NO. 24-7351
(CAPITAL CASE)

In the
Supreme Court of the United States

TERRY PITCHFORD,

Petitioner,

v.

BURL CAIN, Commissioner,
Mississippi Department of Corrections;
LYNN FITCH, Attorney General
for the State of Mississippi,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* LINDA LEE, PATRICIA TIDWELL HUBBARD, AND CARLOS WARD IN SUPPORT OF PETITIONER

Paul d'Ambrosio
KING & SPALDING LLP
110 N. Wacker Drive
Chicago, IL 60606

Amy R. Upshaw
Counsel of Record
K. Paige Tenkhoff
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
aupshaw@kslaw.com

Counsel for Amici Curiae

July 3, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Amici curiae Linda Lee, Patricia Tidwell Hubbard, and Carlos Ward respectfully submit this brief supporting the Petition for Writ of Certiorari filed by Terry Pitchford.

INTEREST OF *AMICI CURIAE*[1]

Amici are Black prospective jurors who were excluded from serving on Petitioner Terry Pitchford's jury because of their race. The State claimed to strike Carlos Ward because he shared too much in common with Pitchford, including being similar in age, unmarried, and having a young child. App.26. But other White potential jurors shared these same race-neutral characteristics, indicating that the real reason for the strike was Ward's race. App.26. The State's pretext to strike Patricia Tidwell Hubbard was that she had relatives who had been convicted of crimes—but so too did other White venire members who were tendered without challenge. App.25. And the State struck Linda Lee for having unspecified "mental problems," but the State never brought this purported issue up prior to or during voir dire or ever produced evidence of that condition. App.24. Far from tailored strikes addressing particular characteristics, these peremptory strikes illustrated the prosecutor's blatant pattern of striking prospective jurors because of the color of their skin.

---

[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici curiae*'s intention to file this brief at least ten days prior to the deadline.

The Court need not accept *amici*'s representations, however, to find that the prosecutor had a pattern of striking prospective jurors because of their race. In *Flowers v. Mississippi*, this Court determined that this same prosecutor had engaged in a pattern of striking individuals because of their race time and time again. *See* 588 U.S. 284, 304–07 (2019).

Amici have a strong interest in ensuring that the racial discrimination they experienced is redressed by a court of law. As this Court made clear in *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970), "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." Their firsthand experiences on the receiving end of the prosecutor's peremptory strikes fuel their desire to advocate for fairness both in this case and in the justice system more broadly. *Amici* are deeply committed to the belief that all citizens should be given equal opportunity to participate in the civic duty of serving on a jury. Because of their unique experiences of facing racial discrimination in Pitchford's trial, they have an important perspective to offer the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A jury sentenced Petitioner to death for participating, as a teenager, in a robbery in which his accomplice shot and killed a store owner. *See* App.11. Doug Evans, the district attorney of the Fifth Circuit Court District of Mississippi, prosecuted the State's case. App.27. This Court is no stranger to Evans. He is the same prosecutor that prosecuted Curtis Flowers six times. App.27. In *Flowers v. Mississippi*, this Court

vacated Flowers' conviction because Evans' "peremptory strikes in Flowers' first four trials strongly support[ed] the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent." 588 U.S. at 305.

The similarities between this case and Flowers' sixth trial are striking. Just as in *Flowers*, in Pitchford's case, Evans relied on race in deciding who to strike from the jury. Evans used his peremptory strikes to strike four of the five Black venire members remaining after voir dire, including Linda Lee, Patricia Tidwell Hubbard, and Carlos Ward. App.16–20. Pitchford's attorney, who was also Flowers' defense counsel, challenged those strikes under *Batson*. But after Evans provided the court with pretextual race-neutral reasons for the strikes, the court—the same trial judge, in fact, which denied the *Batson* objections in *Flowers*—simply denied the challenges. App.21–22. The court failed to determine whether each of the proffered reasons were pretextual, and it prevented trial counsel from contesting those reasons. App.21–22.

The jury of thirteen White jurors and one Black juror convicted Pitchford and sentenced him to death. App.13. Pitchford appealed the conviction and raised his *Batson* challenges once again. But on appeal, the Mississippi Supreme Court affirmed his conviction and sentence, finding his *Batson* challenges waived before the trial court. *See Pitchford v. Mississippi*, 45 So.3d 216, 227–28 (Miss. 2010) (en banc); *see also id.* at 266 (Graves, J., dissenting) (decrying the "erroneous proposition that Pitchford somehow

waived his *Batson* objection by not rebutting the State's proffered race-neutral reasons"). Pitchford sought federal habeas corpus relief, raising his *Batson* challenges once again. App.13. Following this Court's instruction in *Miller-El*, the district court granted him relief, explaining that the Mississippi trial court contravened this Court's precedent by failing to consider whether the State's race-neutral reasons for the strike were pretextual in light of all relevant evidence. *See* App.22–23. The Fifth Circuit reversed, holding that *Batson* allows a court to accept the prosecutor's race-neutral reasons for the strike at face value, even if those reasons are clearly belied by the record. *See* App.8–9.

This Court should grant certiorari and reverse. At the core of the Equal Protection Clause is the assurance that States and state actors will not exclude individuals from jury service based on the color of their skin. Preventing racial discrimination in jury selection is essential to preserving both the principle of equal justice under law and public confidence that it is being upheld. This is why this Court, in *Batson v. Kentucky*, established a stringent three-step, burden-shifting framework which requires the challenger to show a prima facie case of discrimination, the State to respond with allegedly race-neutral reasons, and, finally, the court to determine whether those reasons are pretextual. 476 U.S. 79, 96–98 (1986). In particular, this Court's precedent mandates, contrary to the decision below, that evidence of a prosecutor's prior history of racial discrimination is critical context that—in connection with evidence of discrimination intrinsic to the voir dire proceeding—is sufficient to provide an "undeniable explanation" that the

prosecutor's proffered reasons for striking Black jurors are pretext. *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005); *see also Flowers*, 588 U.S. at 304–07.

I. The original meaning of the Equal Protection Clause ensured that juries would be open to individuals without regard for their race. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37. In 1879, just eleven years after the Fourteenth Amendment was ratified, this Court confirmed that the Fourteenth Amendment guarantees that a State's jury process will be free from racial discrimination. *See Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). That constitutional right to a jury free from racial discrimination extends both to the defendant and to prospective jurors.

II. Careful scrutiny of peremptory strikes are necessary to vindicate the Equal Protection Clause. The Fifth Circuit's approach—which allows trial courts to defer to the State's prosecutorial discretion—severely weakens this constitutional guarantee.

ARGUMENT

I. Prohibiting Racial Discrimination in Jury Selection Is Central to the Equal Protection Clause.

A. As far back as the English common law and continuing to the American Founding, the right to trial by jury has been a "fundamental safeguard of individual liberty." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017). In the 18th century, Blackstone described the jury-trial right in English law as a "strong . . . barrier" to protect the accused. 4 William Blackstone, Commentaries on the Laws of England 349–50 (Cooley ed. 1899). "[B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

The Founding Fathers viewed the jury trial as a necessary check on arbitrary use of power against defendants. Alexander Hamilton described the jury as a protection against "oppressions" and "arbitrary" charges and convictions. The Federalist No. 83 (Alexander Hamilton). Others described the right to trial by jury in more extravagant language: it is "'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *United States v. Haymond*, 588 U.S. 634, 640–41 (2019) (quoting Letter from Earl of Clarendon to William Pym (Jan. 27, 1766), *in* 1 Papers of John Adams 169 (R. Taylor ed., 1977)).

Juries were considered fundamental both because they protected individuals from arbitrary government action and because they gave power to ordinary citizens. "Fear of unchecked power" gave rise to the "insistence upon community participation" and "the common-sense judgment" of the community. *Duncan*, 391 U.S. at 156. Alexis de Tocqueville lauded the American juries because they "place[] the real direction of society in the hands of the governed" and "invest[] the people . . . with the direction of society." 1 Alexis de Tocqueville, Democracy in America 282–83 (Phillips Bradley ed., 1945). The Magna Carta likewise placed power in the hands of a defendant's equals. Magna Carta cl. 39 (British Library trans., Nat'l Archives) (1215) ("No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."). The protection of a jury ensured that "the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, *indifferently chosen* and superior to all suspicion." Blackstone, Commentaries, *supra*, at 349–50 (emphasis added).

The denial of this longstanding right to an indifferently chosen jury, in part, spurred the Founders to declare independence from England. "Prior to the Revolution, Parliament enacted measures to circumvent local trials before colonial juries, most notably by authorizing trials in England for both British soldiers charged with murdering colonists and colonists accused of treason." *Smith v.*

United States, 599 U.S. 236, 246–47 (2023). The Declaration of Independence denounced this practice, under which colonists were "transport[ed] . . . beyond Seas to be tried for pretended offences." *See* The Declaration of Independence para. 19 (U.S. 1776); *see also id.* para. 18 (listing as a grievance the "depriv[ation] . . . of the benefits of Trial by jury"). Underscoring the importance of giving a representative pool of citizens the right to serve on the jury and oversee prosecutions, the Constitution protects that right twice. The Sixth Amendment provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. And Article III also requires that juries in criminal trials are drawn from the place where the defendant is accused of having committed the crime. U.S. Const. art. III, § 2, cl. 3 ("such Trial shall be held in the State where the said Crimes shall have been committed"); *see also Smith*, 599 U.S. at 247 (explaining that this right stemmed from the Founders' "forceful[] object[ions] to trials in England before loyalist juries," which was "an affront to the existing common law of England and more especially to the great and inestimable privilege of being tried by . . . peers of the vicinage" (quotation marks omitted)).

But for much of the country's history, juries were not drawn from the whole of the people in our democracy. Ohio, South Carolina, Georgia, Virginia, Tennessee, Mississippi, and West Virginia, to name a few, restricted jury service to White men, either explicitly or by limiting jury service to those eligible to

vote, which was itself limited to White men.[2] That restriction had a predictable effect. Without representative juries, "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." *Peña-Rodriguez*, 580 U.S. at 222 (quoting James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 909–10 (2004)). The desire to maintain a racially divided society and protect the brutal system of slavery caused several Southern states to declare secession from the United States and triggered the Civil War. *See, e.g.*, *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (Dec. 24, 1860), *in* Edward McPherson, The Political History of the United States of America During the Great Rebellion 1860–1865, at 15–16 (1972) (citing as a reason for secession the northern states' "disregard of their obligation[]" under Article IV of the Constitution to return fugitive slaves); *Confederate States of America—Mississippi Secession*, *Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union*, *in* Yale L. Sch., Avalon Project (2008), https://avalon.law.yale.edu/19th_century/csa_missec.asp. ("Our position is thoroughly identified with the institution of slavery . . . .").

---

[2] Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 La. L. Rev. 55, 58–59 (2020); Miss. Const. art. 14 § 264 (1890) (requiring every juror to be "a qualified elector and able to read and write").

B. After the Union defeated the Confederacy, the Constitution was amended to ensure that all citizens had equal rights before the law, including the equal opportunity to serve on a jury and to be tried by an indifferently chosen jury. Ratified in 1868, the Fourteenth Amendment extended citizenship to all individuals born in the United States and subject to its jurisdiction and guaranteed "equal protection of the laws" for all people. U.S. Const. amend. XIV, § 1.

The Fourteenth Amendment's framers understood that the Amendment prohibited racial discrimination in jury selection. The debates preceding the ratification of both the Thirteenth and Fourteenth Amendments make clear that lawmakers considered jury service necessary to ensure that Black Americans would enjoy equal protection of the law. "Equal protection" included both the protection against crime (in particular, the lynchings and other racially motivated violence that followed the end of the Civil War), and the protection of a fair trial when accused of a crime. Forman, 113 Yale L.J. at 916–17. Congress soon exercised its authority under the Fourteenth Amendment to ban racial discrimination in jury service in state courts. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. at 336–37; *see Ex parte Virginia*, 100 U.S. 339, 369–70 (1879); *see also* An Act for the Further Security of Equal Rights in the District of Columbia, ch. 3, 16 Stat. 3 (1869) (prohibiting racial limitations on jury service and the right to hold office in the District of Columbia). Denying someone the right to serve on a jury because of their race would violate that person's constitutional rights. *See* Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, § 5, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1985 (2000))

(prohibiting Ku Klux Klan and other conspiracy members from serving on juries).

C. This Court has likewise consistently affirmed that the Fourteenth Amendment guarantees a jury and jury service free from racial discrimination. This Court first held that the Fourteenth Amendment prohibits racial discrimination in jury selection in 1879. At that time, West Virginia had a statute which restricted jury service to "white male persons." *Strauder*, 100 U.S. at 305. In *Strauder*, the Black criminal defendant tried to remove his case to federal court before trial. *Id.* He argued that because West Virginia prohibited Black West Virginians from sitting on juries, "he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia . . . as is enjoyed by white citizens." *Id.* at 304. The petition was denied, as were subsequent motions to quash the venire and challenging the array of the panel. He was convicted and sentenced in the state court, and the West Virginia Supreme Court affirmed. This Court, however, reversed the conviction and struck down the West Virginia statute. The statute restricting jury service to White citizens, this Court said, "discriminat[ed] in the selection of jurors [which] amount[ed] to a denial of the equal protection of the laws . . . ." *Id.* at 310.

In the nearly 140 years since *Strauder*, "this Court has been unyielding in its position" that the Equal Protection Clause protects juries from racial discrimination. *See Powers v. Ohio*, 499 U.S. 400, 404 (1991); *see also Peña-Rodriguez*, 580 U.S. at 222. The Court has repeatedly struck down laws and policies that systematically exclude minorities from juries.

Notably, in *Neal v. Delaware*, the Court "reaffirm[ed] the doctrines announced in *Strauder*" and prohibited the "uniform exclusion" of Black Americans from jury service, even when the state statute was facially neutral and they were excluded as unqualified on other grounds. 103 U.S. 370, 370, 397 (1880); *see also Norris v. Alabama*, 294 U.S. 587, 589–90, 597 (1935) (holding that the "long-continued, unvarying, and wholesale exclusion of negroes" was unconstitutional though "the state statute defining the qualifications of jurors [was] fair on its face"); *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (per curiam) (same); *Hill v. Texas*, 316 U.S. 400, 401, 406 (1942) (holding that a facially neutral regime of jury commissioner discretion was unconstitutional when the commissioners' long-standing practice "systematically excluded" Black Americans); *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (holding as unconstitutional a system of drawing tickets from the jury box which were different colors based on the potential juror's race to ensure that only the names of White individuals would be selected to serve on a jury); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (holding that the practice of systematically excluding persons of Mexican descent was unconstitutional); *Castaneda v. Partida*, 430 U.S. 482, 500–01 (1977) (same, in grand jury selection).

In *Batson v. Kentucky*, this Court addressed the racial discrimination that might hide in prosecutorial discretion, particularly in a prosecutor's peremptory strikes. In *Batson*, "[t]he prosecutor used his peremptory challenges to strike all four black persons on the venire," and the resulting all-White jury convicted the defendant. 476 U.S. at 83. The defendant challenged the prosecutor's peremptory challenges as

racially discriminatory. *Id.* at 83–84. While the court below said the prosecutor is entitled to use his peremptory challenges to "strike anybody they want to," this Court reversed. *Id.* "[T]he State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause." *Id.* at 89.

To enforce this principle, the Court established a three-step, burden-shifting framework to determine whether a prosecutor is engaged in unlawful discrimination. *Id.* at 96–98. This framework overturned the "crippling burden of proof" previously announced in *Swain v. Alabama*, 380 U.S. 202 (1965), and required merely proving discriminatory intent in the case at bar. *Id.* at 92–93. In the first step, the challenger of a strike must make a prima facie case of discrimination on the part of the prosecutor. *Id.* at 96–97. It then falls to the State to provide race-neutral explanations for the peremptory strikes. *Id.* at 97. In the third and final step, the Court determines whether the proffered reasons "were the actual reasons or instead were a pretext for discrimination." *Flowers*, 588 U.S. at 298; *Batson*, 476 U.S. at 98. This third step is the determinative step of the analysis and the valve controlling the protective function of the jury.

Careful scrutiny of a prosecutor's reasons for a strike is mandatory to protect the defendant, the prospective jurors, and the integrity of the criminal justice system. This Court in *Flowers* emphasized that "the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process" lies with trial judges. *Flowers*, 588 U.S. at 302. Trial judges especially bear this

responsibility, because appellate courts "necessarily" review the decision below "on a paper record" without the ability to evaluate credibility. *Id.* at 303. Vigorous enforcement of *Batson*'s protection is as much for the jurors as for the defendant. *See Powers*, 499 U.S. at 415 (recognizing the "equal protection claims of jurors excluded by the prosecution because of their race"). Simply put, courts have the mighty responsibility of ensuring "that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99.

II. To Enforce These Protections, Courts Must Rigorously Scrutinize Peremptory Challenges, Including Considering Evidence of a Prior Pattern of Racial Discrimination.

A. To give effect to the Equal Protection Clause's promise, this Court has instructed lower courts to rigorously scrutinize peremptory challenges to determine whether a prosecutor is engaging in unconstitutional discrimination. In *Batson*'s immediate aftermath, lower courts frequently failed to adequately constrain prosecutors from using their peremptory challenges to discriminate against Black jurors. One analysis of capital trials in Philadelphia between 1981 and 1997 found that prosecutors still struck Black jurors about twice as frequently as non-Black jurors, and race-based peremptory challenges decreased only two percent after *Batson* came down.[3] Another concluded that "many courts frequently

[3] David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 52–53, 73 n.197 (2001).

accept[ed] explanations that appear[ed] to be no more than after-the-fact rationalizations for challenges . . . made on subconsciously racial grounds."[4] It quickly became clear that if courts did not make affirmative efforts to sniff out discrimination during *Batson*'s third step, the doctrine did not have much of an effect. This Court's subsequent opinions in *Miller-El* and more recently in *Flowers* responded to this problem and reaffirmed the duty of courts to weigh the government's proffered reasons for the strikes carefully against the evidence.

In *Miller-El v. Dretke*, the Court's analysis emphasized the importance of *Batson*'s third step: courts *must* "ferret[] out discrimination" in jury selection and consider "'all relevant circumstances'" when determining whether peremptory strikes were motivated by intentional racial discrimination, because discretionary, legitimate factors may easily obscure discriminatory intent. 545 U.S. at 238, 240 (quoting *Batson*, 476 U.S. at l96). This includes evidence both internal and external to the proceeding. Relevant internal evidence includes the number and percent of Black jurors stricken by the prosecution, a comparison of Black jurors stricken from the panel and White jurors permitted to serve, and any other conduct during the jury selection procedure. *See id.* at 240–41. Relevant external evidence includes prosecutorial policies and practices of discrimination

[4] Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1107 (1994).

outside of the specific set of jurors under consideration in the given trial. *See id.* at 253.

Failure to adequately scrutinize peremptory strikes in the face of a *Batson* challenge is error that warrants habeas relief. In *Miller-El*, the Court reversed the denial of habeas relief based on the evidence showing that the prosecutor's race-neutral reasons to strike prospective jurors were "so far at odds with the evidence that pretext [was] the fair conclusion." *Id.* at 265. The Court gave great weight to the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected." *Id.* at 253. The Court explained that "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much." *Id.* at 240. "[S]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure [that purposeful discrimination occurred] unless it looks beyond the case at hand." *Id.* at 240, 253. Thus, a prosecutor's history of racially discriminatory strikes in or around the time of the relevant case provides critical context in assessing a prosecutor's proffered neutral reasons for peremptorily striking minority jurors.

B. The Fifth Circuit's decision below defies Supreme Court precedent and deepens a circuit split by failing to require anything at all from courts at *Batson*'s third step. This results in the further injustice of a person's right to be tried by, or serve on, a racially unbiased peer jury potentially depending on where in the United States he or she lives.

In the state trial court where Pitchford's counsel made the *Batson* objection, the court—per the same judge which denied Flowers' *Batson* challenges—found the State's proffered reasons for the strikes to be race-neutral, and "then full-stop ended its *Batson* analysis." App.21. Instead of evaluating the State's reasons, the court immediately continued the juror selection process without further comment. App.21. After the jury was selected, Pitchford's counsel attempted to raise the *Batson* issue again. App.21. But the trial court responded: "[A]ll the reasons were race neutral . . . . And so the Court finds there to be no Batson violation." App.22.

In habeas proceedings, the federal district court correctly observed that the third step of the *Batson* analysis was missing, but the Fifth Circuit reversed. In earlier precedent, the Fifth Circuit had concluded that the trial court may "implicitly" perform the third step of the *Batson* analysis. *United States v. Ongaga*, 820 F.3d 152, 166–67 (5th Cir. 2016).[5] Following suit,

---

[5] *See also United States v. Thompson*, 735 F.3d 291, 300 (5th Cir. 2013) (rejecting a requirement that a court make explicit findings during *Batson*'s third step, even when the only race-neutral reason advanced was a demeanor-based reason not otherwise reviewable based on the record); *United States v. Perry*, 35 F.4th 293, 331 (5th Cir. 2022) (rejecting the argument that "the trial court erred by failing to explicitly reach" step three and recognizing as sufficient "an implicit finding . . . that the Government's explanation was credible"); *United States v. McDaniel*, 436 F. App'x 399, 405–06 (5th Cir. 2011) (per curiam) ("[A] district court will not be reversed for failing to explicitly detail its findings at each step in the *Batson* analysis, if we are convinced that the necessary determinations were 'implicitly' made.").

the court below said here that "a court 'may make implicit findings while performing the *Batson* analysis'" to satisfy the third step and found that the state trial court had indeed done so. App.7 (quoting *Ongaga*, 820 F.3d at 166).

But this willingness to invent "implicit findings" to save the trial court's legal error conflicts with this Court's precedent and precedent from other circuits. In *Snyder v. Louisiana*, for example, the Court emphasized the importance of considering all relevant circumstances in the record—not reaching a result and backfilling with implicit findings later. 552 U.S. 472, 478 (2008). The Third Circuit has followed this precedent to explain that "[a]lthough a judge considering a *Batson* challenge is not required to comment explicitly on every piece of evidence in the record, some engagement with the evidence considered is necessary as part of step three of the *Batson* inquiry." *Coombs v. Diguglielmo*, 616 F.3d 255, 262 (3d Cir. 2010) (quoting *Riley v. Taylor*, 277 F.3d 261, 289 (3d Cir. 2001)). The Ninth Circuit likewise requires courts to "conduct comparative juror analyses when considering *Batson* objections." *Reynoso v. Hall*, 395 F. App'x 344, 348 (9th Cir. 2010). Standards such as these align with this Court's instruction that "in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear on the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478 (also noting that a court might be required to consider the strike of one juror when evaluating the proffered reason behind striking a different juror); *see also Miller-El*, 545 U.S. at 251–52 ("[*Batson*] requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."). A defendant's

access to a fair trial should not depend on whether he lives in one of these circuits.

C. Careful scrutiny of peremptory strikes is critical not only to protect the rights of the defendant but also because it is often the only way to protect the rights of individual jurors to exercise their rights as citizens. Potential jurors who suffer racial discrimination typically have no recourse against prosecutors and may even face retaliation if they speak out.

That is the case in Mississippi, where Pitchford and Flowers were both tried by the same prosecutor. In Flowers' fifth retrial, this Court held that discriminatory intent motivated at least one of the peremptory strikes in Flowers' trial, notwithstanding the trial court's denial of all five *Batson* objections and the Supreme Court of Mississippi's affirmance of same. *Flowers*, 588 U.S. at 288. In Flowers' second retrial, just three years before the state supreme court reviewed Pitchford's case at bar, that high court overturned Flowers' judgment after reviewing "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers v. Mississippi*, 947 So.2d 910, 935 (Miss. 2007) (en banc).

The evidence of discrimination in the *Flowers* litigation was overwhelming. As this Court explained, the prosecutor tried Curtis Flowers six separate times, and evidence of racial discrimination permeated these trials. *Flowers*, 588 U.S. at 289. In the first trial, the prosecutor used peremptory challenges to strike all five Black potential jurors. *Id.* at 306. In the second, the prosecutor attempted to do the same, but the judge

determined the fifth peremptory strike was racially motivated, leaving one Black juror. *Id.* at 290. Both trials were reversed by the Mississippi Supreme Court for *other* prosecutorial misconduct. *Id.* at 287. In the third trial, the prosecutor used all fifteen of his peremptory strikes against Black potential jurors, and this time the Mississippi Supreme Court found a *Batson* violation on review. *Id.* at 290–91. In the fourth trial, the prosecutor used all eleven of his peremptory challenges to strike Black jurors. *Id.* at 291. No racial data was available for the fifth trial, but in the sixth and last trial, the prosecutor struck five of the six Black potential jurors. *Id.* at 292. Writing for the majority, Justice Kavanaugh observed that "[t]he State appeared to proceed as if *Batson* had never been decided." *Id.* at 306.

In light of a clear finding of racial discrimination by this Court, Black jurors in Mississippi—one of whom was part of the jury pool for Curtis Flowers' third trial—sued the prosecutor based on his blatant policy of striking jurors for racial reasons. *See* Class Action Complaint, *Attala Cnty., Miss. Branch of the NAACP v. Evans*, No. 4:19-cv-00167 (N.D. Miss. Nov. 18, 2019), ECF 1. The jurors provided data gathered by investigative reporters from American Public Media Reports, which show that in the 225 trials on which data was gathered, this prosecutor struck Black potential jurors 4.4 times more frequently than White potential jurors.[6] Of this prosecutor's 1,274 total

[6] *See* Will Craft, Am. Pub. Media, Peremptory Strikes in Mississippi's Fifth Circuit Court District, APM Reports 2–3, 5–6, *available at* https://www.apmreports.org/files/peremptory_strike_methodology.pdf (last visited July 2, 2025).

strikes in these trials, 71% were against Black potential jurors, and only 29% were against White potential jurors.[7] This remained true across counties and across serious and minor crimes.[8]

Despite this Court finding racial discrimination and the evidence supporting such a showing, the district court nevertheless refused to entertain the case, dismissing the action based on *O'Shea* abstention. *Attala Cnty., Miss. Branch of NAACP v. Evans*, 2020 WL 5351075, at *1 (N.D. Miss. Sept. 4, 2020). According to the court, because the jurors could have brought the case in state court and the injunctive and declaratory relief sought would interfere with proceedings in Mississippi state court, abstention was required. *Id.* at *8–12.

The Fifth Circuit affirmed on other grounds, namely that the plaintiffs lacked standing. *Attala Cnty., Miss. Branch of NAACP v. Evans*, 37 F.4th 1038, 1040 (2022). According to the Fifth Circuit, the plaintiffs could not show "a likelihood or imminence of the alleged future injury" because "[i]njury would require that a Plaintiff one day is called for jury service in a case assigned to Evans's office; the prosecutor seeks to remove the person from the jury due to race; an independent decision-maker—namely

---

[7] *Id.* at 6 (showing that out of 1,274 total strikes, the prosecutor struck 902 Black venire members and only 372 White venire members).

[8] *Id.* at 7 (showing that Black jurors were, at a minimum, struck 2.9 times more frequently than White jurors in every county studied, and they were at least 4.1 times more likely to be struck for every category of crime).

a trial judge who reviews a *Baston* challenge—then fails to block the use of the discriminatory strike." *Id.* at 1043.

Under this logic, it is virtually impossible for any prospective juror to take action to protect him or herself from racial discrimination. *See, e.g.*, *Pipkins v. Stewart*, 105 F.4th 358, 359–60 (5th Cir. 2024) (per curiam) (affirming W.D. La. summary judgment in Equal Protection action under 42 U.S.C. § 1983 against parish district attorney's alleged custom of discriminatory peremptory strikes). The only way for a court to enforce the rights of prospective jurors and criminal defendants alike is to rigorously review *Batson* challenges and the prosecutor's reasons for a peremptory strike.

Although the United States is full of prosecutors with integrity who seek to fairly enforce the law, this case and *Flowers* make clear that the need for careful scrutiny remains acute. Intervention from this Court is needed once more to reinforce the principles of *Strauder*, *Batson*, *Miller-El*, and *Flowers* and ensure that bad actors do not abuse their prosecutorial discretion to deny anyone the full rights of citizenship guaranteed by the Constitution. The Court should grant the petition of certiorari to enforce the clear mandates of the Equal Protection Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul d'Ambrosio
KING & SPALDING LLP
110 N. Wacker Drive
Chicago, IL 60606

Amy R. Upshaw
Counsel of Record
K. Paige Tenkhoff
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
aupshaw@kslaw.com

Counsel for Amici Curiae

July 3, 2025