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

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure the constitutional promise of equal justice under law for all people.

LDF has a long-standing concern with the influence of racial discrimination on the criminal legal system in general, and on jury selection in particular. We represented the defendants in, *inter alia, Swain v. Alabama,* 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina,* 409 U.S. 524 (1973) and appeared as amicus curiae in

[1] Pursuant to Supreme Court Rule 37.6, counsel for Amicus Curiae state that no counsel for a party authored this brief in whole or in part and that no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Batson v. Kentucky, 476 U.S. 79 (1986), *Georgia v. McCollum,* 505 U.S. 42 (1992), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Dretke*, 545 U.S. 231 (2005) and *Flowers v. Mississippi*, 588 U.S. 284, 305 (2019).

The circumstances of Terry Pitchford's trial directly implicate racial discrimination in jury selection.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2006, Terry Pitchford, a Black teenager, was sentenced to death in Grenada County, Mississippi. In a county that is 40 percent Black, a single Black juror sat on his jury. This was no accident. District Attorney Doug Evans, the lead prosecutor, has a notorious history of discriminating against Black prospective jurors, particularly in capital trials where the defendant is Black. Evans' pattern of discrimination continued

here, when he struck four of five Black prospective jurors who might otherwise have sat on Mr. Pitchford's jury: Patricia Anne Tidwell, Linda Lee Ruth, Christopher L. Tillmon, and Carlos F. Ward. JA167. By comparison, he used just three strikes across thirty-five white venire members. These "numbers speak loudly": Evans struck 80 percent of Black prospective jurors, compared to just 8.3 percent of their white peers. *Flowers v. Mississippi,* 588 U.S. 284, 305 (2019); *see* JA176; ROA.2196-99.

But rather than engage with this powerful prima facie evidence of discrimination, the trial court cut the *Batson* inquiry short, and the Mississippi Supreme Court affirmed. *Pitchford v. State*, 45 So. 3d 216 (Miss. 2010). It held that Mr. Pitchford waived any opportunity to challenge the prosecutor's explanations as pretextual and therefore refused to

examine whether Evans yet again discriminated on the basis of race. *Id*. Not only did this waiver ruling reflect an unreasonable determination of the facts, it rested on an unreasonable application of the law as well. The Mississippi Supreme Court failed to "vigorously enforce[]" the promise of *Batson* and abdicated its "duty to determine" whether the State's asserted reasons were "plausible" in light of the full record. *See Flowers*, 588 U.S. at 301; *Miller-El v. Dretke*, 545 U.S. 231, 239, 251–52 (2005) ("Miller-El II").

The Mississippi Supreme Court's ruling contravened this Court's established precedents. As this Court has emphasized, once a prima facie case of discrimination is established, the state must come forward with race neutral explanations for the strikes, and then a court must "assess the plausibility," *Miller-El II*, 545 U.S. at 251–52, of those explanations,

engaging in an "independent examination of the record." *Foster v. Chatman*, 578 U.S. 488, 502 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 477–78 (2008). Under the three-step framework established in *Batson v. Kentucky,* 476 U.S. 79 (1986), at Step Three, courts "are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition." *Powers v. Ohio*, 499 U.S. 400, 416 (1991). That inquiry is where *Batson* does its most important constitutional work, because it is at this critical juncture that the constitutional enforcement against racial discrimination has teeth. If appellate courts allow trial courts to avoid this inquiry by merely accepting proffered justifications at face value, *Batson* becomes nothing more than an empty promise. This Court should reverse the judgment below and reaffirm, once

again, its unyielding commitment to rooting out racial discrimination in jury selection.

ARGUMENT

I. Black Mississippians Have Long Been Denied the Right to Serve on the Jury

In Mississippi, "[r]ace bias in jury selection has deep roots[.]"[2] From the Constitution of 1817, under which Mississippi was formally organized, through the "Black Codes" of 1865, in its earliest days, Mississippi law forbade Black people from serving on the jury.[3]

The passage of the Civil Rights Act in 1876 and the adoption of the Fourteenth Amendment guaranteed all citizens the right to serve free from

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[2] Chelsea Shirley & William Tucker Carrington, *That Was Now, This Is Then: Mississippi as a Proxy State for the Legalized Re-Emergence of Race-Bias in Criminal Trial Jury Selection* at 9, (October 6, 2025), available at SSRN, http://dx.doi.org/10.2139/ssrn.5572418.

[3] *Id.* at 9–10.

discrimination. In Mississippi, however, that right remained illusory. Rather than allow Black Mississippians to achieve equal citizenship, state law empowered three white officials with unchecked authority to select jurors "based on their good intelligence, sound judgment, and fair character."[4] By 1892, only 8,615 of 147,205 Black men over twenty-one in Mississippi were deemed eligible, converting a Black-majority state into an overwhelmingly white-majority jury pool.[5] Even those registered were often denied the right to serve. For example, in 1896, 1,300 registered Black voters called Bolivar County home compared to just 300 hundred white voters. Despite being a

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[4] *Id.* at 12; 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).

[5] 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, 605 (1987) (by comparison, 68,127 of the 110,100 white men above twenty-one were deemed eligible).

majority-Black district, no Black juror had been called to serve for six years. *See Smith v. Mississippi*, 162 U.S. 592 (1896). Likewise, in a county where Black Mississippians outnumbered their white counterparts threefold (18,000 to 6,000) no Black person had ever served as a juror.[6]

Even through the Civil Rights era, as Black Americans fought to secure equal rights everywhere from the ballot box to the classroom, in Mississippi the jury box remained locked.[7] Between 1965, following *Swain v. Alabama,*[8] and *Batson v. Kentucky* in 1986,

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[6] Gilbert Thomas Stephenson, RACE DISTINCTION IN AMERICAN LAW, 261 (Association Press, 1911) (describing a similar racial disparity in another county, a Mississippi court administrator explained: "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").

[7] *See Gilliard v. Mississippi*, 464 U.S. 867, 871–873 (1983) (Marshall, J., dissenting).

[8] In *Swain v. Alabama*, a Black man accused of raping a white girl was tried before an all-white jury in Talladega County.

the Mississippi Supreme Court heard fifteen claims of discrimination in jury selection. The court denied all fifteen. The Mississippi Supreme Court's analysis of peremptory challenges was "so cursory that it [was] possible to reproduce its discussions unabridged." *Gilliard v. Mississippi*, 464 U.S. 867, 871 (1983) (Marshall, J., dissenting) (describing the four cases in which the Mississippi Supreme Court discussed peremptory challenges between 1979 and 1983); *see, also McLaurin v. City of Greenville,* 187 So. 2d 854, 858 (Miss. 1966) ("This position taken by [McLaurin] is without merit and deserves no further discussion.")

During voir dire, when the prosecutor struck all six prospective Black jurors, Swain asserted that the prosecutor's strikes were in violation of the Fourteenth amendment. *Swain*, 380 U.S. 202, 210 (1965). The *Swain* court erected a high barrier to proving discriminatory purpose, requiring a showing of the of systematic and complete exclusion of Black people from juries over a period of time. *Id.* at 223 (requiring a showing that a prosecutor discriminated against Black jurors "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be").

Recognizing that racial discrimination in jury selection remained largely "immune from constitutional scrutiny," in *Batson*, the Supreme Court sought to establish a new legal framework which would require courts to engage in a more meaningful review. 476 U.S. at 92–93. Applying basic equal protection principles, the *Batson* framework demands that courts consider both "history and math," *Flowers* 588 U.S. at 300, looking at the whole picture to determine whether intentional discrimination has occurred. *See Batson,* 476 U.S. at 91-96 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252 (1977)).

In the 40 years since Batson was decided, the Mississippi Supreme Court has decided 117 race-based *Batson* claims. [9] Of those 117 cases, 105

[9] Shirley & Carrington, *That Was Now, This Is Then, supra* note 3 at 26–27; *id. at* App. B*; Eubanks v. State*, 291 So. 3d 309, 324 (Miss. 2020) (King, J., dissenting).

involved strikes of Black jurors where a *Batson* claim was raised at trial and the trial court found no violation. *Id*. The Mississippi Supreme Court reversed five of the 105 cases involving Black jurors: In two cases the State conceded that the strikes were based solely on the prospective juror's race. In two more, the trial court made explicit factual findings of pretext, but nevertheless allowed the jurors to be struck. *Id*. These stark statistics reflect a persistent failure by Mississippi Courts to enforce the three-step test with the appropriate rigor.

Doug Evans' office's discrimination in jury selection—which the Mississippi Supreme Court long allowed to lurk in the shadows—is the latest chapter in this history. For nearly three decades, Evans and the office he ran systematically denied Black Mississippians the right to serve as jurors. After the case of

Curtis Flowers brought national attention to Mississippi's Fifth Judicial District, journalists began to analyze the use of peremptory strikes in the district throughout Evans' tenure as District Attorney, based on the data of 2,542 venire members in Mississippi.[10] The results revealed bias far more pernicious than a single case could: Under Doug Evans, prosecutors in Mississippi's Fifth Judicial District struck nearly 50 percent of Black jurors and just 11 percent of white jurors.[11] In other words, the state struck Black jurors 4.4 times more frequently than white jurors. These disparities remain even after controlling for nonracial

[10] APM Reports gathered court records for all 418 trials conducted by Mr. Evans and his office since he was elected District Attorney through 2017. Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, 3, APM Reports (2018), https://www.apmreports.org/files/peremptory_strike_methodology.pdf. For 225 trials, involving 6,763 potential jurors, APM Reports was able to collect race data that permitted an analysis of the peremptory strikes. *Id.* at 5.

[11] *Id*. at 6.

explanations.[12] Subjected to rigorous testing, this pattern of discrimination has proven powerfully consistent: Multiple methods of analysis affirm that being Black increased the likelihood of being struck.[13]

Doug Evans served as District Attorney in the Fifth Judicial District for nearly three decades. It is

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[12] APM Reports obtained full trial transcripts in 89 cases. Based on these transcripts, they coded jurors' answers to different questions on *voir dire* to determine whether their answers suggested a nonracial explanation for this pattern of strikes using a binary logistic regression model. They did not. To the contrary, when APM Reports controlled their regression analysis for the answers given, the influence of race increased. Simply being African American increased a juror's chances of being struck by Doug Evans and other prosecutors in his office 6.67 times—a much greater effect than even knowing the defendant or having a family member in law enforcement. *Id.* at 9–11.

[13] Building off this groundbreaking research, a peer-reviewed study later used propensity score matching to examine racial differences in jury selection by comparing Black venire members to similarly situated white venire member counterparts. Propensity scores allow a researcher to balance for potential confounding variables, or external factors which could create a misleading impression of a cause-and-effect relationship. This study affirmed that controlling for measured variables, Black prospective jurors were 4.51 times as likely to be struck. *See generally,* Whitney DeCamp and Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors,* 57 J. RSCH. CRIME & DELINQ., 3-30 (2020), available at https://journals.sagepub.com/doi/10.1177/0022427819873943.

now clear that his office's commitment to discrimination has resulted in *hundreds* of Black prospective jurors—including Patricia Anne Tidwell, Linda Lee Ruth, Christopher L. Tillmon, and Carlos F. Ward—being denied the opportunity to serve. The result is a second-class citizenship for Black people in Attala, Carroll, Choctaw, Grenada, Montgomery, Webster, and Winston Counties, who, no matter how many times they were called to the courthouse, were systematically turned away by the state for decades. Through years of discrimination, the District Attorney's Office in the Fifth Judicial District not only "denigrate[d] the dignity of the excluded juror[s]"; it also "reinvoke[d]" Mississippi's painful history of excluding Black people "from political participation." *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 142 (1994). And, even after this Court interceded in

Flowers v. Mississippi, time and again the Supreme Court of Mississippi has failed to meaningfully intervene. *See, e.g., Clark v. State*, 343 So.3d 943 (Miss. 2022)*; Davis v. State,* 379 So.3d 312 (Miss. 2024).

II. The Harms of Race Discrimination in Jury Selection Must Not Go Unremedied

The entire justice system is harmed by state action that is "rooted in, and reflective of historical prejudice." *Miller-El II*, 545 U.S. at 237–38 (quoting *J.E.B.*, 511 U.S. at 128); *see also Elkins v. United States,* 364 U.S. 206, 223 (1960). As this Court has long recognized, "discrimination on account of race" inflicts distinctly deep harms that "strike[] at the core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system." *Rose v. Mitchell*, 443 U.S. 545, 564 (1979); *accord Peña-Rodriguez v. Colorado*, 580 U.S. 206, 221–222 (2017); *Buck v. Davis*, 580 U.S. 100, 124 (2017). The

use of peremptory challenges to discriminate against jurors, therefore, inflicts deep and layered harms on "the defendant on trial," "those citizens who desire to participate in the administration of the law," and the "basic concepts of a democratic society and a representative government." *Johnson v. California*, 545 U.S. 162, 172 (2005) (cleaned up). This Court must continue its unflinching practice of forcefully addressing racial discrimination in jury selection.

A. Discrimination in Jury Selection Deprives Defendants of Equal Justice

When jury selection is tainted by racial bias, the defendant is deprived of a "fundamental safeguard of individual liberty." *Peña-Rodriguez*, 580 U.S. at 209 (citing The Federalist No. 83 (A. Hamilton), at 451 (B. Warner ed. 1818)). Since before our Nation's founding, *id.,* it has long been understood that the promise of the jury system was the right to be tried by a jury of

one's peers, "that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder v. West Virginia,* 100 U.S. 303, 309 (1879); *see Miller-El II,* 545 U.S. at 237. In capital cases, this right takes on added significance: A representative jury assures "impartiality" in "the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death.'" *McCleskey v. Kemp,* 481 U.S. 279, 309–10 (1987) (quoting *Witherspoon v. Illinois,* 391 U.S. 510, 519 (1968)). Against this background, this Court has been "unyielding": "a defendant is denied equal protection of the laws" when tried before a jury tainted by discrimination. *Powers*, 499 U.S. at 404.

Tracing the roots of this right to its earliest articulation makes clear that "the composition of juries is and has been treated as critical to the ultimate

verdict."[14] *Strauder v. West Virginia* "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn," *Batson,* 476 U.S. at 85, striking down a facially discriminatory state law forbidding Black men from serving on the jury. 100 U.S. 303 (1879). *Strauder* affirmed that a law prohibiting Black men from serving as jurors violated the equal protection rights of Black *defendants. Id.* As the Court reasoned, it 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

[14] Brett M. Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L. J. 187, 196 (1989) (explaining that "[t]he *very existence of peremptory challenges* and the extraordinary amount of time spent on voir dire demonstrate the perceived importance of the jury selection procedure in the outcome of the trial") (emphasis added).

protection which others enjoy." *Strauder*, 100 U.S at 309. Equal protection under law therefore required at least the opportunity to seat a representative jury. As Mr. Strauder, the freedman-defendant, argued, and the Supreme Court agreed, doing so was important for the prospect of a fair trial.[15]

Strauder proved prescient. In perhaps the earliest study of the impact of Black jurors, researchers observed every jury trial in one southern district[16]

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[15] For example, counsel in *Strauder* wrote: "[O]ur petitioner avers that under the laws of Virginia and West Virginia the relation of husband and wife was not recognized between slaves, and that an impression is general in this County and the adjacent ones, that colored men are not entitled to the same protection in their marital relations as white men. That the defense of this petitioner will depend greatly on the fact of the petitioner having been a married man at the time the offence he is charged with was committed." *See* Stephen Cresswell, *The Case of Taylor Strauder*, 44 West Virginia History 3, 193-211 (1983), reprinted in West Virginia Archives & History (Apr. 20, 2020), available at http://www.archivingwheeling.org/blog/the-case-of-taylor-strauder.

[16] As part of an implicit acknowledgment of the racialized violence that terrorized Black jurors at the time of publication, the author changed all names and places.

from January 1954 through June 1955 and interviewed 225 jurors in their homes.[17] Across every case, only three Black jurors served. Just one Black juror served in a criminal trial. During deliberations, that juror shared essential context such as "the probable fear that a young [Black man] would entertain over the prospect of arrest by white policemen (an important point since the defendant had fled when faced with apprehension)."[18] The impact of that context was plainly apparent: One Black defendant had the benefit of the deliberations of a Black juror; he was the sole Black defendant acquitted.[19]

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[17] *See, generally* Dale W. Broeder, *The Negro in Court*,1965 DUKE L. J. 19–31 (1965), available at: https://scholarship.law.duke.edu/dlj/vol14/iss1/2.

[18] *Id.* at 30.

[19] In 2025, a qualitative analysis of the deliberations of mock jurors affirmed that Black jurors "raise concerns about policing, including unjust treatment of Black citizens, then successfully tie[ ] those concerns to the specific legal considerations at issue in the case," often resulting in acquittal. Mona Lynch & Sofia Laguna,

Overt or implicit, strong associations between Blackness and criminality among many white jurors increase the risk of wrongful convictions.[20] We now know that compared to representative juries, all-white and nearly all-white juries make more mistakes[21] and are more likely to presume guilt.[22] In turn, these juries (both mock and real) are harsher on Black defendants, convicting at higher rates and on

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Police Talk in the Jury Room: The Production of Race Conscious Reasonable Doubt Among Racially Diverse Jury Groups, 59 L. & SOC'Y REV. 419, 419–21 (2025).

[20] *See, e.g.* Colbert, *Challenging the Challenge: supra* note 4 at 5 ("Historical evidence and recent sociological data show that all-white juries are unable to be impartial in cases involving the rights of African-American defendants or crime victims.")

[21] *See, e.g.* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 608 (2006), available at https://www.apa.org/pubs/journals/releases/psp-904597.pdf; Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 86–87 (2008), available at https://spssi.onlinelibrary.wiley.com/doi/abs/10.1111/j.1751-2409.2008.00011.x.

[22] *Id. See, also* Equal Just. Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection*, ch. 5 at 57–58 (2021), available at https://eji.org/report/race-and-the-jury/.

more serious counts.[23] White jurors are also more likely to view Black defendants as "coldhearted, remorseless, and dangerous."[24] As a result, when qualified Black venirepersons are excluded based on race, the resulting jury treats Black people more punitively, sentencing Black defendants to death at significantly higher rates.[25] This is so even in the face of compelling

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[23] *Id. See, e.g.* Marian R. Williams & Melissa W. Burek, *Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts*, 31 J. CRIME & JUST. 149, 164 (2008), available at https://www.tandfonline.com/doi/abs/10.1080/0735648X.2008.9721247 (demonstrating that juries with a higher percentage of white people are "more likely to convict [B]lack defendants" controlling for legally relevant factors); Mark D. Bradbury and Marian R. Williams, *Diversity and Citizen Participation: The Effect of Race on Juror Decision Making,* 45 ADMIN. & SOC. 563 (2012), https://doi.org/10.1177/00953997124597.

[24] Equal Just. Initiative, *Race and the Jury, supra* note 22 at 58; *see* William J. Bowers, et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1507–08, 1511, 1531 (2004).

[25] *See, e.g.* William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 J. CONST. L. 171, 193–195 (2001)(finding that likelihood of death sentence in Black-defendant white-victim case was "dramatically increased" with the presence of five or more white males on jury); David C. Baldus, et. al., *The Use of*

mitigating evidence, such as youth, a salient fact for Mr. Pitchford, who was just eighteen years old at the time of his arrest.[26] In contrast, the exclusion of qualified veniremembers on the basis of race makes a jury less likely to hold prosecutors to their standard of proof and to discuss problems—such as racial profiling and stereotyping—that are often overlooked by majority-white juries.[27] Juries selected without race-

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Peremptory Challenges in Capital Murder Trials: A Legacy and Empirical Analysis, 3 U. PA. J. CONST. L. 3, 124 (2001) (studying capital trials in Philadelphia and finding a "substantially higher death-sentencing rate in black defendant cases . . .when jury was predominantly non-black"); Mona Lynch and Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & HUM. BEHAV. 481, 485 (2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2092035` (finding the proportion of white jurors to be a "significant predictor of death verdicts" for Black defendants).

[26] Lynch & Haney, *Capital Jury Deliberation, supra* note 26 at 494 (attributing this finding to the "inability or unwillingness to empathize with the plight of Black defendants"); *see generally* Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573 (2011).

[27] Equal Just. Initiative, *Race and the Jury, supra,* note 22 at 57–58; Sommers, *On Racial Diversity, supra,* note 21 at 606–608; Lynch & Laguna, *Police Talk in the Jury Room, supra,* note 19 at 419–448.

based exclusions engage in "longer, more thorough deliberations"[28] and are better able to assess the credibility of witnesses.[29] Unsurprisingly, then, changes in jury selection procedures result in fairer outcomes.[30]

The case of Curtis Flowers is illustrative. Curtis Flowers was tried six times for the same crime, based on circumstantial and discredited evidence.[31] Each trial was prosecuted by the same district attorney—Doug Evans—and in each trial Evans used

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[28] Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT. L. REV. 997, 1030 (2003); Sommers, *On Racial Diversity, supra,* note 21 at 604–606.

[29] Equal Just. Initiative, *Race and the Jury, supra* note 22 at 58; Sommers, *On Racial Diversity, supra,* note 21 at 606–608.

[30] *See e.g.,* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 71 (1993) (collecting studies showing "a decrease in conviction rates following changes in jury selection procedures that resulted in the inclusion of more [B]lack and Latino jurors").

[31] *See, e.g.,* Parker Yesko, *It's Over: Charges Against Curtis Flowers Are Dropped*, APM REPORTS (Sept. 4, 2020), available at https://www.apmreports.org/episode/2020/09/04/charges-against-curtis-flowers-are-dropped (describing how prosecutorial misconduct, recanted testimony, and circumstantial evidence were the tape holding a weak case together).

peremptory challenges to ensure that Flowers, who is Black, would be judged by an all-white or nearly all white jury. The results are resounding: Every time Evans succeeded in excluding Black venire persons—ultimately seating just one or none—the jury voted to convict.[32] When, on two occasions, more than one Black juror joined deliberations, a hung jury ultimately resulted in a mistrial.[33] Put differently, Evans garnered convictions each time he limited the jury to one Black juror or fewer, and he failed to secure a conviction when more than one Black juror was seated.

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[32] *See Flowers v. Mississippi*, 588 U.S. at 289–292.

[33] *Id.* Notably, after the fifth trial adjourned, the sole holdout—an elderly Black man—was brought into the well of the courtroom and arrested for perjury, without any apparent factual basis. Mr. Evans pursued prosecution of that juror, before ultimately heeding months-long calls for his recusal. The Mississippi Attorney Generals' Office assumed responsibility for the prosecution and swiftly dropped the charges. *See generally In The Dark: The Trials of Curtis Flowers,* APM REPORTS (June 5, 2018), https://www.apmreports.org/episode/2018/06/05/in-the-dark-s2e7.

In *Flowers v. Mississippi,* this Court interceded and, within months, the Mississippi Attorney General took over the case and all charges were dismissed with prejudice. After more than two decades behind bars, Mr. Flowers was finally free.[34]

In the face of weak evidence, while seeking the death penalty, Evans rested his case on the strength of the all-white jury. The tactic is hardly novel: Dating back to "[a]lmost immediately after the Civil War," *Pena-Rodriguez,* 580 U.S. at 222, prosecutors endeavored to empanel all-white juries who would reliably convict Black defendants.[35] In capital cases, especially, all-white juries have been an easy way for prosectors to ensure that Black defendants are sentenced

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[34] *See* Curtis Flowers, NAT'L REGISTRY EXONERATIONS, https://exonerationregistry.org/cases/12889.

[35] James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L. J. 895, 909-910, 915-16 (2004).

to death.[36] While any attempt to racially rig a jury inflicts grave harm on the justice system, wrongful convictions reflect the most profound of many adverse consequences of racial exclusion. Half of all defendants exonerated for murder are Black, meaning that, relative to their share of the general population, innocent Black people are about seven-and-a-half times more likely to be wrongfully convicted of murder.[37] The statistics from Mississippi's death row are even more striking: Of seven exonerees, all but one have been Black.[38]

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[36] Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. REV. 1, 43–44 (1995).

[37] Samuel R. Gross, et al., *Race and Wrongful Convictions in the United States 2022*, at 3, NAT'L REGISTRY EXONERATIONS (Sept. 2022), available at https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Updated%20CP%20-%20Race%20Report%20Preview%20(1).pdf.

[38] Death Penalty Info. Ctr., *Innocence: Exonerations by Race,* available at https://deathpenaltyinfo.org/policy-issues/policy/innocence/exonerations-by-race (last accessed on Feb. 3, 2026).

B. Denial of the Right to Serve Is the Denial of Equal Citizenship

When the state discriminates during jury selection, the harm is not limited to criminal defendants. Black prospective jurors are harmed, too. The "honor and privilege of jury duty" has long been understood as a badge of American citizenship. *Powers*, 499 U.S. at 407. "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." *Id.* at 402. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers,* 588 U.S. at 293; *see, also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (describing the "honor and privilege of participating in our system of justice"). The opportunity "for ordinary citizens to participate in the administration

of justice" is not mere incident to the jury system, rather it is the very foundation of the structure of the judiciary and "has long been recognized as one of the principal justifications for retaining the jury[.]" *Powers*, 499 U.S. at 406–07. It is the institution of the jury that ensures that "the law comes from the people," *Peña-Rodriguez,* 580 U.S. at 209, and thus, "raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people . . . with the direction of society."[39]

The promise of equality under law demands that "all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy." *J.E.B.,* 511 U.S. at 145–46. In an "almost unbroken chain" of decisions, this Court has never

[39] *Powers*, 499 U.S. at 406–07 (quoting Alexis de Tocqueville, 1 DEMOCRACY IN AMERICA, 334–337 (Schocken 1st ed. 1961).

wavered from this commitment. *See Georgia v. McCollum*, 505 U.S. 42, 46–47 (1992) (collecting cases); *see, also Batson*, 476 U.S. at 85 ("Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.") As with all rights, "the State may no more extend [the right to serve] to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." *Carter v. Jury Comm'n of Greene Cnty.,* 396 U.S. 320, 330 (1970). Thus, this Court's jury discrimination cases vindicate the rights of "challenged jurors" as much as defendants. *See, e.g. Edmonson,* 500 U.S. at 616; *J.E.B.,* 511 U.S. at 128. As these cases recognize, when prospective jurors are excluded from the jury on the basis of

race, they are deprived of the "opportunity to be seen as full citizens."[40]

Exclusion from jury service on the basis of race—like all acts of discrimination—leaves a mark. *See Powers,* 499 U.S. at 410 ("[T]he assumption that no stigma or dishonor attaches contravenes accepted equal protection principles.")[41] The "stigmatizing injury" caused by racial discrimination "is one of the most serious consequences of discriminatory government action,"[42] and "damages both the fact and the perception" that our legal system recognizes Black

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[40] Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585, 1609 (2012) (explaining that when "jurors are excluded from the jury, they feel like second-class citizens.").

[41] *See also, Powers,* 499 U.S. at 402 ("In the many times we have confronted [racial bias in jury selection], we have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.")

[42] *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated on other grounds by Lexmark Int'l Inc. v. Static Control Components Inc.,* 572 U.S. 118 (2014).

people and other people of color as having equal value and therefore equally worthy of the rights and protections of citizenship, *Peña-Rodriguez*, 580 U.S. at 223 (citation omitted). In the words of Justice Kennedy, "[t]he reality is that a juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation," *Holland v. Illinois,* 493 U.S. 474, 489 (1990) (Kennedy, J., concurring), and from participation in our democracy more broadly. *See J.E.B.,* 511 U.S. at 145–46.

Interviews with Black people struck from juries—and later the subject of successful *Batson* claims—affirm the lasting sting of this "profound personal humiliation[.]" *Powers,* 499 U.S. at 413–14. Before she was summoned for jury duty, Melodie Harris called Lee County, Mississippi home for a decade. She had worked at the same local company for six years.

Nevertheless, when she was finally called to serve, the prosecution struck her from the jury claiming she had "no ties to the community." Struck based on a clearly pretextual, and false, explanation, "Ms. Harris knew that she and other Black jurors had been treated unfairly" and the unfairness shook her faith in the criminal legal system.[43] Likewise, for Marilyn Garrett—a Black prospective juror whose rights were vindicated by *Foster v. Chapman*—the experience of discrimination under color of law did not wash off with time. At age 63, three decades after her brief time in the jury pool, Ms. Garrett recalled being subjected to a lengthy interrogation on *voir dire*: "They just kept asking me over and over why I had two jobs. . . . They really got me in a defensive mode and then they said I was indignant. They had me in tears when I went out of

[43] Equal Just. Initiative, *Race and the Jury,* supra note 22 at 63.

there. . . . It scared me. I didn't expect to be treated like that. It was really humiliating."[44] After her experience in the courthouse, Ms. Garrett never wanted to serve jury duty again.[45]

These experiences deprive struck jurors of the sense of equal citizenship: For example, in the 1965 study, "Mr. Cox," described his disappointment at being excused from a jury "seemingly just because my skin was black."[46] When asked how he had felt when he first received his summons, Mr. Cox replied: "I was extremely proud . . . It was . . . one of the proudest

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[44] *Id.* at 62; Stephanie Mencimer, *Black Juror: Prosecutors Treated Me "Like I Was a Criminal"*, MOTHER JONES, Nov. 5, 2015, https://www.motherjones.com/politics/2015/11/black-woman-kicked-off-foster-jury-supreme-court/.

[45] *Id.*

[46] Broeder, *The Negro in Court*, *supra* note 17 at 28 ("There was no other reason why I should have been challenged. I was very irritated and extremely disappointed that such a practice should be allowed.")

moments of my life. Ever since I was a little kid in [the South] . . . , I've had a desire to serve."[47]

C. Discrimination in Jury Selection Undermines Public Confidence in the Law

The harms from racial discrimination in jury selection are not confined to the defendant or to jurors of color, however. Discrimination in jury selection "undermine[s] public confidence in the fairness of our system of justice" itself. *Batson*, 476 U.S. at 87.

"The jury is a tangible implementation of the principle that the law comes from the people." *Peña-Rodriguez*, 580 U.S. at 209*; see also, Powers,* 499 U.S. at 407 ("Jury service preserves the democratic element of the law"). By affording "ordinary citizens" the opportunity to participate in the courtroom, the experience of jury service "foster[s], one hopes, a respect

[47] *Id.* at 26.

for law." *Powers,* 499 U.S. at 407 (internal quotations omitted). Functioning properly, the democratic nature of the jury ensures that "its judgments find acceptance in the community, an acceptance essential to respect for the rule of law." *Peña-Rodriguez*, 580 U.S. at 210. When jurors are excluded on the basis of race, on the other hand, that discrimination "is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas,* 311 U.S. 128, 130 (1940).

Whether or not a citizen ever serves, the jury system assures the people that they, "as jurors actual or possible," are "part of the judicial system of the country [and thus] can prevent its arbitrary use or abuse." *Powers,* 499 U.S. at 406 (internal quotation omitted). Thus, in perception and in reality, the "jury acts as a vital check against the wrongful exercise of

power by the State and its prosecutors." *Id.* at 411 (explaining that "[t]he intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee").

When the faces of the jury repeatedly fail to reflect those of the nation, this democratic value is undermined. The "overt wrong" of discriminatory peremptory strikes is "often apparent to the entire jury panel," and as a result "casts doubt over the obligation of . . . the jury . . . to adhere to the law throughout the trial of the cause," *Powers,* 499 U.S. at 407.[48] This is so, even where trial courts make no acknowledgement of the role that race played in jury selection; "people in communities who see members of their race

[48] *See, e.g.* Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1434 (2018) ("The appearance of prejudice in the jury selection process leads to continuing pessimism and distrust concerning the operation of the criminal justice system[.]")

being excluded from juries in case after case recognize it as discrimination even if the courts do not. They lose faith in the credibility and legitimacy of the courts."[49] *See, also Batson,* 476 U.S. at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.")

Judicial acceptance of racial bias during jury selection "condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so it invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers*, 499 U.S. at 412. Jury

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[49] Stephen B. Bright, Opinion, *Our Jury System is Racially Biased. But It Doesn't Have to Be That Way*, WASH. POST (Mar. 27, 2019), https://www.washingtonpost.com/opinions/2019/03/27/our-jury-system-is-racially-biased-it-doesnt-have-be-that-way/ (describing his conversations with jurors).

verdicts are therefore less likely to be accepted by the community "if the jury is chosen by unlawful means at the outset." *Id.* at 413. *See, also McCollum*, 505 U.S. at 49–50 ("The need for public confidence is especially high in cases involving race-related crimes.")

In this way, "the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." *Miller-El II,* 545 U.S. at 238 (internal citations omitted). The consequences are lasting: Racial bias is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice," *Peña-Rodriguez,* 580 U.S. at 224, and erode "public confidence in the jury system." *Holland*, 493 U.S. at 489 (Kennedy, J., concurring).

III. *Batson* Seeks to Remedy These Harms By Requiring the Courts to Consider All Relevant Circumstances to Ensure Discrimination Did Not Occur

Recognizing these harms, for well over a century, "this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *McCollum*, 505 U.S. at 44. Yet, despite this unbroken line of precedent, in *Swain v. Alabama*, the Court "imposed a 'crippling burden of proof'" on defendants seeking to demonstrate jury discrimination, which "left prosecutors' use of peremptories 'largely immune from constitutional scrutiny.'" *Miller-El II*, 545 U.S. at 239 (quoting *Batson*). Two decades later, the Court recognized its error and reversed course in *Batson*, creating a new framework designed to root out "all forms of purposeful racial discrimination" in jury selection. *Batson* 476 U.S. at 88.

Specifically, *Batson* established the now familiar three-step test: First, the defense must make out a prima facie case and show that the "[defendant] is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 96 (internal citation omitted). If a prima facie case is made, the burden then "shifts to the State to come forward with a neutral explanation for challenging [B]lack jurors." *Id.* at 97. Then, at Step Three, the court must "determine if the defendant has established purposeful discrimination." *Id.* at 98. Critically, at Step Three, "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* at 93, (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 (1977)).

The three-step test is intended "to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. at 172.

A. In Refusing to Consider Evidence of Discrimination, the State Courts Failed to Fulfill the Promise of *Batson*

Step Three is the heart of the *Batson* inquiry where the court determines whether any discrimination has occurred. To ensure that the mandate of the Equal Protection Clause is upheld, at Step Three the "court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 588 U.S. at 302.

Facially race neutral justifications cannot be accepted carte blanche. This means courts have an affirmative duty to undertake "a sensitive inquiry into

such circumstantial . . . evidence of intent as may be available." *Foster*, 578 U.S. at 501 (quoting *Arlington Heights,* 429 U.S. at 266). A court must assess the "persuasiveness of the prosecutor's justification for his peremptory strike" *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) ("*Miller-El I*"), and consider its "plausibility" "in light of all evidence with a bearing on it." *Miller-El II*, 545 U.S. at 251–52.

"[T]he importance of the trial court's . . . contemporaneous findings of fact regarding the credibility of the race-neutral explanation that a prosecutor offers when challenged on the use of a peremptory challenge" at this step cannot be overstated. *See* William H. Burgess & Douglas G. Smith, *The Proper Remedy for A Lack of Batson Findings: The Fall-Out from Snyder v. Louisiana*, 101 J. CRIM. L. & CRIMINOLOGY 1, 2 (2011); *see also*, *Snyder v. Louisiana*, 552 U.S.

472, 477, (2008) ("The trial court has a pivotal role in evaluating *Batson* claims."). As Justice Marshall cautioned, *Batson*'s entire purpose and the "protection erected by the Court" would be "illusory" if courts simply accepted a prosecutor's "easily generated explanations." *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

This Court expressed this concern again in *Miller-El II* when it warned, "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El II,* 545 U.S. at 240; *see also* Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings,* 99 YALE L.J. 187, 199 (1989) (If, after a prima facie case of purposeful discrimination, a race neutral reason for a strike is provided and the court could rest

"solely on the good faith of prosecutors" then "*Batson* never would have been necessary.")

Despite these admonitions, the trial court foreclosed the opportunity for rebuttal over Mr. Pitchford's repeated objections and the state courts failed to assess, "in light of all of the relevant facts and circumstances", whether "the prosecutor's proffered reasons [for the challenged strikes were] the actual reasons, or whether [they were] pretextual." *Flowers*, 588 U.S. at 302–03. In so doing, the state courts denied Mr. Pitchford a meaningful opportunity to ensure that he was tried by a jury shaped by the community and not by discrimination. This was error.

When Evans used his peremptory strikes to strike four of the five Black venire members, trial counsel for Mr. Pitchford lodged a timely *Batson* objection.

> MS. STEINER: We would object on the grounds of *Batson versus Kentucky* that it appears there is a pattern of striking almost all of the available African- American jurors . . . It appears to be a pattern of disproportionately challenging African-American jurors.
>
> JA167-168.

At the request of the trial court, Evans offered what he claimed to be race-neutral reasons for striking the four prospective Black jurors. JA169 –170. The court stated it found the proffered reasons to be race neutral and "then full-stop ended its *Batson* analysis." *Pitchford v. Cain*, 706 F.Supp.3d 614, 623 (N.D. Miss. 2023).

When counsel attempted to reassert her objection, the court prevented her from doing so:

> MS. STEINER: At some point the defense is going to want to reserve both its Batson objection and a straight for Tenth Amendment racial discrimination.
>
> THE COURT: You have already made it in the record so I am of the opinion it is in the record.

> MS. STEINER: I don't want to let the paneling of the jury go by without having those objections.
>
> THE COURT: I think you already made those, and they are clear in the record . . .
>
> MS. STEINER: Allow us to state into the record there is one of 12 -- of fourteen jurors, are non-white, whereas this county is approximately, what, 40 percent? . . .
>
> THE COURT: I don't know about the racial makeup, but I will note for the record there is one regular member of the panel that is black, African-American race.
>
> JA175-176.

Counsel for Mr. Pitchford never had the opportunity to rebut the prosecutor's race-neutral reasons. When the court ended the inquiry at Step Two and abandoned its Step Three obligations, it offered a rubber stamp to District Attorney Doug Evans' discrimination. This is inconsistent with the *Batson* framework, a procedure designed "to produce actual answers to suspicions and inferences that discrimination

may have infected the jury selection process," *Johnson*, 545 U.S. at 172, and is exactly what the Court in *Miller-El II* cautioned against.

B. By Allowing the Prosecution's Reasons for Striking Black Jurors to Evade Scrutiny, the Mississippi Supreme Court Is, Again, Turning a Blind Eye to Bias

Seven years after *Flowers v. Mississippi,* the Mississippi Supreme Court continues to undermine this Court's efforts to end the systemic exclusion of Black jurors. District Attorney Doug Evans has a documented history of purposely and repeatedly using peremptory strikes to keep Black Mississippians out of the jury box. *Supra* at § 1. Yet, in *Pitchford v. Cain,* his peremptory strikes of Black jurors went without meaningful review. Mr. Pitchford was foreclosed from rebutting Evans' stated reasons and the trial court never considered "all of the circumstances that bear

upon the issue of racial animosity." *Snyder*, 552 U.S. at 478.

When a trial court fails to "examine the whole picture" *Flowers*, 588 U.S. at 314, and appropriately analyze evidence of discriminatory intent, a reviewing court must conduct an "independent examination of the record." *Foster*, 578 U.S. at 502. This independent examination "demands a sensitive inquiry into such circumstantial evidence of intent as may be available." *Id.* at 501 (cleaned up). But that could not happen here because Mr. Pitchford did not have the opportunity to rebut the prosecutor's race-neutral reasons and the trial court never made a factual determination about the stated reasons. While "great deference" is ordinarily be given to a trial court's factual determinations, *Batson,* 476 U.S. at 98, n.21, deference can only be due when the trial court properly

performs its charge. If *Batson* is "improperly carried out, the courts cannot be confident that the 'real reasons' for the strikes [will] ever [be] discovered." Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 752 (2018).

In finding that Mr. Pitchford's objection was waived and failing to conduct a full analysis of the evidence at Step Three, the Mississippi Supreme Court is imposing the "insurmountable" burdens to proving discrimination that *Batson* sought to eliminate. *Batson*, 476 U.S. at 92; *accord Flowers*, 588 U.S. at 297-98. *Batson* demands better. The Mississippi Supreme Court must be called upon to fulfill *Batson*'s promise and purge the "toxin" of race discrimination from the jury selection process. *Buck*, 580 U.S. at 122.

CONCLUSION

If appellate courts allow trial courts to merely accept proffered justifications at face value, *Batson* becomes nothing more than an empty promise. This Court should reaffirm its commitment to rooting out discrimination in jury selection, reverse the judgment of the court of appeals, and remand for the entry of judgment in Mr. Pitchford's favor.

Respectfully Submitted,

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February 4, 2026