No. 25-5469

IN THE

Supreme Court of the United States

BRYAN CHRISTOPHER BELL & ANTWAUN KYRAL SIMS,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF AMICI CURIAE EMANCIPATE NC, NORTH CAROLINA ADVOCATES FOR JUSTICE, NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS, AND NORTH CAROLINA STATE CONFERENCE OF THE NAACP IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Emancipate NC, North Carolina Advocates for Justice, North Carolina Association of Black Lawyers, and North Carolina State Conference of the NAACP are North Carolina-based organizations whose member attorneys regularly represent criminal defendants in legal proceedings. *Amici* are committed to equal treatment for all people in the legal system and often file briefs in cases involving discrimination in North Carolina.

SUMMARY OF ARGUMENT

Evidence suggests that defiance of this Court's rulings in *Batson v. Kentucky* and *J.E.B. v. Alabama ex rel. T.B.* is deeply ingrained in prosecutorial culture and in the state courts of North Carolina. For a number of reasons, discussed herein, discrimination in jury selection remains a pronounced problem in the Tar Heel state, although recent experiences from other jurisdictions demonstrate the phenomenon also remains a problem elsewhere.

The history of the prosecutor in this case, Mr. Gregory Butler, exemplifies a pattern of race and gender discrimination as dramatic as the District Attorneys in *Miller-El*, *Foster*, and *Flowers*—cases where this Court reversed convictions for capitally-

[1] Counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and its counsel made a monetary contribution to its preparation or submission; counsel also provided both parties more than ten days' notice of their intent to file this brief.

sentenced defendants because of the unlawful exercise of peremptory strikes. In the case below, Mr. Butler asserted that he did not strike Ms. Morrow because she was Black, but because she was a woman, and he was "looking for male jurors and a potential foreperson." The unconstitutionality of this strike was acknowledged by the Supreme Court of North Carolina, but it was not reached because of the court's novel and inconsistent application of a procedural bar.

Certiorari is warranted not only to correct this error, which occurred in a capital case, but also because, as one concurring Justice below noted, and as this case illustrates: North Carolina state courts have effectively overruled and ignored this Court's jury discrimination precedents. Of the 25 most populous states, North Carolina, the ninth largest by population, is the only state whose courts have never granted meaningful *Batson* or *J.E.B.* relief to a criminal defendant.[2]

The consequences of the state's defiance of *Batson* and its gender-based analogue, *J.E.B.*, are significant for criminal defendants and prospective jurors subjected to unlawful discrimination, and also for the public's perception of the courts. This Court has

[2] The only person to ever obtain a remedy in North Carolina, Christopher Clegg, served his full sentence of more than four years and was released from custody a year and a half before his conviction was vacated. *See State v. Clegg*, 867 S.E.2d 885, 911 (N.C. 2022) (noting that "defendant has already served his entire sentence of active imprisonment from his now-reversed conviction, and has been discharged from all post-release supervision").

historically intervened when state courts have "ignored" or plainly refused to give effect to its criminal justice rulings, particularly in capital cases, and it should do so here.

ARGUMENT

In 2022, Onslow County, N.C. Superior Court Judge Charles H. Henry found that prosecutor Gregory Butler used a peremptory challenge to dismiss prospective juror Viola Morrow, a Black woman, from Bryan Bell's and Antwaun Sims' joint murder trial. In striking Ms. Morrow, Judge Henry concluded the prosecution had acted with "gender discriminatory intent," citing what he described as "direct . . . as well as . . . circumstantial evidence tending to show purposeful discrimination."[3] His ruling quoted, among other things, an affidavit from Mr. Butler, who, in an attempt to defeat Defendants' postconviction *Batson* claims under the state's Racial Justice Act, wrote that he had been "looking for male jurors and a potential foreperson" when he exercised the strike against Ms. Morrow.[4]

Mr. Butler misapprehended the law and believed averring the strike was based on *gender* would resolve the trial court's concerns that he had removed a juror because of her *race*. In the intervening years, everyone to consider the issue, including the Supreme

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[3] Chris Berendt, *Ruling Puts Murder Trial Back in Light*, SAMPSON INDEPENDENT, Feb. 4, 2023, https://www.clintonnc.com/news/64586/ruling-puts-murder-trial-back-in-light.

[4] Gregory Butler, Affidavit, *State v. Bell*, No. 00 CRS 500921 (N.C. Super. Ct. Jan. 9, 2012), 1.

Court of North Carolina, appears to agree he was wrong to believe he could strike Ms. Morrow because of her gender. However, the question of whether Defendants are entitled to a remedy remains disputed. Mr. Bell was sentenced to death, and absent action from this Court, his execution may proceed, despite the unconstitutional method in which his sentence was obtained.

This Court has repeatedly recognized "discrimination in jury selection on the basis of gender violates the Equal Protection Clause,"[5] and that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[6] Although the Court's *Batson* and *J.E.B.* decisions have received some criticism regarding their practicality at the trial level, they have also received praise for their salutary effects post-conviction and been recognized as "the lone meaningful doctrine for fighting discrimination in the justice system—the only doctrine defendants can plead and actually win."[7]

That is, except in North Carolina—the only state of the nation's 25-largest to never grant a criminal defendant a meaningful remedy for jury discrimination.[8] Mr. Bell's and Mr. Sims' petition for certiorari

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[5] *Rice v. Collins*, 546 U.S. 333, 340 (2006) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)).

[6] *J.E.B.*, 511 U.S. at 129.

[7] Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 715 (2018).

[8] *See generally* discussion *infra*, Part III.

speaks to the legal error they seek the Court's review to correct, and why the men are strong candidates to be the first defendants to obtain relief. This Brief does not address the specifics of their case. Instead, it focuses on the bigger picture in North Carolina, and why the state's refusal to implement this Court's *Batson* and *J.E.B.* precedents warrants intervention.

Part I describes how and why defiance of *Batson* and *J.E.B.* is deeply ingrained in prosecutorial culture in North Carolina. It observes that while the problem in North Carolina is particularly pronounced, it is not exceptional, and discusses a number of other recent examples involving the systematic evasion of *Batson* in other jurisdictions. Part II explains how the history of the District Attorney in this case, Mr. Butler, exemplifies a pattern of discrimination as dramatic as the prosecutors in *Miller-El v. Dretke*, *Foster v. Chatman*, and *Flowers v. Mississippi*. Part II emphasizes the significance of the prosecutor's admission to gender-based strikes, the state Supreme Court's acknowledgment of discrimination, and an Associate Justice's concurrence, which observed that "the jurisprudence of [North Carolina] has effectively overruled *Batson* and *J.E.B.* for post-conviction relief[.]" Part III provides evidence that, of the 25 most populous states, North Carolina is the only state to never grant *Batson* relief. It argues that the consequences of ignoring North Carolina's defiance of *Batson* are significant to criminal defendants, to prospective jurors, and to public confidence in the state's courts. Part IV concludes by observing that this Court has historically intervened when state

courts have "ignored" or plainly refused to give effect to its criminal justice rulings.

I. DEFIANCE OF *BATSON* AND *J.E.B.* IS DEEPLY INGRAINED IN PROSECUTORIAL CULTURE IN NORTH CAROLINA

In North Carolina, to use this Court's phrasing in *Batson*, jury discrimination remains "common and flagrant."[9] Although it has taken no action to address the issue, the state's Supreme Court recently acknowledged that the "North Carolina court system has a well-documented problem with Black citizens being disproportionately excluded from the fundamental civil right to serve on juries."[10] As this case demonstrates, the same is also true with respect to women jurors. Prosecutors and courts in the state have regularly ignored[11] this Court's holding that it violates equal protection for a prosecutor to exercise a peremptory strike against a woman because of a belief that "men . . . might be more sympathetic and receptive to the [state's] arguments."[12] In Mr. Bell's and Mr. Sims' case, the prosecutor asserted that he struck Ms. Morrow because she was a woman, and he wanted a "strong male juror," preferably to serve as foreman.

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[9] *Batson v. Kentucky*, 476 U.S. 79, 103 (1986).

[10] *State v. Richardson*, 891 S.E.2d 132, 201 (N.C. 2023), *cert. denied*, 144 S. Ct. 2692 (2024).

[11] *See, e.g.*, *Richardson*, 891 S.E.2d at 207–08 (discussing "remarks [from prosecutor] indicat[ing] 'that [he] did not know *J.E.B.* prevented him from removing jurors based on gender, and that he felt free to do so").

[12] *J.E.B.*, 511 U.S. at 137–38.

The Court should grant certiorari because intervention is necessary to send a message to prosecutors and state courts that they do not have a "license . . . to proceed with 'business as usual,' . . . [lest] this right, implicit in the equal protection clause and given vitality by the *Batson* ruling, [become] a right without a remedy."[13] Here, the prosecutor confessed to *J.E.B.* error, under the apparent misapprehension that gender-based discrimination lawfully excused race-based discrimination proscribed by *Batson*—an assertion that speaks to the effective inapplicability of both cases in the state.[14] A Justice who concurred in the court's denial of relief in this case plainly acknowledged "the jurisprudence of [North Carolina] has effectively overruled *Batson* and *J.E.B.* for post-conviction relief."[15] This is not something North Carolina courts have authority to do or that this Court should continue to allow unabated.

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[13] *State v. Jackson*, 368 S.E.2d 838, 843 (N.C. 1988) (Frye, J., concurring).

[14] *See generally* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016); Emily Coward, *What Does It Take to Succeed on a* Batson *Claim in North Carolina?*, N.C. CRIM. LAW BLOG, UNC SCH. GOV'T, Feb. 18, 2020, https://nccriminallaw.sog.unc.edu/what-does-it-take-to-succeed-on-a-batson-claim-in-north-carolina/.

[15] *State v. Bell*, 913 S.E.2d 142, 155 (N.C. 2025) (Earls, J., concurring). The court's most recent terms include multiple cases that illustrate this phenomenon. *E.g.*, *State v. Chambers*, 918 S.E.2d 634, 634 (N.C. 2025) (mem.); *Richardson*, 891 S.E.2d at 132; *State v. Hobbs*, 884 S.E.2d 639 (N.C. 2023), *cert. denied*, 144 S. Ct. 1011 (2024).

Prosecutors in the state have been emboldened by the complete lack of accountability for *Batson* and *J.E.B.* violations. This state of affairs is evidenced by the N.C. Conference of District Attorneys' distribution of a *Batson* "cheat sheet" at CLEs—a document specifically designed to undermine the effectiveness of the test this Court set forth in its seminal 1986 opinion.[16] It can be seen in their willingness to threaten judicial complaints against a Black judge if he should dare assign a post-conviction *Batson* claim to another Black judge.[17] It is visible on prosecutorial list-servs, where D.A.s strategize about steering *Batson* claims

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[16] *See State v. Tucker*, 895 S.E.2d 532, 559–60 (N.C. 2023) (holding that "prosecutors' use of [*Batson*] cheat sheet" did not constitute "evidence sufficient to overcome a procedural bar"), *cert. denied*, 145 S. Ct. 196 (2024); *Clegg*, 867 S.E.2d at 907 (stating that "prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a 'cheat sheet' titled '*Batson* Justifications: Articulating Juror Negatives'"); *State v. Augustine*, 847 S.E.2d 729, 732 (N.C. 2020) (quoting lower court's statement that D.A.'s "use of a prosecutorial 'cheat sheet' to respond to *Batson* objections . . . constitute[d] powerful, substantive evidence that these Cumberland County prosecutors regularly took race into account in capital jury selection and discriminated against African-American citizens"); *see generally* Ian A. Mance, *Cheat Sheets and Capital Juries*, 44 CAMPBELL L. REV. 3 (2021) (discussing North Carolina prosecutors' historical use of *Batson* "cheat sheets" and asserting that equal protection doctrine does not permit prosecutors to employ devices designed to undermine the operation of mechanisms imposed by courts to guard against racial discrimination).

[17] Mance, *supra* note 16, at 29 & n.129.

away from Black judges.[18] And it can be seen in the racialized conduct of the prosecutor in this case, who has called the Black defendants he has prosecuted, including Mr. Bell and Mr. Sims, "predators on the African plain," "thugs," and "pieces of trash."[19] This kind of conduct, engaged in by attorneys "charged with the awesome power of seeking and imposing death,"[20] is the consequence of North Carolina state courts' abdication of responsibility to uphold this Court's precedents in *Batson* and *J.E.B.*

Why is North Carolina like this? Certain features of the state's government may help explain why its prosecutors appear more emboldened than their counterparts in other places. North Carolina is one of only two states to fund an advocacy organization for prosecutors and formally situate it within the judicial branch.[21] It is no small operation. The North Carolina Conference of District Attorneys receives millions in annual funding, employs dozens of people, and exerts considerable political power in the state.[22] The

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[18] *Id.*

[19] Order, *State v. Bacote*, 07 CRS 51499, at 4 (Johnson Co. Sup. Ct. Feb. 7, 2025), available at https://eji.org/wp-content/uploads/2005/11/02-07-25-bacote-order.pdf.

[20] *United States v. Caro*, 597 F.3d 608, 646 (4th Cir. 2010) (Gregory, J., dissenting).

[21] The only other state to do this is Georgia. *See* GA. CODE ANN. § 15-18-40 (2025).

Conference is active on *Batson* issues and has brazenly distributed pre-written "*Batson* Justifications" handouts to its membership at CLEs that have been employed in multiple capital cases[23]—a practice it continues to defend.[24] Also likely playing some role is the fact that North Carolina is, depending on how one describes the issue, "the only state in which the prosecutor controls the [criminal court] calendar."[25]

Against this backdrop, the Court should be skeptical of the state's record with respect to *Batson* and *J.E.B.* challenges. As Chief Justice Roberts has noted, "public confidence in the courts" rests, in part, on the expectation that parties not be permitted "to select a

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[22] Ames Alexander and Luciana Perez Uribe Guinassi, *Prosecutors Lobbied NC Lawmakers to Kill Criminal Justice Reform Bills, Emails Show*, (Raleigh) NEWS & OBSERVER, July 22, 2023.

[23] *E.g.*, *Tucker*, 895 S.E.2d at 532; *Augustine*, 847 S.E.2d at 729.

[24] Elizabeth Weill-Greenberg, *The Persistent History of Excluding Black Jurors in North Carolina*, THE APPEAL (Aug. 26, 2019), https://theappeal.org/north-carolina-black-jury-selection/ (quoting the organization's executive director describing the handout as a "sheet of paper" and "appropriate").

[25] *See* N.C. GEN. STAT. § 7A-61 ("The district attorney shall prepare the trial dockets[.]"); *see also* Jeff Welty, *Is North Carolina the Only State in Which the Prosecutor Controls the Calendar?*, N.C. CRIM. LAW BLOG, UNC SCH. GOV'T, Nov. 17, 2015, https://nccriminallaw.sog.unc.edu/is-north-carolina-the-only-state-in-which-the-prosecutor-controls-the-calendar/ (asserting that the claim is "not completely accurate" and noting that prosecutors in South Carolina and Georgia "retain a role in calendaring").

particular judge to hear a case."[26] In North Carolina, the control District Attorneys exert with respect to the specific judge who presides over a matter is at its height at the trial stage and often carries into post-conviction proceedings,[27] a dynamic that likely contributes to the dearth of *Batson* violations in the state. As Stephen Bright has observed, even in places where prosecutors have no say in the selection of a presiding judge, "You're asking the judge to say that the prosecutor intentionally discriminated . . . and that he lied about it. That's very difficult psychologically for the average judge."[28]

While the problem in North Carolina is particularly pronounced, it also reflects trends present in other jurisdictions. The Tar Heel State has distinguished itself perhaps more than any jurisdiction in its willingness to defy this Court's precedents on jury discrimination, but examples of systemic discrimination by prosecutors against criminal defendants and

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[26] JOHN G. ROBERTS, JR., C.J., U.S. SUP. CT., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY at 5, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[27] *See generally Simeon v. Hardin*, 451 S.E.2d 858 (N.C. 1994) (discussing prosecutors' ability in North Carolina to control the trial calendar to gain tactical advantage over criminal defendants).

[28] Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, THE NEW YORKER, June 5, 2015. Mr. Bright represented the prevailing party in three of this Court's cases involving jury discrimination, *Foster v. Chatman*, 578 U.S. 488, 512 (2016); *Snyder v. Louisiana*, 552 U.S. 472 (2008); and *Amadeo v. Zant*, 486 U.S. 214 (1988).

prospective jurors can be found in jurisdictions across the country, giving the problem a more national dimension. The Alameda County (Calif.) D.A.'s capital team, for example, was recently discovered to have systematically discriminated against Black and Jewish prospective jurors for years, referring to them in racially-discriminatory and anti-Semitic terms in internal notes to one another.[29] Until a few years ago, Washington State, in over 40 cases, had never reversed a conviction based on a *Batson* violation,[30] prompting the state Supreme Court to adopt General Rule 37, identifying presumptively invalid reasons for the exercise of peremptory challenges.[31] In 2009, the U.S. Court of Appeals for the Eleventh Circuit described an "astonishing pattern" of "systematic exclusion of African-Americans" from capital juries by prosecutors in Dallas County, Alabama, whose population was 55% Black.[32]

In Houston County, Alabama, which is approximately 25% Black, a local prosecutor was the subject

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[29] *See* Jennifer Gonnerman, *An Investigation into How Prosecutors Picked Death-Penalty Juries*, THE NEW YORKER, Nov. 18, 2024.

[30] *State v. Saintcalle*, 309 P.3d 326, 335 (Wash. 2013), *cert. denied*, 571 U.S. 1113 (2013), *and overruled in part on other grounds by Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017).

[31] Wash. Gen. R. 37(i); *see also State v. Jefferson*, 429 P.3d 467, 476 (Wash. 2018) (discussing *Batson* and the court's "inherent authority to adopt such procedures to further the administration of justice").

[32] *McGahee v. Alabama Dep't Of Corr.*, 560 F.3d 1252, 1266–70 (11th Cir. 2009).

of a federal civil rights lawsuit by the Equal Justice Initiative after "the jury in every death penalty case . . . [was] either all white or had only a single black juror" over a five year period.[33] Bryan Stevenson, the lead attorney for the plaintiffs, explained the man "has repeatedly been found [by courts] to have illegally excluded black people from jury service with peremptory strikes in capital cases but he continues the practice because most people don't know about it."[34] Elsewhere, *The New Yorker*, which has reported extensively on the phenomenon of jury discrimination, reported that prosecutors in Caddo Parish, Louisiana "struck forty-eight per cent of qualified black jurors between 1997 and 2009 and only fourteen per cent of qualified whites."[35]

In sum, jury discrimination remains a pronounced problem in many jurisdictions around the country, and particularly in the South. However, the difference between those places and North Carolina is there is evidence the appellate courts in states like Alabama take the issue quite seriously.[36]

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[33] Death Penalty Information Center, *Historic Civil Rights Suit Filed in Alabama Over Exclusion of Blacks from Jury Service*, Oct. 19, 2011.

[34] *Id.*; *see generally Hall v. Valeska*, 509 F. App'x 834 (11th Cir. 2012) (unpublished).

[35] Edelman, *supra* note 28.

[36] *See, e.g.*, James E. Coleman, Jr. and David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, N.C. STATE BAR JOURNAL, at 14 (Fall 2017)

II. THE HISTORY OF THE DISTRICT ATTORNEY IN THIS CASE EXEMPLIFIES A PATTERN OF DISCRIMINATION AS DRAMATIC AS THE PROSECUTORS IN *MILLER-EL*, *FOSTER*, AND *FLOWERS*

The actions of the prosecutor in this case should also give this Court great pause. In *Miller-El I & II*, the Court was confronted with a District Attorney's Office with a "remarkable" record of striking Black prospective jurors, along with evidence the office employed a manual "outlining the reasoning for excluding minorities from jury service."[37] A decade later, in *Foster v. Chatman*, the Court encountered a prosecutor who offered "shifting explanations" for his strikes, and whose file exhibited a "persistent focus on race."[38] Most recently, in *Flowers v. Mississippi*, the Court was confronted with a prosecutor who "struck 41 of the 42 black prospective jurors [he] could have struck," reflecting a "relentless, determined effort to rid the jury of black individuals."[39]

The evidence concerning the prosecutor in this case, Gregory Butler, is on par with *Miller-El*, *Foster*, and *Flowers*. Mr. Butler's strike history is extensive,

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("As of 2010, Alabama had over 80 appellate reversals because of racially-tainted jury selection[.]").

[37] *Miller-El v. Dretke*, 545 U.S. 231, 264 (2005) (quoting *Miller–El*, 537 U.S. at 334–35).

[38] *Foster*, 578 U.S. at 512 .

[39] *Flowers v. Mississippi*, 588 U.S. 284, 306 (2019).

highly-racialized, and there is evidence he employed the aforementioned *Batson* "cheat sheet"—with the added feature that he was earlier this year also found by a court to have "a history of denigrating Black defendants in thinly veiled racist terms."[40] As with the prosecutor in *Foster*, Mr. Butler's explanations for the juror strikes in Mr. Bell's and Mr. Sims' case shifted over time. The latest explanation he offered for the strikes—that he struck Ms. Morrow because of her *gender*, not because she is Black—is no less unconstitutional than the motive he sought to disclaim.[41] Mr. Butler's affidavit, irrespective of its accuracy, speaks in a broader sense to the lack of regard for *J.E.B.* and *Batson* that is regrettably characteristic of too many District Attorneys in North Carolina. Indeed, in a separate proceeding, a Superior Court Judge found Mr. Butler's "flawed mindset" spoke to a larger problem in North Carolina in which prosecutors manifestly "failed to understand *Batson*'s purpose."[42]

In this capital case, discrimination in jury selection was confessed by the prosecutor, acknowledged by the Supreme Court of North Carolina, but remains unredressed. The Supreme Court of North Carolina "recognize[d] the reprehensible and insidious nature of discrimination in the jury selection process," as well

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[40] Order, *Bacote*, *supra* note 19, at 4.

[41] *Bell*, 913 S.E.2d at 157 (N.C. 2025) (Earls, J., concurring) (stating Mr. Butler's affidavit includes "new, conclusive admissions by the State that it employed a peremptory strike to remove a juror based on gender," which "is a constitutional violation").

[42] Order, *Bacote*, *supra* note 19, at 85.

as "the discriminatory practices of the State *in this case*."[43] Yet the court invoked a procedural bar to avoid reaching the issue. In a concurring opinion, a Justice of the Supreme Court said she "cannot discern what Bell or his counsel could have done differently to achieve relief under our precedent, even in this extraordinary instance where a prosecutor has admitted under oath that he struck a juror based on her gender."[44]

Mr. Butler's affidavit amounts to a confession of structural error in Mr. Bell's case, and the state court's invocation of a novel application of a procedural bar to avoid reaching the issue warrants the Court's intervention.[45] Absent such intervention, Defendant Bell stands to be executed, and Mr. Sims to serve his life in prison, for a conviction obtained by a prosecutor who has admitted to unconstitutional juror discrimination, who likely employed what the state Supreme Court referred to as a *Batson* "cheat sheet"[46] to strike Black jurors in his trial, and who

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[43] *Bell*, 913 S.E.2d at 143 (N.C. 2025) (emphasis added).

[44] *Bell*, 913 S.E.2d at 157 (Earls, J., concurring).

[45] *See Cruz v. Arizona*, 598 U.S. 17, 32 (2023) ("[W]here a state-court judgment rests on a novel and unforeseeable state-court procedural decision lacking fair or substantial support in prior state law, that decision is not adequate to preclude review of a federal question.").

[46] *See Clegg*, 867 S.E.2d at 907 (expressing "significant suspicion" about prosecutors' reasons for distributing the *Batson* "cheat sheet"); Order, *Bacote*, *supra* note 19, at 85 (discussing *Batson* cheat sheet and Gregory Butler).

described the Defendants, two Black men, in closing arguments, as akin to "predators on the African plain."[47]

This Court has indicated in recent years that the necessity of addressing claims involving racial bias and criminal juries sometimes outweighs the import of procedural rules that might otherwise bar their consideration.[48] Notably, in the lower court proceedings, Defendants have managed to meet even the "crippling burden of proof" required of defendants in the pre-*Batson*, *Swain* era, which is to say they have demonstrated that race was a predominating factor in Mr. Butler's peremptory strikes over the course of his career.[49] Earlier this year, a Superior Court Judge "conclu[ded] that race has been a significant factor in strike decisions . . . in cases tried by Gregory C. Butler."[50] These findings and the confessed discrimination in this case should matter, particularly given the highly unusual way that North Carolina's high court disposed of the issue through inconsistent application of a procedural bar. This Court has long "recognize[d] that the penalty of death is different,"[51] and that cases in which it is imposed warrant heightened scrutiny.

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[47] *State v. Sims*, 588 S.E.2d 55, 62–64 (2003).

[48] *E.g.*, *Peña-Rodriguez v. Colorado*, 580 U.S. 1, 21 (2017); *Buck v. Davis*, 580 U.S. 100, 126–28 (2017).

[49] *Batson*, 476 U.S. at 92 n.17.

[50] Order, *Bacote*, 07 CRS 51499, *supra* note 19, at 3.

[51] *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

III. OF THE 25 MOST POPULOUS STATES, NORTH CAROLINA IS THE ONLY STATE TO NEVER GRANT MEANINGFUL RELIEF FOR A *BATSON* OR *J.E.B.* VIOLATION[52]

Despite being the ninth most-populous state, North Carolina has never, in 40 years since *Batson*

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[52] Appellate courts in all of the top 25 states by population have reversed convictions because of *Batson* violations, and many states' appellate courts have a large number of reversals. Those states and some of the relevant opinions, listed in descending order of states' populations, include California, *People v. Gutierrez*, 395 P.3d 186 (Cal. 2017); Texas, *Cooper v. State*, 791 S.W.2d 80 (Tex. 1990) (en banc); Florida, *Nowell v. State,* 998 So.2d 597 (Fla. 2008); New York, *People v. Estwick*, 241 N.E.3d 796 (N.Y. 2024); Pennsylvania, *Com. v. Basemore*, 744 A.2d 717 (Pa. 2000); Illinois, *People v. Hope*, 589 N.E.2d 503 (Ill. 1992); Ohio, *State v. Kirk*, 145 N.E.3d 1092 (Ohio Dist. Ct. App. 2019); Georgia, *Gamble v. State*, 357 S.E.2d 792 (Ga. 1987); Michigan, *People v. Richardson*, No. 360600, 2023 WL 8877208 (Mich. Ct. App. Dec. 21, 2023) (unpublished); New Jersey, *State v. Andujar*, 228 A.3d 236 (N.J. App. Div. 2020), *aff'd as modified*, 254 A.3d 606 (N.J. 2021); Virginia, *Broady v. Commonwealth*, 429 S.E.2d 468 (Va. 1993); Washington, *State v. Jefferson*, 429 P.3d 467 (Wash. 2018) (en banc); Arizona, *State v. Lucas*, 18 P.3d 160 (Ariz. Ct. App. 2001); Tennessee, *State v. Collins*, No. M201501030CCAR3CD, 2017 WL 2126704 (Tenn. Crim. App. May 16, 2017); Massachusetts, *Com. v. Maldonado*, 788 N.E.2d 968 (Mass. 2003); Indiana, *Addison v. State*, 962 N.E.2d 1202 (Ind. 2012); Missouri, *State v. McFadden*, 216 S.W.3d 673 (Mo. 2007); Maryland, *Ray-Simmons v. State*, 132 A.3d 275 (Md. 2016); Wisconsin, *State v. Guerra-Reyna*, 549 N.W.2d 779 (Wis. Ct. App. 1996); Colorado, *People v. Madrid*, 494 P.3d 624 (Colo. App. 2021), *aff'd*, 526 P.3d 185 (Colo. 2023); Minnesota, *State v. McRae*, 494 N.W.2d 252 (Minn. 1992); South Carolina, *State v. Patterson*, 414 S.E.2d 155 (S.C. 1992); Alabama, *Neal v. State*, 612 So. 2d 1347 (Ala. Crim. App. 1992); and Louisiana, *State v. Coleman*, 970 So. 2d 511 (La. 2007). *J.E.B.* reversals are more

and more than 30 years since *J.E.B.*, granted an appellate remedy for jury discrimination. By contrast, Alabama has had nearly 100 reversals of conviction in that time.[53] The phenomenon in North Carolina is non-partisan and has persisted through different eras in which judges from both parties controlled the state's appellate courts. It is certainly not that jury discrimination does not exist in the state, as the problem remains a significant one, a fact acknowledged by

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difficult to locate because of state courts' tendency to refer to "gender-based discrimination" challenges as *Batson* challenges, consistent with this Court's designation. *See, e.g.*, *State v. McCord*, No. 58795-5-II, 2025 WL 1445534, at *1 (Wash. Ct. App. May 20, 2025) (unpublished) (ruling on "*Batson* challenge," and holding "trial court erred in finding that McCord did not make a prima facie showing of gender discrimination"); *Elliott v. State*, 972 A.2d 354, 369 (Md. App. 2009) ("[T]he State's explanation does not pass muster under *Batson*. The State had the burden of providing a gender-neutral explanation for its strikes. It failed to do so."); *see also Flowers*, 588 U.S. at 301.

[53] Coleman & Weiss, *supra* note 36, at 14.

multiple Governors[54] and, as recently as 2023, by the Supreme Court of North Carolina itself.[55]

After a quarter century of inaction from the state's Supreme Court, during which time the Court considered and denied nearly 75 claims of jury discrimination,[56] the N.C. General Assembly passed the Racial Justice Act, in an attempt to breathe life into *Batson* in the state.[57] Three years later, after initial hearings under the Act (which involved Mr. Butler's cases) uncovered "a wealth of evidence showing the persistent, pervasive, and distorting role of race in

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[54] *See* WECT Staff, *Gov. Perdue Issues Pardon of Innocence for Wilmington 10*, WECT NEWS 6, Dec. 31, 2012 (quoting Governor Perdue stating that "new evidence was made available to me in the form of handwritten notes from the prosecutor who picked the jury at trial" and the "notes show with disturbing clarity the dominant role that racism played in jury selection"); *see also* N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., REPORT 2020, at 100 (report issued by task force co-chaired by the current Governor, Josh Stein, which concluded that "enforcement [of prohibitions on jury discrimination] remains elusive" in North Carolina because of "covert traditions and practices of discriminatory exclusion [which] are persistent and require vigilance to root out").

[55] *See State v. Richardson*, 891 S.E.2d 132, 201 (N.C. 2023) ("The North Carolina court system has a well-documented problem with Black citizens being disproportionately excluded from the fundamental civil right to serve on juries."), *cert. denied*, 144 S. Ct. 2692 (2024).

[56] Pollitt & Warren, *supra* note 14, at 1986–88.

[57] Editorial, *Race and Death Penalty Juries*, N.Y. TIMES, Feb. 6, 2012, A22.

jury selection throughout North Carolina,"[58] lawmakers repealed the law.[59] The decision, to many, appeared animated by what members of this Court once called "a fear of too much justice."[60] To date, no defendant has obtained a meaningful remedy for jury discrimination in their trial, and the state remains, for all intents and purposes, a *Batson*-free zone.

The consequences of ignoring North Carolina's defiance of *Batson* are significant. *Batson* recognized that discriminatory jury selection inflicts harm on "the entire community" and "undermine[s] public confidence in the fairness of our system of justice."[61] In subsequent opinions, the Court has repeatedly stated that a discriminatory peremptory strike "casts doubt on the integrity of the judicial process."[62] That doubt presently exists in North Carolina. The state's largest newspaper recently began a column with the words, "There's a growing crisis of confidence in the

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[58] *Augustine*, 847 S.E.2d at 731 (quoting trial court order in *State v. Robinson*, 846 S.E.2d 711 (N.C. 2020)).

[59] Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013, A13.

[60] *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting, joined by Marshall, J., Blackmun, J., and Stevens, J.)

[61] *Batson*, 476 U.S. at 87.

[62] *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

legitimacy of the courts."[63] Among other problems, people in the state know jury discrimination exists, and they are troubled by the failure of their courts—in even a single instance—to address it.

State courts' failures to remedy confessed acts of jury discrimination have undermined public confidence in the jury's essential fact-finding function, in convictions, and in the integrity of the judiciary in North Carolina.[64] The failure of state courts to act when confronted with obvious acts of jury discrimination has also compounded other legal errors. In a number of instances, people denied *Batson* relief in the face of credible challenges have gone on to be convicted for crimes they did not commit. A decade after *Batson*, for example, this Court denied review of a death sentence imposed on a Black teenager[65]—who Justice Scalia famously held out as among those most deserving of death,[66] and who two decades later was

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[63] Ned Barnett, *Under Chief Justice Newby, NC Courts Grow More Partisan*, (Raleigh) NEWS & OBSERVER, March 28, 2022.

[64] *See, e.g.*, Br. of Amicus Curiae, N.C. Assoc. of Black Lawyers and N.C. State Conference of the NAACP, at 2–3, *State v. Tucker*, 895 S.E.2d 532 (N.C. 2023) (discussing N.C. Conference of D.A.'s distribution of a *Batson* "cheat sheet," encouraging the Court "to reject the State's benign characterization of this troubling document," and expressing concern about the "troubling message [ignoring it sends] to the state's trial courts and to litigants").

[65] *McCollum v. North Carolina*, 512 U.S. 1254, 1254 (1994).

[66] *See Callins v. Collins*, 510 U.S. 1141, 1142–43 (1994) (Scalia, J., concurring) (discussing *McCollum*).

exonerated by DNA[67]—after North Carolina courts denied him a remedy for another act of jury discrimination.[68]

IV. THIS COURT HAS HISTORICALLY INTERVENED WHEN STATE COURTS HAVE "IGNORED" OR PLAINLY REFUSED TO GIVE EFFECT TO ITS CRIMINAL JUSTICE RULINGS

One of the important roles of the Court is maintaining uniform application of core Constitutional rights in criminal proceedings. For this reason, the Court often intervenes when an individual state approaches an issue of criminal and constitutional law in a way that conflicts with the approach taken by almost every other state.[69] The Court has also historically intervened when state courts have plainly refused to give effect to its rulings. In multiple instances involving prisoners on death row, in particular, the Court has summarily reversed state courts

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[67] *Gilliam v. Sealey*, 932 F.3d 216, 221–22 (4th Cir. 2019).

[68] *State v. McCollum*, 433 S.E.2d 144, 159 (N.C. 1993).

[69] *See, e.g.*, *Ramos v. Louisiana*, 590 U.S. 83 (2020) (Louisiana and Oregon and nonunanimous juries); *Timbs v. Indiana*, 586 U.S. 146 (2019) (Indiana and excessive fines); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Louisiana and the death penalty for non-homicide offenses); *Simmons v. South Carolina*, 412 U.S. 154 (1994) (South Carolina and capital jury instructions); *Hunter v. Underwood*, 471 U.S. 222 (1985) (Alabama and disenfranchisement for crimes of moral turpitude).

that have refused to give effect to its criminal justice jurisprudence.[70]

Here, four decades of data compel the conclusion that North Carolina's state courts have failed to give effect to the Court's landmark rulings in *Batson* and *J.E.B.* Mr. Bell's and Mr. Sims' case provides a compelling example of this phenomenon, involving a prosecutor who used racial, derogatory terms to refer to the Defendants, and who, when challenged for making racially-discriminatory peremptory strikes, managed to defend himself to the trial court, only to later admit that he had exercised strikes for gender-based reasons.

For both men, and Mr. Bell, in particular, who is capitally-sentenced, the stakes could not be higher. This Court once stated in another case originating from North Carolina that "the penalty of death is qualitatively different," and "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific

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[70] *See, e.g.*, *Cruz*, 598 U.S. at 17 (Arizona's application of *Simmons v. South Carolina*); *Bosse v. Oklahoma*, 580 U.S. 1 (2016) (per curiam) (Oklahoma's application of *Booth v. Maryland*, 482 U.S. 496 (1987)); *Wearry v. Cain*, 577 U.S. 385 (2016) (per curiam) (Louisiana's application of *Brady v. Maryland*, 373 U.S. 83 (1963)); *Hinton v. Alabama*, 571 U.S. 263 (2014) (Alabama's application of *Strickland v. Washington*, 466 U.S. 668 (1984)); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam) (Georgia's application of *Strickland*); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (Florida's application of *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); *Smith v. Texas*, 543 U.S. 37 (2004) (Texas' application of *Penry v. Johnson*, 492 U.S. 302 (1989)).

case."[71] It has likewise said that "discrimination in the selection of jurors . . . places the fairness of a criminal proceeding in doubt."[72] For these reasons, the Court should grant certiorari and carefully review the case below.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' petition for certiorari.

Respectfully submitted,

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Dated: September 19, 2025

[71] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

[72] *Powers v. Ohio*, 499 U.S. 400, 411 (1991).