooks.[61] And, unlike peremptory challenges, CAs can exclude minorities from panels before the decision becomes public in a courtroom.

CAs—military commanders—use two methods to select members. They ask eligible members to fill out background questionnaires or they rely on personal knowledge of a given servicemember. Respondent incorrectly implies that selected members complete background questionnaires after the CA selects them.[62] *Potential members* do it *before* selection so the CA can make the statutorily required selection decision.

Here, the CA did not just consider the ten questionnaires for the members he selected. Rather, he asked a number of eligible members to complete questionnaires.[63] The eligible members who completed them, along with eligible members the CA

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456 (1996) (recognizing a presumption of prosecutorial regularity in the context of a selective prosecution claim)).

[60] 10 U.S.C. § 825(d)(2).

[61] To satisfy 10 U.S.C. § 825(d)(2)'s personal "opinion" requirement, a CA must have *personal knowledge* of an eligible member's background.

[62] BIO 16-17.

[63] Pet. 13-18.

personally knew (i.e., members of his command), comprised the pool of potential members.

Indeed, that is why the judge suggested Bess needed more information about "the racial and statistical makeup of the pool of members for this particular [CA]."[64] And it is why Bess's counsel moved for production of such information—a motion the judge erroneously denied after inviting it.[65] Yet respondent and the CAAF majority defend the judge's erroneous denial of discovery while concurrently criticizing Bess for an "inadequate record."[66]

The record here is "compelling and highly disturbing."[67] Most notably, the CA used two different questionnaires in creating his pool of potential members, only one of which asked for a potential member's race. No reasonable justification exists for the different questionnaires. The statute does not make eligible members who identify their race less qualified than those who do not. Yet the CAAF majority gave this practice the stamp of "regularity."[68] And respondent supports it.[69]

There is reason for "grave" concern if this dual questionnaire practice constitutes regular practice in military justice.[70] CAs with a mind to discriminate can ensure all eligible Black members receive the questionnaire asking for their race, then exclude them

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[64] CAAF J.A. 196.
[65] *Id.* at 196-97; Pet. App. 48a-49a.
[66] BIO 23.
[67] Pet. App. 55a.
[68] *Id.* at 22a-23a.
[69] BIO 15-17.
[70] Pet. App. 55a.

from the panel without fear of public detection. Far from hypothetical, the record here shows the CA had access to the race of potential members in his pool.[71]

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Respondent's opposition resurrects all-White juries from the ignoble past,[72] cloaks them as "regular," and deems them constitutionally acceptable in courts-martial across the globe. The Court should grant review to make the regular use of all-white juries—and court-martial panels—a relic of history.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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[71] CAAF J.A. 809-13.
[72] *Flowers*, 139 S. Ct. at 2238-42.