*** CAPITAL CASE ***

No. 24-7351

In the Supreme Court of the United States

TERRY PITCHFORD,

Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; LYNN FITCH, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI,

Respondents.

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

BRIEF OF AMICI CURIAE FAIR AND JUST PROSECUTION, THE LAW ENFORCEMENT ACTION PARTNERSHIP, AND 40 CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT OFFICIALS, AND FORMER JUDGES SUPPORTING PETITIONER

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***** CAPITAL CASE *****

QUESTION PRESENTED

Whether, under the standards set forth in AEDPA, 28 U.S.C. § 2254(d), the Mississippi Supreme Court unreasonably determined that petitioner waived his right to rebut the prosecutor's asserted race-neutral reasons for exercising peremptory strikes against four black jurors.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are 40 current and former prosecutors, current and former law enforcement officials, and former judges, as well as Fair and Just Prosecution (FJP), a project of the Tides Center, and the Law Enforcement Action Partnership (LEAP). A list of all amici and their titles are included in the addendum to this amicus brief.

Amici are all committed to protecting the integrity of the justice system, advancing accountability and fairness, and ensuring the safety of everyone in our communities. We all believe that prosecutorial power carries profound responsibility. The prosecutor's role is not merely to secure convictions, but to achieve justice and impartiality. This obligation extends to every stage of the criminal process, including jury selection.

As the Nation grapples with persistent racial disparities in criminal justice outcomes, we recognize that discriminatory jury selection practices undermine both the integrity of individual cases and public confidence in the system. As criminal justice leaders, including those from states still reckoning with the historic exclusion of Black citizens from political participation and the racially discriminatory nature of peremptory strikes, we recognize the grave importance of uprooting practices that perpetuate racial inequality.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

The rights and procedures enshrined in *Batson v. Kentucky*, 476 U.S. 79 (1986), represent an important avenue for defendants to vindicate their rights to be free from a trial infected with racial discrimination. Additionally, *Batson* represents the only realistic opportunity to vindicate the rights of the jurors who are being discriminated against. But *Batson*'s goal of eliminating racial discrimination in jury selection will be illusory if state courts are free to bar defendants from articulating their *Batson* claims and later assert that the defendant "waived" the claim, as the Mississippi courts have done in petitioner Terry Pitchford's case. Amici believe that when state courts arbitrarily apply "waiver" rules after failing to afford defendants an opportunity to argue their claims, it is imperative that federal courts step in and correct this injustice. It is precisely the kind of extreme malfunction in the state criminal justice system that AEDPA reserves for federal habeas review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal writ of habeas corpus "is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment) (citing *Stone v. Powell*, 428 U.S. 465 (1976)). "Instead, it is designed to guard against extreme malfunctions in the state criminal justice systems." *Ibid.* This case presents the question of when a state court's finding of waiver or forfeiture in its application of *Batson* constitutes such an extreme malfunction.

The answer, in amici's view, is straightforward: A defendant cannot "waive" a *Batson* pretext argument that the trial court's own procedures did not afford him an adequate opportunity to make. That is not a reasonable application of *Batson*. It arbitrarily forecloses a fundamental constitutional claim—exactly the kind of state court failure that federal habeas can correct.

Terry Pitchford sits on death row after District Attorney Doug Evans—the very same prosecutor at the heart of the *Batson* challenge in *Flowers v. Mississippi*, 588 U.S. 284 (2019)—struck 80% of the Black venire members in Mr. Pitchford's capital trial. When defense counsel raised a *Batson* objection, the trial court required Evans to provide race-neutral reasons. Evans did so. After each explanation, the trial court declared the reason "race neutral." After the fourth explanation, the court stated: "The Court finds that to be race neutral as well. So now we will go back and have the defense [peremptory strikes] starting at [venire member no.] 37." Pet. App. 216.

The trial judge thus moved directly from the prosecutor's explanations to a declaration that the strikes themselves were "race neutral" and then to the next phase of jury selection. The judge did not afford any opening for defense counsel to rebut the prosecutor's stated reasons. Yet when petitioner raised pretext arguments on appeal based on evidence in the trial record, the Mississippi Supreme Court held that he had "waived" those arguments by not raising the precise pretext arguments before the trial judge. *Pitchford v. State*, 45 So. 3d 216, 227-28 (Miss. 2010). But as Presiding Justice Graves recognized in dissent, petitioner "preserved the issue for appeal by

making a *Batson* objection"—he was not raising a new issue, but arguing that the prosecutor's stated reasons were pretextual based on "evidence contained in the record and presented to the trial court during voir dire." *Id.* at 267-68 (Graves, P.J., dissenting).

The Question Presented asks whether that waiver determination was unreasonable under 28 U.S.C. § 2254(d). Amici believe it was. To be sure, waiver rules—even as a feature of a state judiciary's implementation of *Batson*—can be extremely important to the proper functioning of our criminal justice system. But whatever the validity of waiver rules generally, and whatever their proper application in other contexts, one principle is beyond dispute: A defendant cannot be held to have waived an argument he was not given an adequate opportunity to make. When trial proceedings do not accommodate any argument that the state's proffered race-neutral reasons were pretextual under a *Batson* (and thus Equal Protection Clause) challenge, and the appellate court penalizes the defendant for failing to make the argument, the application of that rule is arbitrary. And arbitrary procedural rules that foreclose constitutional claims are precisely what AEDPA's isthmian standard is designed to catch.

This Court's *Batson* jurisprudence reinforces the point. Procedural rules governing *Batson* claims must be designed to "ferret out" discrimination, not to insulate it from review. *See Miller–El v. Dretke*, 545 U.S. 231, 266 (2005) (Breyer, J., concurring). Thus, in applying *Batson*, states cannot fashion procedural barriers so onerous that they effectively nullify the Equal Protection Clause's guarantees. *See Johnson v. California*, 545 U.S. 162, 170 (2005). In *Johnson*,

California required defendants at *Batson*'s first step to show that discrimination was "more likely than not," essentially requiring them to prove their case by a preponderance before the prosecutor even had to offer race-neutral reasons. *Id.* at 166-68. This Court rejected that approach, holding 8-to-1 that California's heightened standard was "an inappropriate yardstick" because it short-circuited *Batson*'s framework. *Id.* at 168, 173. A defendant need only produce evidence "sufficient to permit the trial judge to draw an inference that discrimination has occurred," not prove discrimination at the threshold. *Id.* at 170. Penalizing a defendant for not making an argument the trial court's procedures did not accommodate is at least as problematic. Like California's Supreme Court in relation to *Batson*'s step-one *prima facie* showing, the Mississippi Supreme Court here erected a barrier that prevents *Batson* from functioning between steps two and three.

This case presents that situation. The result of Mississippi's *Batson* waiver determination was that petitioner had no real chance to rebut District Attorney Evans's race-neutral justifications and thus no court—trial or appellate—ever examined whether Evans's stated reasons for striking 80% of the Black venire members were pretextual. Federal habeas must be available to correct this failure. *See, e.g.*, *Miller–El*, 545 U.S. at 241 n.2 (rejecting dissent's view that Miller–El forfeited his *Batson* arguments by failing to make same arguments to the trial court); *see also Flowers*, 588 U.S. at 331 (Thomas, J., dissenting) (arguing that Flowers "forfeited" *Batson* "argument by failing to present it to the trial court").

Amici have a profound stake in ensuring that it is corrected. Discriminatory jury selection harms defendants who deserve impartial juries, citizens excluded based on race from their fundamental civic duty, and the public whose safety depends on a justice system they trust. As prosecutors and judges who dedicated our careers to a fair and effective justice system, we urge this Court to hold that Mississippi's waiver determination was unreasonable. The Court need go no further to reverse.

ARGUMENT

I. FEDERAL HABEAS SERVES AN ESSENTIAL ROLE IN ENFORCING *BATSON*'S CONSTITUTIONAL GUARANTEE.

The Fourteenth Amendment's guarantee of equal protection prohibits racial discrimination in jury selection. This Court held in *Batson v. Kentucky*, 476 U.S. 79 (1986), that the Equal Protection Clause forbids prosecutors from exercising peremptory challenges to exclude jurors on account of their race. *Id.* at 89. To enforce that promise, *Batson* established a burden-shifting framework: Once a defendant makes a prima facie showing of discrimination, the prosecutor must articulate race-neutral reasons for the strikes, and the trial court must then determine whether the defendant has proven purposeful discrimination. *Id.* at 96-98.

But constitutional rights are only as meaningful as the mechanisms available to enforce them. Thus, this Court has long recognized that federal habeas "is designed to guard against extreme malfunctions in the state criminal justice systems." *See Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J.,

concurring in the judgment). Habeas does not exist to second-guess every state court ruling or to relitigate factual disputes. But even under deferential AEDPA review, *see* 28 U.S.C. § 2254, federal habeas ensures that when state courts fundamentally fail to enforce constitutional guarantees, a federal remedy remains available.

Batson's framework thus depends on trial courts conducting genuine inquiries into whether prosecutors' stated reasons are pretextual, on state appellate courts reviewing the totality of the record evidence, and—when state courts fail at both levels—on federal habeas courts serving as the ultimate safeguard against constitutional violations. And racial discrimination in jury selection is precisely the kind of constitutional harm that habeas must be equipped to remedy. As discussed below in Part III, this Court has repeatedly emphasized that such discrimination causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. *See Powers v. Ohio*, 499 U.S. 400, 407-13 (1991). It "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. It inflicts dignitary harm on excluded jurors and "brand[s]" them with "an assertion of their inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). And it compromises the accuracy and legitimacy of verdicts. *See infra* pp. 15-16.

The alternative is to render *Batson* a dead letter. It is undisputable that the District Attorney, Doug Evans, has engaged in a long pattern of striking Black venire members. *Cf. Flowers v. Mississippi*, 588 U.S. 284, 288, 306 (2019). If state courts can insulate such

conduct from review through procedural rules that penalize defendants for failing to present arguments they were not given an opportunity to raise, such discrimination will face little meaningful constraint.

II. A DEFENDANT CANNOT "WAIVE" AN ARGUMENT HE WAS NOT GIVEN A CHANCE TO PRESENT.

The Question Presented asks whether the Mississippi Supreme Court unreasonably determined that petitioner "waived his right to rebut the prosecutor's asserted race-neutral reasons." Amici believe the answer is yes—not because a *Batson* waiver is inherently invalid, but because this application was arbitrary and unreasonable.

A. Waiver Presupposes Opportunity.

"Waiver, the 'intentional relinquishment or abandonment of a known right or privilege,' is merely one means by which a forfeiture may occur." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Although "[s]ome rights may be forfeited by means short of waiver" (for example, the rights to a public trial, against double jeopardy, and to confront adverse witnesses), "others," like "the right to counsel" or the "right to trial by jury" "may not." *Ibid.* And a "right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true." *Ibid.* Thus, a defendant cannot intentionally relinquish a right he was never given an adequate opportunity to exercise. That is not waiver—it is forfeiture by operation of procedures that did not accommodate the argument the defendant is later faulted for failing to raise.

Here, the trial court's procedure for handling the *Batson* challenge did not include such a step—even though Mississippi's precedent contemplates one. Mississippi has held that "[t]he defendant is allowed to rebut the reasons which have been offered by the prosecution," *Bush v. State*, 585 So. 2d 1262, 1268 (Miss. 1991) (citing *Taylor v. State*, 524 So. 2d 565 (Miss. 1988)), and "the trial court must make a finding of fact to determine if the defendant has proved purposeful discrimination" only after affording that opportunity, *see Coleman v. State*, 697 So. 2d 777, 786 (Miss. 1997). Mississippi has also mandated that trial judges make "on-the-record factual determination[s]" as to each proffered reason—a "procedure [that] is necessary to protect the rights of both defendants and potential jurors, as well as making clear the ruling of the trial judge for purposes of appellate review." *See Hatten v. State*, 628 So. 2d 294, 295 (Miss. 1993). But here, after each of petitioner's prima facie *Batson* challenges, the trial court simply declared D.A. Evans's proffered justifications "race neutral" and moved on. *See* Pet. App. 212-16. After the last such explanation, the court stated: "The Court finds that to be race neutral as well. So now we will go back and have the defense [peremptory strikes] starting at [venire member no.] 37." *Id.* 216. That was the end of the matter.

The court's procedure thus moved directly from the prosecutor's step-two explanation to a ruling and then to the next phase of jury selection. There was no third step in which the court paused to hear from defense counsel on whether the stated reasons were credible or pretextual. The procedure simply did not include that component, even though longstanding

Mississippi *Batson* authorities recognize the trial court's duty to afford a rebuttal opportunity. The court did not invite further argument on pretext; it treated the matter as closed. Pet. App. 21 ("Rather than turning to Pitchford and allowing him the opportunity to rebut the reasons articulated by the State, the trial court immediately continued with the juror selection conference.") (quoting (*Pitchford v. Cain*, 706 F. Supp. 3d 614, 623 (N.D. Miss. 2023)). Indeed, when defense counsel later attempted to raise their *Batson* objection again, the trial court responded that they had "already made" those objections and that the objections were "clear in the record"—an "exchange [that] evinces an attempt by Pitchford's counsel to argue pretext that was thwarted ... by the trial court's abrupt conclusion that there had been no *Batson* violation." *Id.* 22-23.

On direct appeal, petitioner argued that D.A. Evans's stated reasons were pretextual based on evidence in the trial record—including a comparative juror analysis showing that white venire members shared the same characteristics Evans cited for striking Black venire members, something that is often perceptible only after the judge has ruled on all strike challenges and the jury has been empaneled. The Mississippi Supreme Court refused to consider those arguments and thus the evidence, holding that petitioner had waived them by not raising them at trial. *See Pitchford v. State*, 45 So. 3d 216, 227-28 (Miss. 2010). Having expressly rejected any review of the relevant record evidence, given this supposed waiver, the Mississippi Supreme Court affirmed the trial court's rejection of petitioner's *Batson* challenges without engaging with his appellate arguments. That

is arbitrary and plainly unreasonable under 28 U.S.C. § 2254(d).

B. This Court's Precedent Confirms That Procedural Rules Cannot Arbitrarily Foreclose *Batson* Claims.

This principle is reinforced by this Court's decision in *Johnson v. California*, 545 U.S. 162 (2005), which held that states cannot impose procedural barriers that effectively nullify *Batson*'s protections. *See id.* at 173. In *Johnson*, California required defendants to show at *Batson*'s first step that discrimination was "more likely than not." *Id.* at 168. States have "flexibility in formulating appropriate procedures to comply with *Batson*," the Court acknowledged, but that flexibility has limits. *Id.* at 168. *Batson* rules cannot be "so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." *Id.* at 170. This Court thus held that California's heightened standard was impermissible because it made *Batson*'s protections too difficult to invoke. *Id.* at 173.

Justice Thomas alone dissented, arguing that *Batson* gives states "wide discretion" to adopt whatever procedures they wish. *Johnson*, 545 U.S. at 174 (quoting *Smith v. Robbins*, 528 U.S. 259, 273 (2000)). But eight Justices rejected that view, holding that states cannot erect procedural barriers that prevent *Batson* from functioning as intended, notwithstanding the expectation that states will craft rules and procedures to implement it. *See id.* at 173.

A *Batson* waiver rule that penalizes defendants for not making arguments a trial court does not accommodate is exactly such a barrier. It effectively eliminates *Batson*'s third step—the step at which the trial court is supposed to determine whether the defendant has proven purposeful discrimination by examining "all of the circumstances that bear upon the issue of racial animosity," and which appellate courts are due to evaluate from the entire trial record. *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

This Court's decision in *Miller–El v. Dretke*, 545 U.S. 231 (2005), further supports petitioner. The Court distinguished between "evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Id.* at 241 n.2. Because the voir dire transcript and "evidence on which Miller–El base[d] his arguments and on which" the Court "base[d]" its "result" were "before the state courts," nothing suggested the defendant "did not 'fairly present' his *Batson* claim to the state courts"—even though he had not articulated the same precise arguments on appeal about what that evidence showed. *Ibid.* (cleaned up).

Justice Thomas again dissented, arguing, as Mississippi contends here, that petitioner Miller–El "did not even attempt to rebut the State's racially neutral reasons at the hearing. He presented no evidence and made no arguments." *Miller–El*, 545 U.S. at 278. Yet the Court found a *Batson* violation anyway, *id.* at 266, rejecting Justice Thomas's view that "Miller–El's arguments about the prosecution's disparate questioning of black and nonblack panelists and its use of jury shuffles, are not properly before this

Court, not having been 'put before the Texas courts,'" *id.* at 241 n.2.

Dissenting in *Flowers v. Mississippi*, 588 U.S. 284 (2019), Justice Thomas again argued, like he had in *Miller–El*, that "Flowers forfeited" any *Batson* argument he had not made in the same form "to the trial court." *Id.* at 331. According to Justice Thomas, "Mississippi has reasonably read *Batson*'s 'prophylactic framework' to mean that the party making a *Batson* claim forfeits arguments not made to the trial court." *Id.* at 331 n.5 (quoting *Johnson*, 545 U.S. at 175 (Thomas, J., dissenting)). Justice Thomas even cited the Mississippi Supreme Court's decision in this very case as an example of a legitimate prophylactic framework by which a "party making a *Batson* claim forfeits arguments not made to the trial court." *Id.* at 331 n.5 (citing *Pitchford*, 45 So. 3d at 227-28). The majority did not accept Justice Thomas's forfeiture argument in *Flowers*, just as it had rejected his forfeiture claim in *Miller–El*.

C. The Court Need Not Invalidate A State Waiver Rule To Resolve This Case.

Many undersigned amici are current and former prosecutors and former judges; we do not suggest that Mississippi can never find a *Batson* challenge or argument waived. We recognize that waiver and forfeiture rules serve critical purposes. They encourage defendants to raise arguments promptly, give trial courts the opportunity to address issues in the first instance, and promote the orderly administration of justice.

But whatever the general validity of waiver rules, everyone should agree that they cannot be applied

arbitrarily. When the effect of a waiver rule is that it is applied as a trap that forecloses any record examination of whether a prosecutor's stated reasons for striking Black jurors were pretextual, the result is an extreme malfunction in the state criminal justice system. This Court can hold that Mississippi's *Batson* waiver determination was unreasonable as applied here without holding that the underlying rule is invalid in all applications, thereby communicating to that jurisdiction a vitally important course correction for its adherence to the Equal Protection Clause without unduly interfering with the state's administration of *Batson*. *See supra* pp. 9, 11-12.

III. CORRECTING THIS MALFUNCTION SERVES JUSTICE AND BETTER PROTECTS US ALL.

In amici's experience as law enforcement leaders, discriminatory jury selection undermines everything the justice system is supposed to achieve. And when state courts arbitrarily foreclose any examination of the Equal Protection Rights animating the question, *viz.*, whether a prosecutor's reasons for striking Black jurors were pretextual, the consequences extend far beyond the individual defendant. They compromise the integrity of verdicts, erode public trust in the courts, and ultimately make all of us less safe.

A. Discriminatory Jury Selection Harms Defendants Who Deserve Impartial Juries And A Fair Deliberative Process.

The Sixth Amendment guarantees criminal defendants the right to trial by an impartial jury. The Fourteenth Amendment guarantees equal protection of the laws. Together, these provisions ensure that no

defendant will face judgment by a jury selected through a racially discriminatory process.

This Court has long recognized that racialized jury selection "places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). For good reason. Empirical evidence demonstrates that racially homogeneous juries produce systematically different and less fair outcomes than diverse juries. For example, research shows that less diverse juries spend less time deliberating, consider fewer perspectives, and are more likely to convict defendants of color.[2] All-white and nearly all-white juries make more mistakes and are more likely to presume guilt, particularly when judging Black defendants.[3] Diverse juries, on the other hand, have proven to be better equipped when it comes to accurately assessing witness credibility from multiple perspectives, identifying problems like racial profiling and stereotyping, and holding prosecutors to their burden of proof.[4]

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[2] *See* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1032 (2012); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 241 (2001); *see also* 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).

[3] *See* Sommers, *supra*, at 603-04.

[4] *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).

Accordingly, a conviction obtained from a nearly all-white jury after the prosecutor struck four out of five Black venire members, with no court ever examining whether the reasons were pretextual or the wider circumstances bearing on the prosecutor's intent, is a conviction that rests on an uncertain foundation. When such verdicts are later overturned, the result is wasted resources, delayed justice for victims, and diminished public confidence in the system. In capital cases, the stakes are even higher. The irrevocability of the death penalty demands the highest level of procedural fairness. A death sentence imposed by a jury selected through a process that no court has determined was non-discriminatory under *Batson*'s requirements should trouble anyone who cares about the integrity of capital punishment and our justice system.

In amici's experience, prosecutors care about the integrity of the capital convictions they secure. After all, prosecutors are "the representative not of an ordinary party to a controversy, but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (alterations omitted) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see* Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (Am. Bar Ass'n 2010) (prosecutors are "minister[s] of justice"). Many prosecutors therefore welcome the opportunity to demonstrate that their jury selection was non-discriminatory when the deliberative process that secured a capital conviction is called into doubt.

B. Discriminatory Jury Selection Harms Citizens Excluded Based On Race From Democratic Participation.

Jury service is a "duty, honor, and privilege." *Powers*, 499 U.S. at 415. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 588 U.S. 284, 293 (2019) (citing *Powers*, 499 U.S. at 407). Accordingly, when prosecutors strike Black citizens from juries because of their race, they inflict a profound dignitary harm that "brands" Black citizens as presumptively unqualified to decide important questions, "an assertion of their inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). "A venireperson excluded from jury service because of race" therefore "suffers a profound personal humiliation heightened by its public character." *Powers*, 499 U.S. at 413-14.

The harm is made worse because excluded jurors have virtually no practical recourse and thus little reason to challenge their exclusion. "The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Powers*, 499 U.S. at 415 (citing *Barrows v. Jackson*, 346 U.S. 249, 257 (1953)). And even when excluded jurors muster the courage to try, courts are reluctant to hear their collateral claims. *See, e.g.*, *Pipkins v. Stewart*, 105 F.4th 358, 361-62 (5th Cir. 2024) (per curiam) (affirming summary judgment for the government in Equal Protection action under 42 U.S.C. § 1983 against the Caddo Parish District Attorney's alleged custom of discriminatory peremptory strikes); *Hall v. Valeska*, 849 F. Supp. 2d

1332, 1337-40 (M.D. Ala. 2012) (similarly dismissing § 1983 action by excluded jurors challenging alleged systemic racial discrimination in peremptory strikes), *aff'd*, 509 F. App'x 834 (11th Cir. 2012).

Peremptory strikes have historically been and to this day are used to exclude potential Black jurors and other jurors of color. *Cf.* Hon. Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809, 827 (1997) (describing peremptory strikes as "the Last Best Tool of Jim Crow"). Peremptory strikes have been and are used to racialize juries not only based on explicit race-based policies, but also by using "race-neutral" criteria that have the same intended discriminatory effect. *See* Equal Just. Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* 43 (2021).

The harm caused by discriminatory jury selection is compounded by the backdrop of systemic barriers that already compromise equal participation of jurors of color. From the start, citizens of color face underrepresentation in jury pools largely because jury selection systems rely heavily on voter registration and driver's license lists that systematically exclude these communities.[5] People of color also face disproportionate disqualification due to past involvement with the criminal justice system and

[5] Julie A. Cascino, *Following Oregon's Trail: Implementing Automatic Voter Registration to Provide for Improved Jury Representation in the United States*, 59 Wm. & Mary L. Rev. 2575, 2578-79 (2018) ("Due to the low registration rates of these groups, voter rolls often do not accurately represent the proportion of eligible minority, low-income, or young voters in a specific community. Accordingly, jury pools are less representative of that community as well.").

resulting financial hardship; hardship that is more prevalent in marginalized communities to begin with.[6] And Black jurors encounter higher rates of for-cause challenges, frequently based on their lived experiences with law enforcement and the courts.[7]

Each of these realities reduces jury diversity; together, they aggravate the injuries that racialized peremptory strikes already inflict, which are constitutionally intolerable on their own. The legitimacy of the verdicts we obtain and the judgments we render depends on the public's belief that juries represent the community. Law enforcement leaders like amici therefore have a particular interest in ensuring that jury service is open to all citizens on equal terms.

C. Discriminatory Jury Selection Erodes Public Trust And Thus Undermines Public Safety.

The consequences of discriminatory jury selection extend to all of us. A justice system that tolerates racial discrimination in jury selection—or that erects arbitrary procedural barriers to avoid examining whether such discrimination occurred—forfeits the

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[6] *See* Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, Prison Pol'y Initiative (Feb. 18, 2021), https://tinyurl.com/bdzsrdc5.

[7] *See, e.g.*, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785, 793-95 (2020) (studies on data from Mississippi and Louisiana found that Black prospective jurors were more than three times more likely as white prospective jurors to be excluded "for cause").

public trust on which effective law enforcement depends.

This Court recognizes that racial bias in the jury system is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *See Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224 (2017). And because it "implicates unique historical, constitutional, and institutional concerns," the Court demands vigilant judicial attention to ensure that racial bias does not infect a defendant's right to a fair trial. *Ibid.*[8] "The duty to confront racial animus in the justice system is not the legislature's alone," this Court has held. *Id.* at 222. "Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Ibid.* In resolving such cases, the Court has consistently held that "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Id.* at 223 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

"Enforcing th[e] constitutional principle" of equal protection in jury selection helps to "protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system." *Flowers*, 588 U.S. at 301. The Court has

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[8] *See, e.g.*, *id.* at 225 (holding that the Sixth Amendment requires an exception to the no-impeachment rule when a juror makes clear statements indicating reliance on racial stereotypes to convict, as racial bias differs from other jury misconduct and threatens systemic harm to the administration of justice); *see also id.* at 221 (the constitutional "imperative to purge racial prejudice from the administration of justice" has deep historical roots).

warned repeatedly of the dangers in racializing jury selection in particular because it "places the fairness of a criminal proceeding in doubt," which "casts doubt on the integrity of the judicial process" itself. *Powers*, 499 U.S. at 411 (quoting *Rose*, 443 U.S. at 556). "Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Id.* at 407 (citing *Green v. United States*, 356 U.S. 165, 215 (1958) (Black, J., dissenting)). The jury serves as "a vital check against the wrongful exercise of power by the State and its prosecutors," and striking jurors because they aren't white damages "both the fact and the perception of this guarantee." *Id.* at 411 (citing *Batson v. Kentucky*, 476 U.S. 79, 86 (1986)); *see also Davis v. Ayala*, 576 U.S. 257, 285 (2015) (Court has repeatedly emphasized that racially motivated jury selection "undermines our criminal justice system" and "poisons public confidence in the evenhanded administration of justice").

These concerns are not abstract. From amici's experience, public safety depends on public trust, and that public trust depends on a justice system that treats people fairly. When people have trust in legal authorities and view the police, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses, and accept police and judicial system authority.[9] On the other hand, when

[9] *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008); *see also* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance,*

the public does not trust law enforcers, community members may be less willing to participate in the criminal justice system.[10] This reluctance hampers the ability of the courts, police, and prosecutors to fulfill their public safety obligations. Without cooperating victims and witnesses, police are unable to investigate, prosecutors are unable to bring charges, and juries are unable to convict the guilty or free the innocent.[11]

* * *

A 2018 study of District Attorney Doug Evans's judicial district found that Black prospective jurors were more than four times as likely to be struck as white prospective jurors. *See* Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, APM Reports, at 2 (2018). That was true in this case. When *Batson* claims arising in that context can be disposed of through arbitrary waiver rules without any court determining whether the proffered race-neutral reasons for that disparity are genuine, something has gone seriously wrong and federal habeas exists as the final bulwark.

Cooperation, and Engagement, 20 Psych., Pub. Pol'y, & L. 78, 78-79 (2014) .

[10] *See, e.g.*, Giffords L. Ctr. to Prevent Gun Violence, *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence* (Sept. 9, 2021), https://tinyurl.com/3nf737kt.

[11] *Ibid.*

CONCLUSION

The Fifth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX

Fair and Just Prosecution (FJP), a Project of the Tides Center

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Dave Clegg
Former District Attorney, Ulster County, New York

John Creuzot
District Attorney, Dallas County, Texas

Kara Davis
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Michael Dougherty
District Attorney, Twentieth Judicial District (Boulder), Colorado

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