No. 24-7351
(Capital Case)

In The
Supreme Court of the United States

TERRY PITCHFORD,

v.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The State's brief in opposition grossly mischaracterizes the Petition's gravamen. The central problem necessitating plenary review is the Fifth Circuit's deepening of a circuit split by its failure to properly consider the Mississippi state courts' violation of this Court's clearly established law providing—for each of the defense's four discrete challenges of the District Attorney's discriminatory peremptory strikes—the *trial court's* "duty to determine if the defendant has established purposeful discrimination." *Batson v. Kentucky*, 476 U.S. 79, 98 (1986). This step three *Batson* duty requires findings of fact, *id.* at n.21 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)), that were to have been evaluated for "the plausibility of the [prosecutor's proffered race-neutral] reason in light of all evidence with a bearing on it." Pet. i (citing *Miller-El v. Dretke*, 545 U.S. 231, 251–52 (2005) (*Miller-El II*)).

To confuse matters, the State recasts this Petition as a referendum on the *performance of trial counsel*—not the trial court and, upon direct review, the state supreme court—in relation to the defense's *Batson* objections, faulting defense counsel for not doubly objecting, on top of each of counsel's four *Batson* objections, to District Attorney Evans's proffers. Opp. 3, 8, 11, 17, 23, and 26. The State seeks to rewrite the voir dire transcript to erase the fact, which the District Court recognized, that the Honorable Joseph Loper "full-stop ended" his *Batson* inquiry, foreclosing further argument immediately following Evans's step two proffer in the fourth challenged strike, proclaiming, "The court finds that to be race neutral as well. So

now we will go back and have the defense starting at [venire member number] 37." App.021. Under the weight of this trial court record, however, the State's attempt to reframe the petition's *Batson* inquiry falters.

ARGUMENT

I. THE FIFTH CIRCUIT CEMENTED ITS SPLIT FROM THE CIRCUITS RECOGNIZING THAT *BATSON* TRIAL COURTS MUST CONSIDER "ALL OF THE CIRCUMSTANCES THAT BEAR UPON THE ISSUE OF RACIAL ANIMOSITY."[1]

A. A Trial Court Must Make a Step Three Determination from Its Record.

The State's use of "present" or "presentation" blurs questions of whether the *evidence* of pretext is in the trial court record and whether pretext was *argued* before the trial court. Opp. 8, 10–13. *Batson* requires the former. *Snyder*, 552 U.S. at 483; *see also Reed v. Quarterman*, 555 F.3d 364, 372 (5th Cir. 2009) (the waiver argument "conflates the difference between evidence that must be presented to the state courts . . . and theories about that evidence"). The *Batson* evidence here was decidedly in Mr. Pitchford's trial record and, critically, the trial court failed to make its required determination under *Batson*'s step three. Nonetheless, the State embraces the Mississippi Supreme Court's erroneous refusal to review Mr. Pitchford's so-called "late-breaking" pretext argument on appeal. Opp. 9 (*see also, infra*, § II). Instead, the State reasons that the state supreme court correctly discarded the "arguments supporting petitioner's *Batson* claim that petitioner did not present to the trial judge."

[1] *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted."). Pet. i.

Opp. 8. The District Court rectified this constitutional violation only to have the Fifth Circuit panel concretize that court of appeals' U-turn from the clearly established Federal law. Pet. 22–24 (discussing *Ramey v. Lumpkin*, 7 F.4th 271 (5th Cir. 2021); *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) (en banc)); *see infra* § III.

The State asserts a distinction between *Miller-El II* and *Pitchford*, arguing that in the former, unlike in the latter, the defendant argued his *Batson* objection based on "evidence" from the "transcript of voir dire." Opp. 14 (quoting *Miller-El II*, 545 U.S. at 241 n.2). The State is correct to emphasize the discussion in *Miller-El II*. But it fails to apprehend that, because Mr. Pitchford has relied only on his trial record in his direct appeal and federal habeas corpus proceedings, *Miller-El II* establishes *petitioner's* central point, which he emphasized in the Fifth Circuit and emphasizes here. *See, e.g.*, Pet. 17, 36 (quoting *Miller-El II*, 545 U.S. at 278 (Thomas, J., dissenting)).

As the majority in *Miller-El II* explained, at the heart of this matter is "the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Miller-El II*, 545 at 241 n.2. On his direct appeal and throughout these habeas corpus proceedings, Mr. Pitchford has relied *only* on the trial court record consisting of the voir dire transcript and juror questionnaires. ROA.17978 n.6 (citing ROA.17798–17964), App.034–287. In the Mississippi Supreme Court, Pitchford presented comparative analysis of the jurors and argued pretext from that very same trial

record. *Pitchford v. State*, 45 So.3d 216, 227 (Miss. 2010). Given the centrality of *Miller-El II* for this Petition, the entirety of footnote 2 clarifies the present matter:

> The dissent contends that comparisons of black and nonblack venire panelists, along with Miller-El's arguments about the prosecution's disparate questioning of black and nonblack panelists and its use of jury shuffles are not properly before this Court, not having been "put before the Texas courts." [*Miller-El II,* 545 U.S. at 278] (opinion of Thomas, J.) But the dissent conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence. See 28 U.S.C. § 2254(d)(2) (state-court fact-finding must be assessed "in light of the evidence presented in the State court proceedings"); *Miller-El v. Cockrell*, [537 U.S.] at 348 [] (2003) (habeas petitioner must show unreasonability "in light of the record before the [state] court"). There can be no question that the transcript of *voir dire*, recording the evidence in which Miller-El bases his arguments and on which we base our result, was before the state courts, nor does the dissent contend that Miller-El did not "fairly presen[t]" his *Batson* claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 [] (1971).

Miller-El II, 545 U.S. at 241 n.2. At bottom, *Miller-El II* makes plain that a federal habeas court must consider whether a *Batson* trial court, on the *record* before the trial court, correctly made its determination on discriminatory intent. This Petition arises from the Fifth Circuit's firm position on the wrong side of this important question.

B. The State's Realignment of the Circuits is Unprincipled.

The State's foregoing ambiguous use of "present" fuels its dissembling treatment of the cases manifesting the Petition's split. *See* Opp. 16–20.

The Petition cites *Galarza v. Keane*, 252 F.3d 630, 636–37 (2d Cir. 2001) (Sotomayor, J.), *Jordan v. Lefevre*, 206 F.3d 196 (2d Cir. 2000), *Williams v. Beard*, 637 F.3d 195, 219 (3d Cir. 2011), *Coombs v. Diguglielmo*, 616 F.3d 255 (3d Cir. 2010),

Hardcastle v. Horn, 368 F.3d 246, 259 (3d Cir. 2004), *Drain v. Woods*, 595 F. App'x 558, 561 (6th Cir. 2014), *Reynoso v. Hall*, 395 F. App'x 344, 348 (9th Cir. 2010), and *Love v. Scribner*, 278 F. App'x 714 (9th Cir. 2008), *Kesser v. Cambra*, 465 F.3d 351, 161 (9th Cir. 2006), *Johnson v. Rankins*, 104 F.4th 194, 203 (10th Cir. 2024), *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1244, 1258 (11th Cir. 2013), and *McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252 (11th Cir. 2009), as one side, *viz.*, circuits recognizing the clearly established Federal law that a trial court in step three has a duty to determine from the totality of circumstances in the record before it whether the proffered race neutral explanations were pretextual. Pet. 19–20. On the other side, the Fifth Circuit, only in recent years (*see Chamberlin v. Fisher*, *infra* § III), has joined the Fourth and Eighth Circuits in disavowing that clearly established Federal law on the trial court's step three determination. Pet. 21 (citing *United States v. Whitfield*, 314 F. App'x 554, 556 (4th Cir. 2008); *Davis v. Baltimore Gas & Elec. Co.,* 160 F.3d 1023, 1028 (4th Cir. 1998) (an employment discrimination lawsuit); *Hopson v. Fredericksen*, 961 F.2d 1374, 1377–78 (8th Cir. 1992)).[2]

The State attempts to evade this split by realigning these opinions into its own groupings broadly via the above-noted ambiguous use of "present" or "presentation." The State hereby obscures the distinguishing criterion of whether the given circuit recognizes the trial court's duty to consider the totality of circumstances in determining if a strike was discriminatory.

[2] The Petition also cites *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990). *Id*. The Second Circuit thereafter adopted the clearly established Federal law, as indicated in the subsequent cases, *Galarza* and *Jordan*.

The State's first grouping includes *Jordan*, *Coombs*, and *Love*—cases from the Second, Third, and Ninth Circuits, respectively. Opp. 17. The State argues the cases are distinguishable from *Pitchford* in that the trial courts therein erred by preventing the defense from putting evidence in the record. Opp. 17–18. The State argues that Mr. Pitchford, by contrast, "simply failed to make a showing of purposeful discrimination." *Id.* 17. Given that the basis of Mr. Pitchford's partial summary judgment derives entirely from the trial record, the State sidesteps the crux of the split. This approach merely deflects attention to a distinct factual nuance, *viz.*, whether Mr. Pitchford at trial was permitted to *argue* in rebuttal during *Batson* step three, which is irrelevant to the articulated circuit split.

The State's next grouping includes *Galarza* and *Barnes* (Second Circuit), and *Reynoso* and *Kesser* (Ninth Circuit), which it characterizes as cases wherein "a lower court erred by failing to make any ruling on purposeful discrimination, by applying the wrong standards, or by ignoring overwhelming evidence of racial animus." Opp. 18. The State partly invokes the central point of the circuit split but portrays it as somehow a basis for distinguishing from the Petition's impetus for plenary review. The State's parenthetical quotations for each of the cases are variations on a finding that the trial court erred in denying a *Batson* objection without properly considering the totality of circumstances in the trial court record. *Id.* Of course, that is the very premise for the inclusion of those circuits on the correct side of this split.

Instead of acknowledging the split, the State claims that in Mr. Pitchford's case, "by contrast, the trial judge applied the proper standards and 'found no

discrimination' when he credited the prosecution's race-neutral reasons as to each challenged strike and then 'announced that he found there to be no *Batson* violation' in view of petitioner's 'bare assertions' of pretext." Opp. 19 (quoting App.007, 010) (cleaned up). But in fact, the trial court made no such finding on discrimination.[3] As three of the Black venire persons whom District Attorney Evans unconstitutionally struck from Mr. Pitchford's jury keenly observe, the Fifth Circuit's "willingness to invent 'implicit findings' to save the trial court's legal error conflicts with this Court's precedent and precedent from other circuits." Brief of Amici Curiae Linda Lee, Patricia Tidwell Hubbard, and Carlos Ward in Support of Petitioner, *Pitchford v. Cain*, No. 24-7351, at 18 (discussing *Snyder v. Louisiana*, and *Coombs v. Diguglielmo* and *Reynoso v. Hall* (*supra*)).[4] Thus, the court of appeals' resulting disregard of the trial judge's failure to conduct step three is the fulcrum of this circuit split, as shown in the circuits arrayed on the other side. *E.g., Kesser*, 465 F.3d at 359 ("Although the burden remains with the defendant to show purposeful discrimination, the third step of *Batson* primarily involves the trier of fact. After the prosecution puts forward a race-neutral reason, the court is required to evaluate the persuasiveness of the justification.") (quotation omitted).

[3] The State's quote of the Fifth Circuit's quotation of the Mississippi Supreme Court is misleading. The actual quote reads: "'One could certainly argue,' the court remarked, that the trial court 'implicitly found' no discrimination when, at the subsequent bench conference, the trial court announced that it 'finds there to be no *Batson* violation' and that 'jury selection was appropriate.'" *Pitchford*, 126 F.4th at 428 (App.007).

[4] In ways that the parties simply cannot, these amici speak forcefully to the "longstanding right to an indifferently chosen jury." *Id*. at 7.

The State's last grouping includes *Johnson* (Tenth Circuit), *McGahee* and *Adkins* (Eleventh Circuit), and *Williams* and *Hardcastle* (Third Circuit). Opp. 19. The State characterizes these as cases, like *Miller-El II*, in which "an appellate court had to consider new facts or arguments on pretext" but claims the reasons for doing so are "absent here." *Id*. Factual distinctions between these cases and *Pitchford*, if any are even arguable, in no way undermine their inclusion in the Petition in that each of these cases recognizes that the trial court is obliged to consider the totality of the evidence before it in determining the credibility of the prosecutor's race neutral explanations. *E.g.*, *McGahee*, 560 F.3d at 1257 (Pet. 20–21 ("Because the trial court denied McGahee's *Batson* motion based only upon the State's proffer of generalized reasons for its peremptory challenges, and because the trial court failed to make any ruling following the State's proffer of individualized reasons for its peremptory challenges, the trial court unreasonably applied *Batson* to this case.")).[5]

At stake in this circuit split is among the most pressing, yet enduring concerns in the work of our courts. As the Fair and Just Prosecution amici curiae put it, "Racial bias in the jury system is a 'familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.'" Brief of Amici Curiae Current

[5] The trial record in *McGahee* stands in contrast to *Pitchford*'s:

> After the State's proffer, the trial court only asked, "Is that all you wish to put into the record?" The State responded, "That's all." The court asked the defense counsel, "And you, Mr. Boynton?" He responded, "Yes, ma'am, that's all." The court concluded, "All right."

Id. at 1260. Thus, in *McGahee*, the defense was expressly afforded an opportunity to argue further with respect to the extant record—unlike in Mr. Pitchford's trial—but declined. Nonetheless, the Eleventh Circuit, in overturning the state courts, astutely recognized McGahee's trial court had omitted its step three duty.

and Former Elected Prosecutors, Former Attorney General and Federal and State Judges, and Fair and Just Prosecution in Support of Petitioner, *Pitchford v. Cain*, No. 24-7351, at 11 (quoting *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 222 (2017)). The State's opposition is utterly silent to these concerns as it clutches to arid, not to mention unlawful, technicalities to foreclose consideration of the actual conduct of an inveterate *Batson* violator in petitioner's 2006 trial—a prosecution conducted amid District Attorney Evans's six-trial saga of racial discrimination this Court punctured in 2019.

II. THE MISSISSIPPI WAIVER RULE VIOLATES CLEARLY ESTABLISHED FEDERAL LAW.

The Mississippi Supreme Court precedent relied on to deny *Batson* relief in Mr. Pitchford's direct appeal is contrary to clearly established Federal law. Pet. i. These state authorities hold that when the defense does not argue in support of its *Batson* objection in rebuttal to the prosecution's step two race neutral explanations, "the trial judge must base his [or her] decision on the reasons given by the State." *Pitchford*, 45 So.3d. at 227 (quoting *Berry v. State*, 802 So.2d 1033, 1037 (Miss. 2001) (modification in *Pitchford*), and citing *Manning v. State*, 735 So.2d 323, 339 (Miss. 1999); *Woodward v. State*, 726 So. 2d 524, 533 (Miss. 1997)). Pet. 34.

The Mississippi rule unconstitutionally terminates full consideration of a *Batson* objection: when its condition is met, it *prohibits* the trial court from doing anything but overruling the *Batson* objection and further *prohibits* it from contemplating any evidence before it of pretext or otherwise conducting any credibility assessment of the prosecution's proffer. *Pitchford*, 45 So.3d at 227 n.16

(the reviewing court "may not reverse on this point") (quoting *Woodward*, 726 So.2d at 533). *Manning* makes clear that the Mississippi rule is based on a theory of waiver. *Manning*, 735 So.2d at 339 ("The failure to [argue after step two] constitutes waiver."); *Woodward*, 726 So.2d at 533. But the line of this Court's jurisprudence simply does not require defendants to re-raise the *Batson* objection at every step.

In *Miller-El II*, this Court held that after the defense discharges its low burden of making a prima facie case and the prosecutor provides a race neutral explanation, "'The trial court then will have the duty to determine if the defendant has established purposeful discrimination.'" *Miller-El II*, 545 U.S. at 478 (quoting *Batson*, 476 U.S. at 98). *Miller-El* also exemplifies this principle,[6] as the dissenting opinion illustrates most starkly, complaining, in relevant part,[7] that the majority should not have

[6] As the Petition points out (Pet. 18–19, 33), this Court recently clarified that per 28 U.S.C. § 2254(d)(1), clearly established Federal law is any holding of this Court, which encompasses any general legal principle underlying a decision, even if not explicitly discussed and even in cases involving different facts. *Andrew v. White*, 605 U.S. __, 145 S. Ct. 75, 80–81 (2025). Pet. 18–19. This Court found that *Lockyer v. Andrade*, 538 U.S. 63, 7172 (2003), clearly established Federal law that the Due Process Clause prohibits admission of unduly prejudicial evidence that is not relevant. *Id*. This holding applied in *Andrew*, a case involving inadmissibility of irrelevant guilt-phase evidence of the defendant's sex life, even though *Lockyer* involved inadmissibility of certain types of victim opinion testimony at capital sentencing. *Id*. It is far clearer that *Miller-El II* clearly establishes the duty to consider the totality of evidence in the record bearing upon whether the prosecutor's race neutral explanations are pretextual.

[7] Justice Thomas also objected that the majority considered *evidence* not presented to the trial court or indeed in state court at all. *Miller-El II*, 545 U.S. at 274 (Thomas, J., dissenting) ("This Court [finds *Batson* error], because it relies on evidence never presented to the Texas state courts."). While here, Petitioner has developed substantial additional evidence of intentional racial discrimination in Rule 6 discovery in the District Court, the grant of partial summary judgment whose reversal is at issue in this Petition is based *solely* on the trial court record. Thus, even assuming Justice Thomas was correct in strict adherence to § 2254(d)(2) (*see Shinn v. Ramirez*, 596 U.S. 366 (2022) (strictly construing § 2254(e)(2)), that question is not relevant to this Petition. What is more, it is surely arguable that the new evidence of discrimination extrinsic to the state court record could be contemplated even in relation to the state supreme court's denial of *Batson* relief. An unadjudicated, separate habeas corpus claim pending in Mr. Pitchford's stayed District Court proceedings directly applies this evidence extrinsic to the state record, pursuant to *Foster v. Chatman*, 578 U.S. 488 (2016). ROA.17484–17493.

permitted consideration, especially in federal habeas corpus proceedings, of argument not raised in the trial court. *Miller-El II*, 545 U.S. at 280 (Thomas, J., dissenting) ("Miller–El did not argue disparate treatment or disparate questioning at the *Batson* hearing . . . .").

This Court addressed this issue again in holding that under direct review, the state appellate court must conduct pretext analysis including comparative analysis even when these arguments "were not raised at trial." *Snyder*, 552 U.S. at 483. Even in these circumstances, *Batson* requires "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Id*. at 478. Given the jurisdiction's history (*infra* § III), it is unsurprising that the Mississippi rule prohibiting this analysis is incompatible with this Court's contemporary law. What *is* surprising is the Fifth Circuit's change of course in now refusing to recognize this.

Indeed, the Fifth Circuit historically had recognized that a capital defendant does not waive a *Batson* objection this way. In *Woodward v. Epps*, 580 F.3d 318, 338 (5th Cir. 2009), the Fifth Circuit cited its own authority recognizing that waiver of *Batson* only applies in non-capital cases, taking that opportunity to correct the Mississippi Supreme Court's contrary waiver holding twelve years prior, on direct appeal, in *Woodward*, 726 So. 2d at 533 (*supra*). The Fifth Circuit further recognized the holding from *Miller-El II*:

> Notwithstanding that "Miller-El's arguments gave the state court no reason to go leafing through the voir dire transcript," the *Miller-El* majority "soundly rejected" the dissent's argument that the state court's consideration of evidence supporting a *Batson* claim is "unrealistic." *Id.* at 372 (quoting *Miller-El,* 545 U.S. at 283 [](Thomas, J., dissenting)). *Contra Snyder,* [552 U.S. at 489] (Thomas, J., dissenting) ("We have no

> business overturning a conviction, years after the fact and after extensive intervening litigation, based on arguments not presented to the courts below.").

Id. The Fifth Circuit concluded, "We therefore decline to find that Woodward waived any *Batson* claim based on a comparison analysis." *Id*.

In *Reed v. Quarterman*, the Fifth Circuit again reviewed a case in which comparative juror argument was first raised on direct appeal. 555 F.3d 364, 369 (5th Cir. 2009) ("On appeal to the TCCA [Texas Court of Criminal Appeals], Reed presented a 'comparative analysis' to establish a *Batson* violation."). At the *Batson* hearing in the trial court,[8] prosecutors offered race neutral explanations from their review of the voir dire transcripts, and the trial court, assuming the defendant had satisfied his burden of raising a prima facie case, noted that neither party urged it to review the voir dire transcripts and "concluded that the defendant had failed to refute the State's race neutral explanations." *Id*. On appeal, the TCCA "refused to consider Reed's comparative analysis, ruling that Reed had waived his comparative analysis argument by not raising it at the *Batson* hearing." *Id*. Noting the similarities to *Miller-El II* (and the direct discussion of the waiver issue raised in Justice Thomas's dissent), the Fifth Circuit emphasized that "[t]he majority soundly rejected Justice Thomas's argument." *Id*. 371–72. The Fifth Circuit understood that the waiver argument "conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories

[8] The *Batson* hearing in question in *Reed* followed a remand when the initial pre-*Batson* trial court proceedings failed to request race neutral explanations. *Id*.

about that evidence." *Id*. at 372. Since the voir dire transcript was certainly part of the state court record, argument about it was permissible even in federal habeas proceedings. *Id*. at 373. Indeed, the Fifth Circuit understood that *Miller-El II* means the obligation to conduct comparative juror analysis is part of the *court*'s duty under *Batson*, "not something that the parties must submit." *Id*.

As noted (*supra* § I), the Fifth Circuit has undertaken an about face from its proper understanding of the clearly established Federal law. *Chamberlin*, 885 F.3d at 838 (en banc) ("*Miller-El II* did not clearly establish any *requirement* that a state court conduct a comparative juror analysis at all, let alone *sua sponte*.").

III. THE FIFTH CIRCUIT'S CALCIFIED JURISPRUDENCE TRANSGRESSING *BATSON* NEEDS PLENARY REVIEW.

The State misrepresents Petitioner's argument that the Fifth Circuit's treatment of Petitioner's case further cements its unconstitutional U-turn from clearly established Federal law. Instead, the State asserts that the Petition advances "an intra-circuit conflict" unworthy of plenary review. Opp. 21. Failing even to cite *Woodward* or *Reed*,[9] the State refuses to acknowledge that the present opinion concretizes the Fifth Circuit's rejection of its own precedent and this Court's law under *Batson*, 476 U.S. at 98, *Miller-El II*, 545 U.S. at 478, and *Snyder v. Louisiana*, 552 U.S. at 483, that a capital petitioner is unable to have "waived any *Batson* claim based on a comparison analysis," even when such comparative inquiry is not argued

[9] Nor does the State address any of the other four cases Petitioner invoked in the Fifth Circuit supplying a total of six cases from this pre-*Chamberlin* line mentioned in oral argument: *Woodward* and *Reed*, as well as *Smith v. Cain*, 708 F.3d 628, 628 (5th Cir. 2013), *Stevens v. Epps*, 618 F.3d 489, 497 (5th Cir. 2010), *Hayes v. Thaler*, 361 F.App'x 563, 571 (5th Cir. 2010), and *Wade v. Cain*, 372 F.App'x 549, 553 (5th Cir. 2010). Pet. 24 n.23.

on the trial record. Opp. 21 (citing *Pitchford*, 126 F.4th at 430 (App.009) n.9 (citing *Chamberlin*, 885 F.3d at 838–39 (en banc)).

The Fifth Circuit's retreat from clearly established Federal law reflects, and is perhaps driven by, the historical reluctance of Mississippi to end racial discrimination in jury selection. *See generally*, Brief of Amicus Curiae Mississippi Legislative Black Caucus in Support of Petitioner, *Pitchford v. Cain*, No. 24-7351. The Legislative Black Caucus explains that Mississippi's "legal history has from its inception been rooted in White supremacy," *id*. at 2, tracing the measures in Mississippi's "foundational history" to deny Black citizens equal rights, particularly the right to serve on criminal juries, *id*. at 6–10. Unfortunately, Mississippi has also persisted in skirting modern legal advancements guaranteeing the right to jury service. *Id*. at 11–24. In his dissent in *Flowers v. State*, 240 So.3d 1082 (Miss. 2017), "which the majority described as 'extraordinary,' 'exceptional,' and 'unusual,'" *id*. at 24, former state legislator, Justice Leslie King, elucidated Mississippi's track record there in an opinion that would have decided that case the way this Court did in *Flowers v. Mississippi*, 588 U.S. 284 (2019). The State's Brief in Opposition has nothing to say in response to this incisive amicus brief and also ignores the other two illuminating amicus briefs (*supra*).

CONCLUSION

Petitioner respectfully requests the petition for writ of certiorari be granted.

Respectfully submitted,

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