NO. 24-7351
(CAPITAL CASE)

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

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February 4, 2026

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Linda Lee, Patricia Tidwell Hubbard, and Carlos Ward 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. JA706–707. But other White potential jurors shared these same race-neutral characteristics, indicating that the real reason for the strike was Ward's race. JA706–707. 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. JA706. 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. JA705. 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.

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

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[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.

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 Terry Pitchford to death for participating, as a teenager, in a robbery in which his accomplice shot and killed a store owner. *See* JA687–688. Doug Evans, the district attorney of the Fifth Circuit Court District of Mississippi, prosecuted the State's case. JA708. This Court is well acquainted with Evans. He is the same prosecutor that prosecuted Curtis Flowers six times. JA708. 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.

Just as in *Flowers*, Evans here 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. JA693–699.

Pitchford's attorney, who was also one of 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, who denied the *Batson* objections in *Flowers*—simply denied the challenges. JA700–702. The court failed to determine whether each of the proffered reasons was pretextual, and it never allowed trial counsel to contest those reasons. JA700–702. "[S]pecifically, after the State provided its justification for striking Ward, the trial court responded, '[t]he court finds that to be race neutral as well. So now we will go back and have the defense starting at 37.'" JA701 (district court quoting the trial court transcript). To preserve the *Batson* challenge, Pitchford's counsel raised the *Batson* objection again "[j]ust seconds after the trial court read aloud the names of those selected for jury service." JA702.

The jury of eleven White jurors and one Black juror convicted Pitchford and sentenced him to death. JA689. Pitchford appealed the conviction and raised his *Batson* challenges once again. On appeal, however, the Mississippi Supreme Court found his *Batson* challenges waived before the trial court and thus

affirmed his conviction and sentence. *See Pitchford v. Mississippi*, 45 So.3d 216, 227–28 (Miss. 2010) (en banc). Although the court acknowledged "that—in adjudicating the pretext issue—the trial judge must look at the totality of the circumstances and all of the facts," it then determined that a court need not consider *any* facts and circumstances in the record unless they are specifically highlighted by the defendant's counsel. *Id.* at 228 n.17. Justice Graves dissented, decrying the majority's position: "[T]he suggestion that this Court cannot review the trial court's decision under the totality of the relevant facts is contrary to applicable law." *Id.* at 267 (Graves, J., dissenting). Pitchford did not somehow "waive[] his *Batson* objection by not rebutting the State's proffered race-neutral reasons," especially where he was never given a chance to do so. *Id.* at 266 (Graves, J., dissenting).

Pitchford sought federal habeas corpus relief, raising his *Batson* challenge once again. JA690. Following this Court's instruction in *Miller-El v. Dretke*, 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* JA701–704. 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* JA727–732. And it endorsed the Mississippi Supreme Court's determination that Pitchford's counsel waived his *Batson* objections. JA727–728.

This Court should reverse. The record shows that the prosecutor in Pitchford's case struck prospective Black jurors because of their race. The Mississippi Supreme Court's decision to avert its eyes to from that reality because the trial court denied Pitchford an opportunity to rebut the prosecutor's pretextual reasons for the strikes is wrong, and it belittles a central feature of the Equal Protection Clause.

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 in the administration of justice. 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.

A state court cannot do away with this protection under the guise of waiver. Federal waiver rules govern

the waiver of federal rights, *Brookhart v. Janis*, 384 U.S. 1, 4 (1966), and as this Court has long instructed, when a right "is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937); *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). Waiver is not a mere failure to speak at the moment a court truncates the required inquiry: it is the "intentional relinquishment or abandonment of a known right," *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938). Such an intentional relinquishment never happened here, and the Mississippi Supreme Court never even attempted this type of analysis. Under 28 U.S.C. § 2254(d), the Mississippi Supreme Court thus unreasonably determined that Petitioner's *Batson* challenge failed because of a purported waiver.

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 is necessary to vindicate the Equal Protection Clause. This Court has instructed that a trial court cannot

merely defer to a prosecutor's ability to name one race-neutral reason for his strike. The court must instead determine whether those reasons were pretextual. *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008). The trial court here cut the inquiry short and never took that step, contravening clearly established federal law, as determined by this Court.

III. The Mississippi Supreme Court's waiver decision likewise conflicts with clearly established federal law and with the facts of the case. Waiver of a constitutional right is the "intentional relinquishment" of that right, *Johnson*, 304 U.S. at 464–65, and it is not to be lightly inferred, *Smith v. United States*, 337 U.S. 137, 150 (1949). A state appellate court *cannot* insulate a clear error from habeas review under 28 U.S.C. § 2254(d) by imposing a waiver rule that conflicts with this Court's waiver precedent, defies *Batson* and its progeny, and clashes with the original meaning of the Equal Protection Clause.

ARGUMENT

I. Prohibiting Racial Discrimination in Jury Selection Is Central to the Equal Protection Clause and Is Essential to Protecting the Rule of Law.

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 343 (1769). "[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 crucial 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." 2 Democracy in America 282–83 (Phillips Bradley ed., Henry Reeve trans., 1945). The Magna Carta likewise placed power in the hands of a defendant's equals. Magna Carta, 1215, cl. 39, *in* Nat'l Archives (British Library trans.), https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/ ("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 343.

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* Declaration of Independence of 1776, para. 19; *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.*, *Confederate States of America—Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (Dec. 24, 1860), *in* Yale L. Sch., Avalon Project (2008), https://avalon.law.yale.edu/19th_century/csa_scarsec.asp (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),

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[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"), *available at* https://www.mshistorynow.mdah.ms.gov/issue/mississippi-constitution-of-1890-as-originally-adopted.

https://avalon.law.yale.edu/19th_century/csa_missec.asp ("Our position is thoroughly identified with the institution of slavery . . . .").

B. After the Civil War, the American people amended the Constitution 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 (1880); *see also* An Act for the Further Security of Equal Rights in the District of Columbia, ch. 3, 16 Stat. 3, 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 to death 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 racial discrimination that might hide in prosecutorial discretion, particularly in a prosecutor's peremptory strikes. The prosecutor in *Batson*, "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. *Batson*, 476 U.S. 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 requires considering "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478. 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. It is the court's "duty to determine," *Batson*, 476 U.S. at 98, whether purposeful discrimination occurred—a duty that reviewing courts may not presume the trial court dispatched where "the trial judge simply allowed the challenge without explanation," *Snyder*, 552 U.S. at 478–79. Trial judges especially bear this responsibility, because appellate courts "necessarily" review the decision below "on a paper record" without the ability to evaluate credibility. *Flowers,* 588 U.S. 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. A State Court's Decision to Defer to a Prosecutor's Pretextual Reason for a Strike Warrants Habeas Relief.

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 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*, 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.

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[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).

[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).

at 96). This includes "all of the circumstances that bear upon the issue of racial animosity." *Snyder,* 552 U.S. at 478. Relevant circumstances include 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 Miller-El*, 545 U.S. at 240–41; *see also Snyder*, 552 U.S. at 478 (explaining that persisting doubts about one strike require considering another "for the bearing it might have" on the analysis). And relevant circumstances may also include prosecutorial policies and practices of discrimination outside of the specific set of jurors under consideration in the given trial. *See Miller-El*, 545 U.S. 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

(emphasis added). 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. *Miller-El* squarely governs here. The record reflects the same combination of facts that *Miller-El* treats as dispositive: a lopsided pattern in which the prosecutor used peremptory strikes to remove four of five Black venire members; side-by-side comparison showing that the State struck Black jurors for traits shared by—or more pronounced in—White jurors it accepted; and contextual evidence, including the same prosecutor's pattern of discriminatory strikes—later recognized as probative in *Flowers*—that renders the State's explanations implausible once measured against the full transcript. *See* 545 U.S. at 240–41, 252–53, 265. The voir dire here likewise bears the hallmarks of discrimination that *Miller-El* instructs courts to confront head-on. The State directed probing questions to Black jurors on topics it never broached with similarly situated White jurors and accepted White jurors without examining the very concerns it claimed were disqualifying for Black venire members. Those are classic indicators of pretext under *Miller-El*'s requirement to evaluate "all relevant circumstances." *Id.* at 240–41 (quoting *Batson*, 476 U.S. at 96). Under *Miller-El*, the mix of comparative and contextual proof points one way: pretext and an Equal Protection violation. That is the fair conclusion.

The state courts, however, took a different path. They treated the State's recitation of race-neutral reasons as the end of the matter. That conflicts with

Batson, and it is exactly what *Miller-El* forbids. *Id.* at 240, 252–53, 265; *see also Snyder*, 552 U.S. at 478–79 (explaining appellate courts cannot infer that a trial court conducted pretext analysis from a silent record). The law required a searching, record-based pretext analysis. The courts below declined to conduct such an analysis, defying clearly established law and warranting relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

III. The Mississippi Supreme Court's Clearly Erroneous Waiver Decision Cannot Immunize the *Batson* Claim from Habeas Review.

A. State courts cannot insulate clearly erroneous applications of *Batson* and its progeny by invoking waiver. This Court has long held that waiver of federal constitutional rights "is, of course, a federal question controlled by federal law." *Brookhart*, 384 U.S. at 4. And under this Court's precedents, when the rights at issue are fundamental, courts "indulge every reasonable presumption against waiver." *Aetna*, 301 U.S. at 393; *see also Maryland v. Shatzer*, 559 U.S. 98, 104–05 (2010) (reaffirming the "high standard of proof" for waiver set forth in *Johnson v. Zerbst* (cleaned up)). "[W]aiver of constitutional rights . . . is not lightly to be inferred." *Smith*, 337 U.S. at 150.

This Court has thus explained that waiver demands proof of the "intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464–65. Valid waiver must be both voluntary—"the product of a free and deliberate choice rather than intimidation, coercion, or deception"—and "intelligent[]"—made with "full awareness of both the

nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

B. That high standard for waiver is especially important here, where the Equal Protection guarantee protects more than just the individual defendant. In addition to safeguarding the defendant's right to a trial free of racial discrimination, *Batson* also protects the distinct equal-protection rights of prospective jurors to be free from race-based exclusion, and it ensures that racial discrimination does not pollute the administration of justice. *See Peña-Rodriguez*, 580 U.S. at 223 (noting that courts have a "*duty* to confront racial animus in the justice system" (emphasis added)); *see also Batson*, 476 U.S. at 86–88; *Powers*, 499 U.S. at 409–10, 415.

Indeed, a court's enforcement of the Equal Protection Clause through *Batson* is often the *only* way to protect the rights of individual jurors. Consider, for example, the rights of the jurors struck by the prosecutor here. After this Court in *Flowers* found that the evidence "strongly support[ed] the conclusion" that the prosecutor's strikes were racially motivated, *Flowers*, 588 U.S. at 305, Black jurors in Mississippi sued the prosecutor based on his blatant policy of striking jurors for racial reasons. *See* Class Action Complaint, *Attala Cnty., Miss. Branch of NAACP v. Evans*, No. 4:19-cv-00167 (N.D. Miss. Nov. 18, 2019), ECF 1. The jurors provided substantial data gathered by investigative reporters from American Public Media Reports, showing 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.[5] Of this prosecutor's 1,274 total strikes in these trials, 71% were against Black potential jurors, and only 29% were against White potential jurors.[6] That remained true across counties and across serious and minor crimes.[7]

Despite all this evidence, the jurors' claims were tossed out of court. The district court refused to entertain the jurors' claims and dismissed the action based on *O'Shea* abstention, ostensibly 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. *Attala Cnty., Miss. Branch of NAACP v. Evans*, 2020 WL 5351075, at *8–12 (N.D. Miss. Sep. 4, 2020). The Fifth Circuit then affirmed because the plaintiffs lacked standing. *Attala Cnty., Miss. Branch of NAACP v. Evans*, 37 F.4th 1038, 1040 (5th Cir. 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

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[5] *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 Feb. 3, 2026).

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

[7] *Id.* at 6–7 (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).

Evans's office; the prosecutor seeks to remove the person from the jury due to race; an independent decision-maker—namely a trial judge who reviews a *Batson* challenge—then fails to block the use of the discriminatory strike." *Id.* at 1043.

It is thus virtually impossible for prospective jurors to take action to protect themselves 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 and protect the integrity of the judicial system is to rigorously review *Batson* challenges and the prosecutor's reasons for a peremptory strike.

This structural character of *Batson*'s guarantee counsels strongly against expansive and amorphous waiver rules that excuse judicial noncompliance. In the past, this Court has refused to allow certain waivers that would undercut structural or public-rights safeguards. In *Zedner v. United States*, 547 U.S. 489, 502–03 (2006), for example, this Court held that "[a] defendant may not prospectively waive the application of the [Speedy Trial] Act," because allowing such waivers would operate "to the detriment of the public interest." And in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 850–51 (1986), the Court explained that "[t]o the extent that this [separation-of-powers] structural principle is implicated in a given case, the parties *cannot* by

consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." (emphasis added). Structural rights that protect the integrity of our governmental system are afforded special protection. And *Batson* protects such a structural right.

C. The Fifth Circuit's decision should be reversed under AEDPA because the Mississippi Supreme Court unreasonably determined that Pitchford's *Batson* claim failed because of a purported waiver. Although AEDPA gives States considerable leeway to navigate gray legal areas, it gives state courts no license to disregard this Court's interpretation of the Constitution. Under the law, federal courts shall review state court decisions to ensure they are not "contrary to, or involve[] an unreasonable application of" law or an "unreasonable determination of the facts" and by ensuring that detention and punishment proceed according to law rather than will. *See* 28 U.S.C. § 2254(d).

The Mississippi Supreme Court erred by finding waiver where Pitchford's counsel was denied the opportunity to make its *Batson* argument at what the Mississippi Supreme Court itself considered to be the proper time. The federal district court correctly observed that Pitchford's counsel was never afforded "an opportunity to rebut the State's [proffered race-neutral] explanations at the time they were made." JA702. The trial court skipped *Batson*'s third step and simply accepted the State's race-neutral reasons as true without scrutiny. The Mississippi Supreme Court should have corrected that error on appeal. Applying

a restrictive waiver rule to insulate that error from review conflicts with this Court's clear precedent on the waiver of federal rights.

The waiver ruling is especially egregious in light of the record. Pitchford's counsel invoked *Batson* multiple times, including after the trial judge announced the jury's composition. *See* JA700–704. And the trial court expressly held that the *Batson* objection was preserved, stating: "You have already made it in the record so I am of the opinion it is in the record." JA175. Finding waiver here, where the trial court expressly determined that the objection was adequately preserved, conflicts with any reasonable determination of the facts and is a clear error of law.

AEDPA's history confirms that habeas relief is designed for cases exactly like this one. The writ of habeas arose as a structural check against arbitrary power, an institutional guarantee that government may restrain liberty only according to law. *See Boumediene v. Bush*, 553 U.S. 723, 744–47 (2008); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 141–44 (2020) (Thomas, J., concurring). Here, the State departed from the law to sentence a man to death. AEDPA's predecessor, the Habeas Corpus Act of 1867, arose in tandem with the Reconstruction Amendments, and emerged as a central safeguard for vindicating federal constitutional rights in state criminal cases, especially the rights of Black and Jewish citizens. *See Fay v. Noia*, 372 U.S. 391, 404–05, 415–16 (1963) (explaining that Congress enacted the 1867 statute at a time when the nation was still struggling to reconstruct the former Confederate States and to secure federal rights against recalcitrant

state action); *Hawk v. Olson*, 326 U.S. 271, 276 (1945); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Moore v. Dempsey*, 261 U.S. 86, 90–91 (1923); *Frank v. Mangum*, 237 U.S. 309, 335 (1915); *Ex parte Virginia*, 100 U.S. at 345–47; *Strauder*, 100 U.S. at 306–10; *Ex parte McCardle*, 73 U.S. 318, 325–26 (1868). Here, the prosecutor infringed on the constitutional rights of Black prospective jurors and a Black criminal defendant, just as he did in *Flowers*. *See* 588 U.S. at 315–16. And in AEDPA, Congress ensured that "state-court convictions are given effect" but only "to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). AEDPA continues to provide individuals with relief when state decisions unreasonably disregard clearly established law or rest on unreasonable factual determinations. *See Shoop v. Hill*, 586 U.S. 45, 47 (2019) (per curiam); *Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394, 402 (2001). This is such a case.

* * *

The United States is full of prosecutors with integrity who seek to fairly enforce the law. But this case and *Flowers* make clear that the need for careful scrutiny remains acute. This Court should once more reinforce the principles of *Strauder*, *Batson*, *Miller-El*, *Snyder*, and *Flowers* to ensure that bad actors do not abuse their prosecutorial discretion to deny anyone the full rights of citizenship guaranteed by the Constitution. As *Strauder v. West Virginia* makes clear, a State cannot secure a man's death sentence by preventing citizens from serving on the jury because of their race. That is what happened here. The Court should reverse.

CONCLUSION

The Court should reverse the Fifth Circuit's decision below.

Respectfully submitted,

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February 4, 2026