No. 24-7351

IN THE

Supreme Court of the United States

TERRY PITCHFORD,

Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* MISSISSIPPI LEGISLATIVE BLACK CAUCUS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Mississippi Legislative Black Caucus ("MLBC") was initially conceived in 1976, after the election of the first Black Mississippian to the State Legislature in the 20th century, and then formally established four years later. The MLBC would not exist, and Mississippi's Black population would have remained disenfranchised for far longer, but for legislation like the Voting Rights Act of 1965 that took aim at racial bias, and entities like the Mississippi Freedom Democratic Party and the NAACP, which spoke the law's words into action. Their voices still resonate: thirty-eight percent of Mississippi's citizens are Black, and fifty-six of its one hundred and seventy-four state legislators are Black. Thus, as a direct consequence of, and responsibility to, its founding, the MLBC remains deeply committed to issues that affect all Mississippians, especially those of color, those in rural communities and those who are disadvantaged.

MLBC's efforts to promote equality, inclusion, and progress throughout the State are especially focused on maintaining and expanding our constituents' ability to participate in the political process—the twinned rights to the franchise and to jury service, chief among them—most notably when those rights are targets of racial bias and oppression.[1]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or their counsel made a monetary contribution to its preparation or submission. The parties received timely notice of amicus's intent at least 10 days prior to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Mississippi, the right to serve as a juror is not merely a smaller, component part of the larger bundle of rights that comprise full participation in the democratic process. In Mississippi, history teaches the same lesson across time: that the right to serve as a juror is, instead, a core right, integral to that bundle. This is especially true for Mississippi's Black citizens. Because Mississippi's legal history has from its inception been rooted in White supremacy, its repressive efforts, violent and systemic, have often found their most effective purchase in the state's criminal justice system. There, rank discrimination targets not only the accused, but also their peers who would otherwise sit in judgment of them. It thus engineers a social system—threatening, punitive and capricious—that simultaneously produces targeted harm while placing itself beyond the civic reach of those it harms the most. For precisely this reason, contemporary efforts to deny Black Mississippians full participation in the jury process—or, put differently, to employ tactics that tilt the scales of participation in favor of other affinity groups—make manifest the persistence of the age-old effort to deny what many of Mississippi's White citizens have been traduced into fearing the most: "the consummation of ... [a] dream [] and ever-abiding hope and most fervent prayer," as Mississippi's Theodore Bilbo once fulminated from the well of the U.S. Senate chamber, of Mississippi's Black citizens "to become socially and *politically* equal to the white man."[2]

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2. 75 Cong. Rec. 892 (1938) (statement of Sen. Theodore Bilbo); Robert L. Zangrando, *The NAACP Crusade Against Lynching: 1909-1950*, at 150 (1980) (emphasis added).

Standing in direct contrast to Bilbo's racist demagoguery and continuing efforts to routinize it are this Court's guiding directives over the same period of time—in cases like *Strauder v. West Virginia*,[3] decided in 1880, *Swain v. Alabama*,[4] decided nearly a century later, and *Batson v. Kentucky*[5] in 1986, whose holdings are unambivalent, clear, and constant: race-bias in jury selection is repugnant to the guarantee of the right to a free and fair trial and equal protection of the law, and is also anathema to the exercise of a prospective citizen-juror's full panoply of rights.

And yet, for as much as this Court has hewed to this unwavering principle and the proper application of the legal analysis to implement it, Mississippi, sometimes by legislation but more often through acts of legal attrition, has sought to undermine them both. Mississippi began by pursuing a legal path divergent from *Strauder*'s teaching; later, by persistently ignoring the plain record of serialized discrimination in jury selection to deny *Swain* challenge after *Swain* challenge; and finally, by manipulating *Batson* and its progeny to blunt this Court's clear prescription.

The most recent iteration of this historical obstreperousness is the Mississippi Supreme Court's reaction to, and subsequent application of, this Courts 2019 decision in *Flowers v. Mississippi*.[6] Curtis Flowers was tried six times by the same prosecutor—and now

3. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879).

4. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

5. *Batson v. Kentucky*, 476 U.S. 79 (1986).

6. *Flowers v. Mississippi*, 588 U.S. 284, 316 (2019).

well-documented *Batson* violator—for the same crime. (Terry Pitchford's case features the same prosecutor from all six Flowers prosecutions. In 2007, three years before Pitchford's appeal, the Mississippi Supreme Court said of this prosecutor's abuse of peremptory strikes in Flowers' third trial that it presented "as strong a prima facie case of racial discrimination as we have ever seen in context of a *Batson* challenge."[7] The Court's 2010 opinion affirming Pitchford's conviction is silent on this prior finding.)[8]

After the Mississippi Supreme Court affirmed Flowers' conviction and death sentence from the sixth trial, he sought certiorari in this Court, which subsequently granted the petition, vacated the ruling below and remanded ("GVR'd") the case for further consideration in light of the then recent decision in *Foster v. Chatman*.[9] Instead of following this Court's directive, however, the state court majority, without altering its prior analysis, summarily declared that "the historical evidence of past discrimination [in this case]" did not violate *Batson*.[10] This Court then granted certiorari for a second time and reversed, not by applying any new law or analysis, but "simply [by] enforce[ing] and reinforc[ing] *Batson*, by applying it to the extraordinary facts of" the case.[11]

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7. *Flowers v. State*, 947 So.2d 910, 935 (2007).

8. *See Pitchford v. State*, 45 So.3d 216 (Miss. 2010).

9. *Flowers v. Mississippi*, 579 U.S. 913 (mem.) (2016).

10. *Flowers v. State*, 240 So.3d 1082, 1124 (Miss. 2017).

11. *Flowers*, 588 U.S. at 316.

Given these circumstances, those who have long-championed the rights of all eligible Mississippi citizens to participate in the jury process expected *Flowers* to have produced a chastening effect on Mississippi courts' race-bias jurisprudence. After all, the data across the six Flowers trials, in conjunction with the substance and tenor of this Court's decision, offered ample evidence that state courts had failed to uphold *Batson*'s promise at every level, from trial through appellate review. Instead, the Mississippi Supreme Court has reverted to form: paying lip service to the principle while developing work-arounds to avoid implementing it. These work-arounds are not only prospective, but, as additional developments in this case and others have demonstrated, also retroactive. The unmistakable message is that without this Court's intervention, Mississippi intends, as Justice Sotomayor recently warned from the denial of certiorari in yet another recent Mississippi *Batson* challenge petition, "to carry on with business as usual...."[12] That business has always been, and still remains, quite simple: to subtly and relentlessly subvert this Court's calibrated analysis to ferret out race-bias so that close guard may be kept on who is allowed admission into the jury box.

12. *Clark v. Mississippi*, 143 S.Ct. 2406, 2407 (2023) (Sotomayor, J., dissenting from denial of certiorari) (mem.).

ARGUMENT

I. MISSISSIPPI'S FOUNDATIONAL HISTORY WAS PREMISED ON THE EFFORT TO DENY BLACK CITIZENS EVERY ASPECT OF CIVIC ENJOYMENT, ESPECIALLY IN THE JUSTICE SYSTEM, AND MOST PARTICULARLY THE RIGHT TO PARTICIPATE AS A JUROR IN CRIMINAL CASES.

A citizen's right to serve on a jury as a peer of both the charged defendant and of her fellow jurors is deeply rooted in our nation's democratic traditions.[13] Indeed, many other key features of American citizenship are harnessed to it.[14]

But the question of who qualified as a "peer" was not inclusive. Initially, and also by inherited tradition, only White men who owned property were eligible to serve.[15] Over time, property ownership requirements were relaxed, though the motivation for that, particularly in the South, had less to do with increasing equity than it did with expanding jury eligibility to poor White males whose votes could effectively disenfranchise those of token Black citizens'.[16] Nowhere was this more true than in Mississippi, which, as initially organized under its 1817 Constitution—described as "'the least democratic of ...

13. 4 William Blackstone, *Commentaries on the Laws of England* 342 (Univ. of Chi. Press 1979) (1765).

14. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 869-80 (1994).

15. *Id.* at 876-78.

16. *Id.* at 877-80.

any state admitted after the War of 1812'"[17]—had as its central aim "to establish a wealth-producing slavocracy."[18] As a result, it was exceedingly rare for judicial officials to intervene in the master-slave relationship. Most of what passed for justice was delivered to slaves outside the formal legal processes of any court.[19] In fact, when it came to process, there was virtually none: no grand jury indictment, no court record, no right to appeal, and a charged slave was presumed guilty.[20] As one Mississippi planter put it: "Handling Blacks ... was like handling mules. No one used law to make a mule work."[21]

Even so, a half-century later, Alexis de Tocqueville would observe that the American experiment of trial by a jury of peers was a resounding success. Tocqueville described the undertaking as a "kind of magistracy" because it compelled fellow but otherwise disconnected citizens "to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society."[22]

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17. Michael P. Mills, *Slave Law in Mississippi from 1817-1861: Constitutions, Codes and Cases*, 71 Miss. L.J. 153, 164 (2001).

18. *Id.* at 164.

19. Christopher Waldrep, *Substituting Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court*, 82 J. Am. Hist. 1425, 1428-30 (1996).

20. *Id.* at 1430.

21. *Id.* at 1437; Dan T. Carter, *When the War was Over: The Failure of Self-Reconstruction in the South, 1865-1867*, at 221 (1985).

22. Alexis de Tocqueville, *Democracy in America* 260 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2002) (1835).

For a brief time, Mississippi's Black citizens were afforded this magisterial opportunity. The culmination of the Civil War and ratification of the Fourteenth Amendment in 1868 created a watershed moment. As historian Jill Lepore describes it, the era threw open the doors to Black participation in civic life.[23] In Greenville, Mississippi in 1871, juries were empaneled that were majority Black; in nearby Bolivar County, juries were sometimes entirely Black, with Black lawyers and Black judges.[24] In Adams County, the governor had appointed a former slave, John Roy Lynch, as justice of the peace. In his autobiography, Judge Lynch recalled a White man he "knew unfavorably and well" had "cursed, abused and threatened" an elderly Black gentleman. When Lynch asked the man if he had, in fact, done what the affidavit alleged, the man wondered aloud whether cursing a Black man was even a crime. "Yes," Judge Lynch told him, and when the man challenged him, "handed him the code and told him where he could find the section bearing upon the point at issue and requested him to read it for himself, which he did."[25]

"Well, I'll be damned," the man exclaimed when he had finished, and Judge Lynch let him off with a fine of five dollars.[26] For Black citizens in his community, access to a

23. Jill Lepore, *These Truths: A History of the United States* 323 (2018), *citing* Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* 215 (Harv. Univ. Press 2005) (2003).

24. Hahn, *supra* note 23, at 243.

25. John Roy Lynch, *Reminiscences of an Active Life: The Autobiography of John Roy Lynch* 63 (John Hope Franklin ed., 1970).

26. *Id.*

court was "something entirely new," Lynch observed, "and they were anxious to avail themselves of such a glorious privilege."[27]

In the post-Reconstruction era that followed, however, and primarily as a result of the repressive 1890 state convention to draft a new state constitution, Mississippi's Black citizens were excluded from anything even remotely approaching meaningful civic participation. Developments like the imposition of formalized terror in the form of lynching and other random acts of unreported and unpunished systemic violence have told a critical part of the story, but voting data also tells a succinct and categorical one. At the time of the constitutional convention, Mississippi had a total of 189,884 Black and 118,890 white registered voters.[28] Two years later, after the new constitution had been in force (it was never ratified but, instead, just put into effect as drafted),[29] 68,127 out of 110,100 white males qualified as registered voters while only 8,615 out of 147,205 Black males did.[30] As historian C. Vann Woodward synthesized the numbers, "a potential electorate of 257,305 was reduced to a potential electorate of 76,742 and a Negro majority of 37,105 converted into a white majority of 58,512."[31]

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27. *Id.*; see also Hahn, *supra* note 23, at 243-44.

28. Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—and Beyond*, 57 Miss. L.J. 591, 603 (1987).

29. *Id.* at 605.

30. *Id.* at 603.

31. C. Vann Woodward, *Origins of the New South, 1877-1913*, at 344 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951).

Among the doors shut to those Black Mississippians, none closed more definitively than the door to the jury box. According to a comprehensive effort to collect Mississippi jury data in the first part of the twentieth century, in one Mississippi county with 6,000 whites and 18,000 Blacks, records indicated that the county had never empaneled a single Black juror.[32] In another county, a court administrator reported that even though "[t]he jury law in this State makes no discrimination on account of race, color, or previous condition of servitude ... the great trouble is, there are comparatively few Negroes in any county, and none in some of the counties, who can measure up to the qualifications prescribed by law ... [and those that qualify] are almost invariably challenged."[33]

It was no wonder. Racialized jury composition was absolutely critical to upholding the virulent design of southern justice. "White Southerners," as one historian has explained, "guarded their juries more strictly than their voting booths."[34] A token number of Black voters could be tolerated and the effects ameliorated, but "whites tried very hard to keep every last black person off their juries ... [A] few votes did not really matter, but the power to investigate and define crime and determine guilt did."[35]

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32. Gilbert Thomas Stephenson, *Race Distinctions in American Law* 261-62 (Ass'n Press 1911) (1910).

33. *Id.*

34. Christopher Waldrep, *Jury Discrimination: The Supreme Court, Public Opinion, and a Grassroots Fight for Equality in Mississippi* 4 (2010).

35. *Id.*

II. EVEN AS ADVANCEMENTS WERE MADE TO GUARANTEE CITIZENS THE RIGHT TO SIT ON A JURY, INCLUDING DECISIONS BY THIS COURT TO PROHIBIT RACE-BIAS IN JURY SELECTION, MISSISSIPPI, THROUGH LEGISLATIVE AND JUDICIAL ACTS, CREATED IMPEDIMENTS TO DIMINISH THAT RIGHT.

A full decade *before* Mississippi summarily enshrined its 1890 constitution, this Court had decided *Strauder v. West Virginia*, which found that a West Virginia law restricting jury service only to White men violated the Fourteenth Amendment because "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."[36] For Taylor Strauder, the freedman-defendant, full enjoyment meant a jury that would recognize his legal status as a married man. This recognition was critical to his defense to the capital murder charge, a step an all-White jury seemed far less likely to accord him given that marriage had historically not been a recognized right for enslaved people.[37]

The same day *Strauder* was handed down, however, this Court also decided *Virginia v. Rives*.[38] In *Rives*, an all-

36. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879).

37. Stephen Cresswell, *The Case of Taylor Strauder*, 44 West Virginia History 3, 193-211 (1983), *reprinted in* West Virginia Archives & History (Apr. 20, 2020), http://www.archivingwheeling.org/blog/the-case-of-taylor-strauder.

38. *Virginia v. Rives*, 100 U.S. 313 (1879).

White grand jury in Patrick County, Virginia, had indicted two Black men for murder.[39] Rives and his co-defendant alleged that the record indicated that no Black veniremen had ever served on a criminal or civil jury there.[40] In ruling against them, the Court held that the Fourteenth Amendment protected individuals only from state action, not the acts of state governmental officials, even if officials targeted the very rights the federal legislation was meant to protect.[41] "In such a case," the Court wrote, "it ought to be presumed the [state] court will redress the wrong."[42]

Strauder and *Rives* offered two different visions to address the near total exclusion of Black citizens on petit juries: one, which chose to acknowledge the humanity of Blacks as full-citizens, and the other, which left the choice up to local state officials. Mississippi availed itself of the opportunity afforded by *Rives*, passing a statute which vested in three state officials the right to select jurors "based on their good intelligence, sound judgment, and fair character."[43] The Mississippi Supreme Court followed suit, issuing rulings that adopted *Rives*' reasoning and ignoring evidence of massive under-representation of Black jurors and the unjust results that flowed from it. In *Gibson v. Mississippi* and *Smith v. Mississippi*, for example, Black defendants, each charged with murder,

39. *Id.* at 314.

40. *Id.* at 314-15.

41. *Id.* at 320.

42. *Id.* at 321-22.

43. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 76 (1990).

filed petitions alleging systematic exclusion of Black citizens from grand and petit juries.[44] In *Gibson*, the record revealed that Washington County had listed no Black jurors for years despite the county's three-fourths Black population;[45] Smith produced evidence that in Bolivar County, which had 1,300 registered Black voters compared to 300 Whites, no Black juror had been called to serve in the previous six years.[46] The Mississippi Supreme Court summarily denied the claims in each case.[47]

Thanks to the hard-fought efforts of countless Mississippi Black citizens, the twentieth-century brought significant advancements in access to basic civil rights.[48] But even in the face of this steady, and often costly, progress, there remained one seemingly inviolate tool of racial oppression: the peremptory strike.[49] While the strike has been valorized as a guarantor of the right to a fair trial by a jury of peers—this Court having written that the peremptory strike is "one of the most important of the rights secured to the accused"[50]—it has proved in

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44. *Gibson v. State*, 17 So. 892 (Miss. 1895); *Smith v. Mississippi*, 16 S.Ct. at 901 (1896).

45. *Gibson v. State*, 162 U.S. 565, 591–92 (1896).

46. *Smith*, 16 S.Ct. at 901.

47. *Gibson*, 17 So. at 892.

48. *See generally* John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* (Univ. of Ill. Press 1995) (1994).

49. Pamela S. Karlan, *Batson v. Kentucky: The Constitutional Challenges of Peremptory Challenges*, in *Criminal Procedure Stories* 381-83 (2006).

50. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

other circumstances to be particularly pernicious when aimed serially against minority representation.[51]

Though *Swain v. Alabama* left untouched the unfettered use of peremptory strikes, it did create a "carve-out" provision that permitted criminal defendants to challenge the serialized use of race-based peremptory strikes if, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, [it] is responsible for the removal of Negroes ... with the result that no Negroes ever serve on petit juries ..."[52] Just as it had in the wake of *Rives*, Mississippi had a choice to make. And just as it had then, the Mississippi Supreme Court once again opted to toe the party line. The Court denied all fifteen *Swain* claims it heard.[53]

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51. April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 Stan. J. C.R. & C.L 1, 30 (2020).

52. *Swain*, 380 U.S. at 223.

53. *See McLaurin v. City of Greenville*, 187 So.2d 854 (Miss. 1966); *Shinall v. State*, 199 So.2d 251 (Miss. 1967); *Irving v. State*, 228 So.2d 266 (Miss. 1969); *Watts v. State*, 317 So.2d 715 (Miss. 1975); *Coleman v. State*, 378 So.2d 640 (Miss. 1979); *Gaines v. State*, 404 So.2d 557 (Miss. 1981); *Hughes v. State*, 420 So.2d 1060 (Miss. 1982); *Gilliard v. State*, 428 So.2d 576 (Miss. 1983); *Mason v. State*, 440 So.2d 318 (Miss. 1983); *Booker v. State*, 449 So.2d 209 (Miss. 1984); *In re Hill*, 460 So.2d 792 (Miss. 1984); *Ward v. State*, 461 So.2d 724 (Miss. 1984); *Belino v. State*, 465 So.2d 1043 (Miss. 1985); *Johnson v. State*, 476 So.2d 1195 (Miss. 1985); *Caldwell v. State*, 481 So.2d 850 (Miss. 1985).

According to Justice Thurgood Marshall's candid assessment in a dissent from a denial of certiorari involving one of these Mississippi *Swain* challenges, the Mississippi Supreme Court had not bothered to closely examine the potential abuse of the peremptory challenge, and instead "has simply looked to the federal constitution, determined that *Swain v. Alabama* is still good law, and rejected all claims that use peremptory challenges to exclude members of a particular race ..."[54]

The *Batson* era would prove no different. According to this Court in *Flowers*, "*Batson* immediately revolutionized the jury selection process."[55] But not in Mississippi; it again yielded to a form: time-tested, ossified, and effective.

In the first post-*Batson* case the Mississippi Supreme Court decided, *Lockett v. State*, the prosecutor had struck all five qualified, prospective Black jurors in a death penalty case.[56] Among them were a "single, 22-year old laborer with an eleventh-grade education," struck because "his youth, marital and educational level appeared to the prosecutor to indicate instability"; a "49-year-old minister/bus driver who was married and had an eleventh grade education was stricken because he was a preacher"; and, a "single, 25-year-old who went through 12th grade" struck "because he wore a hat into the courtroom, and because his general demeanor suggested to the prosecutor that he was unstable, unconcerned, and had no respect for the proceedings."[57]

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54. *Gilliard v. Mississippi*, 464 U.S. 867, 873 (1983) (Marshall, J., dissenting).

55. *Flowers*, 588 U.S. at 301.

56. *Lockett v. State*, 517 So.2d 1346, 1348 (Miss. 1987).

57. *Id.* at 1350.

After defense counsel raised a *Batson* challenge, the trial court judge found the prosecutor's bases for his strikes to be credibly race-neutral.[58] The Mississippi Supreme Court affirmed. Ministers, it reasoned, are fairly perceived to be sympathetic towards criminal defendants;[59] the juror who wore the hat and appeared contemptuous "may reasonably be assumed to spell trouble for the prosecution;"[60] and, with respect to the single, unmarried, under-educated juror, the Court found that while it was true that "the prosecutor allowed persons with less education to serve on the jury, none of the white jurors possessed this combination of characteristics ..."[61] But the Court did not stop there. The Court also attached an appendix—a cheat-sheet—of "racially neutral reasons upheld by other courts in an effort to provide some guidance to our trial courts" in assessing future *Batson* claims.[62] The list contained nearly sixty purportedly valid rationales, among them, "lived in a 'high crime' area," "body english," "short term employment," "single with children," "demeanor," "slouched, wore gold chains, rings and watch," and "avoided eye contact."[63]

According to the dissent in *Lockett*, "[t]he probability of the prosecutor using all challenges in this manner by chance, with no discriminatory intent, gives a level of

58. *Id*. at 1351.

59. *Id.*

60. *Id*. at 1351-52.

61. *Id*. at 1352.

62. *Lockett*, 517 So.2d at 1353.

63. *Id*. at 1356-57.

significance of approximately 0.00000000397."[64] (In *Batson* itself, this Court cited to cases where a significant level of likely discrimination was determined to be present at a significance of 0.05.)[65] The dissent continued, "the chances of the prosecutor having employed *Batson*-legitimate non-discriminatory reasons in striking peremptorily all five (5) black jurors are slim to none."[66]

This stubborn indifference to math and to principle has accrued into a staggering record. Current Mississippi Supreme Court Justice Leslie King, whose *Batson* analysis this Court would later adopt in *Flowers*, pulls no punches about his assessment of this record: "In the more than thirty years since *Batson* was decided, this Court has simply failed to give *Batson* any teeth whatsoever, all while prosecutors become increasingly savvy in their explanations for strikes that are often wildly disproportionate based on race."[67]

64. *Id.* at 1358-59 (Robertson, J., dissenting).

65. *Id.*

66. *Id.*

67. *Id.* at 327.

III. INSTEAD OF A CORRECTIVE, MISSISSIPPI COURTS AND NOW THE FIFTH CIRCUIT HAVE EMPLOYED *FLOWERS VERSUS MISSISSIPPI* TO PERPETUATE THE SAME UNJUST RESULTS.

When this Court decided *Flowers* in 2019, Justice Kavanaugh wrote that the Court was not breaking any new legal ground:

> [o]ur disagreement with the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court), largely comes down to whether we look at ... [a] strike in isolation or instead look at ... [a] strike in the context of all the facts and circumstances. Our precedents require that we do the latter. As Justice King explained in his dissent in the Mississippi Supreme Court, the Mississippi courts appeared to do the former.[68]

The message could not have been clearer about how Mississippi courts should proceed with their *Batson* analyses. Instead, the Mississippi Supreme Court has returned to its habituated conduct. In the first *Batson* case to reach the Court post-*Flowers*, the defendant, Tony Terrell Clark, had faced a trial jury of eleven whites and one Black after the prosecutor used seven of his twelve strikes against Black jurors and five against White ones.[69] (Percentage-wise, prosecutors struck 87.5% of Black

68. *Flowers v. Mississippi*, 588 U.S. at 315-16.

69. *Clark v. State*, 343 So.3d 943, 1016 (Miss. 2022) (King, J., dissenting).

jurors and 16.7% of Whites.)[70] The targeted removal of Black jurors wasn't the only thing that echoed *Flowers*. So, too, did the prosecutors' investigation of Black jurors—pulling county arrest records of persons who shared their last names, while making no similar efforts to investigate White jurors.[71] Clark was found guilty and sentenced to death.

During oral argument in the Mississippi Supreme Court, Justice Dawn Beam interrupted Clark's lawyer. "You rely very heavily on *Flowers*," Beam pointed out, "but wouldn't you agree with me that there is a night and day difference in the *Clark* case and the *Flowers* case?"[72] In reality, there was no daylight between them. Had the Mississippi Supreme Court conducted its *Batson* analysis consistent with *Flowers*' teaching, it would have come to that inescapable conclusion. Indeed, Justice King did just that in dissent.[73] Instead, as Justice Sotomayor would later point out in her dissent from the denial of certiorari in *Clark*, "the majority below responded to these telling statistics with an equally telling silence, failing to even

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70. *Id*. at 1016.

71. *Id*. Also, as in *Flowers*, the prosecution misrepresented the answers of Black jurors in order to justify strikes. *Id*. at 953.

72. *See Oral Argument of Clark v. State*, Mississippi College of Law Judicial Data Project (Dec. 8, 2021), https://law-db.mc.edu/judicial/case.php?id=1130522.

73. *Clark*, 343 So.3d at 1015-24 ("The strikes of the four black jurors were discriminatory in violation of both Clark's and those jurors' constitutional right to be free of racial discrimination.") (King, J., dissenting).

mention them in its *Batson* analysis. There is simply no way to square this with *Flowers*."[74]

Two years after *Clark*, the Mississippi Supreme Court again denied *Batson* relief in *Davis v. State*.[75] In *Davis*, when the prosecutor was asked to provide a race-neutral reason for the striking of a Black female juror, he answered:

> I had the reason written down, Your Honor. I believe if I'm not mistaken, we may have some information on ... [the struck juror] regarding family members being involved in some criminal matters concerning—I think the family member of the [sic] one of the victims involved in a crime. I am not sure.[76]

The trial judge found this to be a satisfactory explanation, denied the *Batson* challenge, and the Mississippi Supreme Court affirmed.

Once again, the majority relied on its interpretation of *Flowers* to justify its ruling, but not in the way that it had used *Flowers* for support in *Clark*. Instead, the majority lamented the state of the record before it—noting, for instance, that its *Batson* assessment was made more difficult because neither the racial makeup of the venire

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74. *Clark v. Mississippi*, 600 U.S. ____, 143 S.Ct. 2406, 2408-09 (2023) (Sotomayor, J., dissenting) (mem.).

75. *Davis v. State*, 379 So.3d 312 (Miss. 2024).

76. *Id*. at 319.

nor the unchallenged peremptory strikes were recorded.[77] With respect to evidence of pretext, the majority found that there was little or none to be found in the record, even though—citing *Flowers*—the defendants had been free to introduce "statistical evidence about the prosecutor's use of peremptory strikes; evidence of 'disparate questioning'; 'side-by-side comparisons' of strikes on prospective jurors; and other types of evidence to support a *Batson* claim."[78]

Had the defendant marshalled evidence of pretext, it is fair to ask how well that would have served his claim given that in *Clark* the Court had invoked *Flowers* as an evidentiary barrier to a *Batson* claim. In the courts of Mississippi, *Flowers* has turned out not to be the corrective that this Court charted, but, instead, a conveniently adaptable work-around: If evidence of discrimination is "lacking," *Flowers* can stand for the proposition that the opportunity was available, but missed; when evidence of discrimination is present, *Flowers* can stand as the baseline—an unreachable one—which all claims must meet.

This Court's *Flowers* teaching has fared no better in the Fifth Circuit, the instant case standing as example.[79] In declining to apply *Flowers* to Terry Pitchford's *Batson* claim, the Fifth Circuit relied in part on the temporal fact that *Flowers* had been decided in 2019, nine years after the Mississippi Supreme Court had affirmed Pitchford's conviction and death sentence. The timing itself, the

77. *Id.* at 321.

78. *Id.*, *quoting Flowers*, 588 U.S. at 302.

79. *Pitchford v. Cain*, 126 F.4th 422 (5th Cir. 2025).

panel reasoned, necessarily meant that *Flowers* was of no moment because it was not a "clearly established" rule of law at the time Pitchford's state court conviction became final.[80] But that is a temporal red herring. *Flowers* says as much: "In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case."[81]

In citing to *Miller-El*, this Court's 2005 decision reversing the same circuit, *Flowers* reiterated that "a defendant may still cast *Swain*'s 'wide net' to gather "'relevant'" evidence."[82] The decisions in *Flowers*—as well as *Miller-El*—as this Court has explained, were arrived at by the simple application of well-settled law to fact in order to achieve this Court's long-stated principle.[83] Thus, *Flowers* did not change the law; instead, it employed pre-existing, proper legal analysis that, when applied correctly, led inexorably to the correct result.[84]

What is perhaps most troubling about the Fifth Circuit's opinion, though, is the way it discounts the fundamental rights of Terry Pitchford and similarly situated defendants and prospective jurors. By advancing

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80. *Id.* at 430.

81. *Flowers*, 588 U.S. at 316.

82. *Flowers*, 588 U.S. at 304-05, *quoting Miller-El II*, 545 U.S. 231, 239-40 (2005).

83. *Flowers*, 588 U.S. at 316.

84. *See, e.g.*, *Flowers*, 588 U.S. at 304-05 ("*Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination.").

its specious claim that there is no way a 2019 U.S. Supreme Court decision could have any bearing on a 2010 state court ruling, the court of appeals avoids a sad truth. That truth is that the reason it took nine more years for this Court to decide *Flowers* is because the trial prosecutor was allowed to try Flowers twice more (with mixed-race juries that could not reach a verdict in the fourth and fifth trials) and then again at the sixth and final trial with an illegally chosen jury. Several more years would then pass because the Mississippi Supreme Court erroneously affirmed the conviction—not once but twice—on direct appeal and again in response to this Court's GVR. In finding that Pitchford could not establish that the state court adjudication of his *Batson* claim involved an unreasonable application of clearly established law, the Fifth Circuit rewarded Mississippi's continuing evasion of its obligations under *Batson*.

While laying blame for the structural failures of a system that takes two plus decades to reach a correct legal decision is surely appropriate, holding Pitchford procedurally accountable while ignoring the broader legal principle for it is perverse.[85]

By extension, though, the Mississippi Supreme Court and the Fifth Circuit also force another group to own the system's error: illegally struck Black jurors. There were forty-one of them in the *Flowers* litigation—four in the instant case, four in *Clark*, and one in *Davis*. Political scientist Alfred Dzur has glossed de Tocqueville's observation about American jury service this way: "Jury

85. *See Andrew v. White*, 145 S.Ct. 75, 82 (2025) ("General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court.")

service is a liberation from the servitude of private habit and routine that forestalls possibilities of a better individual and collective life"[86] Together, this group of struck jurors comprise a small, public community—peers, citizens, and constituents—whose liberation was denied, and whose contribution to the betterment of our collective life—a just outcome through lawful processes—was deemed unworthy by virtue of their race.

CONCLUSION

When the Mississippi Supreme Court majority denied relief in *Clark*, it did so by finding that the allegations of race-bias did not rise to the levels present in *Flowers*, which the majority described as "extraordinary," "exceptional," and "unusual."[87] Not only did Justice King come to a different conclusion in his dissent—his assessment being that "neither the Constitution nor the United States Supreme Court precedent forbids only extraordinary, exceptional, or unusual racial discrimination"—he also used his dissent to call out the majority for its broader failing: its cynical perversion of this Court's holding in *Flowers* to justify yet another holding hostile to *Batson*'s and this Court's efforts over time to prohibit race-bias in jury selection.[88]

Was there no shame, Justice King's dissent asked? After all, when his colleagues in the majority initially reviewed Flowers' sixth trial and *affirmed* the conviction and sentence, they did so because they *had not* found the

86. Albert W. Dzur, *Punishment, Participatory Democracy, and the Jury* 70 (2012).

87. *Clark*, 343 So.3d at 960.

88. *Id*. at 1015.

race bias extraordinary, exceptional and unusual.[89] Justice King did not put a name to this phenomenon, but this Court has: "backsliding." *Flowers* made explicit mention of it: "In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding."[90] In other words, the legal solution is explicit, manifest in this Court's developed jurisprudence. Just as the penetrating counsel of one of Mississippi's most revered native sons reminds us—that "[t]he past is never dead. It's not even past"—if these principles are to have any force at all in the State of Mississippi, then Mississippi state courts' and the Fifth Circuit's stubborn relapse into their own learned mode of behavior requires remedy.[91]

Respectfully submitted,

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89. *Id.*

90. *Flowers*, 588 U.S. at 301.

91. William Faulkner, *Requiem for a Nun* 73 (1954).