No. 25-5469
CAPITAL CASE

IN THE

Supreme Court of the United States

BRYAN CHRISTOPHER BELL & ANTWAUN KYRAL SIMS,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF *AMICI CURIAE* THE DUKE UNIVERSITY SCHOOL OF LAW CENTER FOR CRIMINAL JUSTICE AND PROFESSIONAL RESPONSIBILITY AND THE DUKE UNIVERSITY SCHOOL OF LAW WILSON CENTER FOR SCIENCE AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are centers within Duke University School of Law united in their commitment to the rule of law and the integrity of the criminal justice system. Recognizing that the fairness and legitimacy of our justice system depends upon the nondiscriminatory composition of juries, *amici* urge this Court to enforce its holding in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), prohibiting juror discrimination on the basis of gender.

The Wilson Center for Science and Justice at Duke Law brings together faculty and students at Duke University in law, medicine, public policy, and arts and sciences to pursue research, policy, and education to improve criminal justice outcomes. Their work is nonpartisan and evidence-informed. The Wilson Center is devoted to safeguarding the accuracy and integrity of the criminal justice system, which includes ensuring that all citizens have an equal opportunity to participate in the legal process. The Center is particularly interested in this brief because of its focus on the importance of the jury as a cornerstone of our justice system and the need for courts to fully enforce the constitutional right to be free from juror discrimination on the basis of gender.

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[1] *Amici* confirm that no party or counsel for any party authored this brief in whole or in part, that no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief, and that counsel also provided both parties more than ten days' notice of their intent to file this brief.

The Wilson Center was founded and is led by Faculty Director, Professor Brandon L. Garrett, the David W. Ichel Professor of Law, where he has taught since 2018. Garrett was previously the Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law. His research and teaching interests include criminal procedure, wrongful convictions, habeas corpus, corporate crime, scientific evidence, civil rights, and constitutional law.

Duke's Center for Criminal Justice and Professional Responsibility (CCJPR) promotes justice in criminal cases and works to identify, remedy, and prevent the wrongful conviction of innocent people. Established in 2006, CCJPR was founded and is led by James E. Coleman, Jr., the John S. Bradway Distinguished Professor of the Practice of Law at Duke University School of Law. For his lifelong commitment to equal justice, due process, and the rule of law, Professor Coleman was awarded the 2022 Raphael Lemkin Rule of Law Guardian Medal by the Bolch Judicial Institute at Duke University School of Law.

This brief reflects the central concern of CCJPR's newest initiative, the Inclusive Juries Project (IJP). IJP maintains that nondiscriminatory jury formation helps to prevent miscarriages of justice and to ensure the public acceptance of jury verdicts. Through education, research, and collaborative projects, IJP works to end discriminatory jury selection practices and safeguard the constitutional right to a fair and impartial jury.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the 1994 landmark case of *J.E.B. v. Alabama ex rel. T.B.*, this Court extended the longstanding constitutional protections against race-based juror discrimination to juror strikes motivated by gender. 511 U.S. 127, 129 (1994). The *J.E.B.* court recognized that "gender, like race, is an unconstitutional proxy for juror competence and impartiality," and that the Fourteenth Amendment's "Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race." *Id.* An important milestone, *J.E.B.* promised equal access to the jury box for citizens reporting for jury duty, irrespective of gender. But constitutional rights are not self-enforcing, and settled-in-law is not settled-in-practice.

Over three decades have passed, and, while this Court has issued several opinions clarifying and strengthening the *Batson* framework applicable to claims of racial discrimination, it has never revisited the practice of gender-based juror discrimination. In the intervening years, even in cases with explicit admissions of gender-motivated juror strikes, the *J.E.B.* doctrine has been ignored, misunderstood, and unenforced, as these cases illustrate. Despite a prosecutor's sworn statements confessing that he struck a juror as part of a "concerted effort to send male jurors" to the jury box, and a trial court's finding that this strike "was motivated in substantial part by [the juror's] gender," the North Carolina Supreme Court denied relief, as it has in every other *J.E.B.* case it has reviewed. *See State v. Bell*, 387 N.C. 262, 267, 285 (2025); s*ee also State v. Richardson*, 385 N.C. 101, 202–03 (2023); *State v. Maness*, 363 N.C. 261, 276 (2009); *State v. Call*, 349 N.C. 382, 403–04 (1998); *State v.*

Gaines; 345 N.C. 647, 670 (1997); *State v. Bates*, 343 N.C. 564, 595–97 (1996); *State v. Best*, 342 N.C. 502, 513 (1996). Were a party to admit that they struck Black jurors in favor of sending white jurors to the jury box, such strikes would not be tolerated. Yet, explicit gender discrimination, in these cases and others described below, is tolerated without remedy. Today, in North Carolina and elsewhere, the promise of *J.E.B.* is unfulfilled.

Failure to apply this court's *J.E.B.* ruling has serious consequences, as the harm caused by juror discrimination "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). In light of that, further guidance confirming the existence, scope, and meaning of the *J.E.B.* framework is long overdue and sorely needed. Without such guidance from this Court, the rule of law, legitimacy of the courts, and public understanding of the right to be free from juror discrimination remain at risk. We ask this Court to reaffirm the Fourteenth Amendment's application to juror strikes motivated by gender, and to issue an opinion clarifying the contours of this constitutional right.

ARGUMENT

I. Even in Cases with Explicit Admissions of Discriminatory Intent, *J.E.B.* is Both Underenforced and Misapplied, Resulting in Failure to Address Gender Discrimination in the Jury Box.

A. *J.E.B.* is Rarely Raised, Which Strongly Suggests the Bar is Unfamiliar with the Doctrine.

Relevant case law reveals that parties litigate claims of race-based juror discrimination at substantially higher rates than claims of gender-based juror discrimination. This contrast emerges when reviewing the appellate treatment of such claims. In North Carolina, for example, appellate courts have considered *Batson* claims in more than one-hundred twenty cases. *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1957 (2016) (listing one-hundred fourteen cases decided between 1986 and 2016); *see, e.g., State v. Campbell*, 384 N.C. 126, 127 (2023); *State v. Richardson*, 385 N.C. 101, 191 (2023); *State v. Tucker*, 385 N.C. 471, 472 (2023); *State v. Clegg*, 380 N.C. 127, 129 (2022). By contrast, they have considered claims raised under *J.E.B.* in only ten cases, two of which are the cases at bar. *See State v. Sims*, 387 N.C. 349, 353–55 (2025); *State v. Bell*, 387 N.C. 262, 263 (2025); *State v. Richardson*, 385 N.C. 101, 202–03 (2023); *State v. Maness*, 363 N.C. 261, 276 (2009); *State v. Call*, 349 N.C. 382, 403–04 (1998); *State v. Gaines*, 345 N.C. 647, 670 (1997); *State v. Bates*, 343 N.C. 564, 595–97 (1996); *State v. Best*, 342 N.C. 502, 513 (1996); *State v. Gupton*, No. COA23-661, 2025 WL 1949973 (N.C. App. July 16, 2025) (unpublished); *State v. Holden*, 275 N.C. App. 421

(2020) (unpublished). North Carolina appellate courts have never found a *J.E.B.* violation, even in cases in which the discrimination is acknowledged.

The pattern is repeated in the Fourth Circuit, where *Batson* is cited in two hundred fifteen cases. In contrast, the *J.E.B.* decision is cited in twenty-eight cases, only *seven* of which involve a claim of gender-based discrimination in jury selection. *United States v. Roane*, 378 F.3d 382, 397 (4th Cir. 2004); *United States v. Green*, 599 F.3d 360, 377 (4th Cir. 2010); *United States v. Tipton*, 90 F.3d 861, 881 (4th Cir. 1996); *United States v. Jordan*, No. 94-5602, 1995 WL 543521, at *2, fn 4 (4th Cir. Sept. 14, 1995); *United States v. Ray*, No. 93-5688, 1994 WL 642205, at *3, fn * (4th Cir. Nov. 15, 1994); *Richardson v. Boddie-Noell Enters., Inc.*, No. 03-1011, 2003 WL 22429534, at *2–3 (4th Cir. Oct. 27, 2003); *United States v. Wingate*, No. 03-4905, 2004 WL 2457771, at *1 (4th Cir. Nov. 3, 2004).

Indeed, this Court has issued several significant, frequently invoked decisions in recent years clarifying the scope of *Batson*, but has not once revisited its holding in *J.E.B. See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); *Flowers v. Mississippi*, 588 U.S. 284 (2019).

Perhaps parties raise fewer gender-based juror discrimination claims because this type of discrimination occurs less frequently. Nevertheless, while we lack data documenting the rate of gender-based removals, the facts of the case at bar, as well as the facts in the *J.E.B.*-based appellate decisions, show that parties are openly discriminating based on gender. Indeed, in some instances, parties admit to striking jurors based on gender. *See, e.g.*, *United States v. Martinez*, 621 F.3d

101, 104 (2d Cir. 2010) (over twenty years after *J.E.B.* was decided, attorney "submitted written notice to the district court [of] inten[t] to exercise peremptory challenges on the basis of gender" and stated that "gender probably, almost surely, will be my primary reason for exercising peremptories"). Often these openly gender-motivated strikes pass without objection, allowing unconstitutional behavior to persist in our courtrooms. *See, e.g.*, *Bell*, 387 N.C. at 277 (the case at bar, in which the defense failed to object to the State's strikes despite the State's assertion that they wanted male jurors). This failure of litigation, as discussed in sections B and C, *infra*, suggests a troubling ignorance on the part of lawyers that gender-based strikes violate the Constitution, and the urgent need for this Court's intervention.

B. Even in Cases of Explicit Admission of Gender Discrimination, Courts Fail to Find Discrimination.

This Court should reiterate and clarify the prohibition announced in *J.E.B.* because, in its silence, unconstitutional gender-based strikes occur with impunity in our courts. Take the case at hand, *State v. Bell*. As the majority opinion emphasizes, the prosecution in this case stated at least three times that they wanted more men on the jury, then proceeded to use twenty of its twenty-four peremptory strikes to exclude female prospective jurors. 387 N.C. 262, 277, 280 (2025). Amazingly, it was only after twenty-one years of litigation, and after the prosecutor signed an affidavit admitting to striking a female juror because he wanted male jurors, that a court found the explicit admission of strikes based on gender was more likely than not motivated by intentional gender-based discrimination. *Id.* at 266–67. Ultimately, however, the North Carolina

Supreme Court held that the issue was waived and now is procedurally barred. *Id.* at 282. If the parties in this case had understood *J.E.B.*'s prohibition, this injustice, still unremedied decades later, could have been avoided entirely.

Even in cases where appellate courts do find *J.E.B.* violations, trial court tolerance of admitted gender discrimination demonstrates that our justice system does not uniformly appreciate the constitutional prohibition against gender-based strikes. *See, e.g.*, *Elliott v. State*, 972 A.2d 354, 367–68 (Md. App. 2009) (trial court overruled a *J.E.B.* objection where the State admitted to striking male jurors to balance the jury); *State v. Chatwin*, 58 P.3d 867, 868–73 (Utah Ct. App. 2002) (the trial court, mentioning the spousal-abuse nature of the case, refused to uphold the *J.E.B.* objection where the prosecutor stated, in part, "I therefore made efforts to take men off of the jury."). Lower courts need guidance from this Court on the right to be free from gender-based juror discrimination.

C. This Court Should Make Clear That Discrimination Based on Gender Violates an Individual Prospective Juror's Equal Protection Rights, Without Regard to How Many Men or Women Otherwise Will be Seated.

In the limited body of *J.E.B.* case law, a clear pattern emerges: Many lawyers and judges believe that gender-based strikes against individual jurors are allowed to seat a jury balanced between men and women. For example, in *State v. Lowe*, the State admitted striking male jurors to balance the jury. The trial court overruled the defendant's objection, finding that "no equal protection violation [occurred] because the final jury panel consisted of an equal number of

males and females." 267 Neb. 782, 789–92 (2004). In *State v. Richardson*, the North Carolina Supreme Court, citing the number of men and women on the jury, denied a gender-discrimination claim "in light of the composition of the jury as it existed in part at the" time of the objection. 385 N.C. 101, 202–04 (2023). Similarly, in *State v. Erickson,* the prosecutor used all nine peremptories to strike male jurors. Upon defendant's objection, the trial court found no violation "because the jury empanelled was gender-balanced." 148 Idaho 679, 687 (Ct. App. 2010).

This Court should reaffirm that striking a single juror due to the juror's gender violates Equal Protection; the Constitution does not tolerate such discrimination to achieve gender balance. Tolerance of unconstitutional gender balancing weakens a critical holding underlying modern *Batson* jurisprudence: "In the eyes of the Constitution, one [] discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019). As this Court explained in *Flower*s, the demographic balancing argument is absolutely impermissible in the context of race. *Id.* at 300. This Court, in both *Flowers* and *Batson*, expressly rejected the argument that the Constitution allows both sides to use discriminatory strikes and "in essence balance things out." *Id.*; *Batson*, 476 U.S. at 99. "Under the Equal Protection Clause, the [*Batson*] Court stressed, even a single instance of race discrimination against a prospective juror is impermissible." *Flowers,* 588 U.S. at 300. *See also Snyder v. Louisiana,* 552 U.S. 472, 478 (2008) (recognizing that the Constitution prohibits "striking even a single prospective juror for a discriminatory purpose."); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the

Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.") (internal quotations omitted).

To be sure, gender discrimination against individual prospective jurors may be less obvious and visible than race-based juror discrimination. For that reason, it is especially important for this Court to reject the gender balancing justification for juror discrimination. Given that jury panels are often roughly split between men and women, a party can discriminate against one or more jurors on the basis of gender under the judicial radar. *See Flowers*, 588 U.S. at 300 (noting that, in most jurisdictions, a prosecutor employing race-based strikes would have enough strikes to remove all of the prospective Black jurors from the jury). The relative gender balance in jury pools may obscure, but does not negate, the constitutional harm of juror discrimination during the voir dire process. Consequently, to ensure uniform application, the law proscribing unconstitutional gender-based discrimination must be clear and unequivocal. By clarifying that the "single instance" prohibition in *Batson* and *Flowers* applies equally in the case of gender, this Court will advance justice and protect the rights of our citizens.

Without this Court's intervention, lower courts may exclude an unknown number of eligible potential jurors on the basis of their gender, in violation of their constitutional right to be included in the sacred civic duty of jury service. *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 726 (1992). Imagine a male voter turned away from his polling place by a poll worker because the last ten voters who entered were men, and the poll workers sought a gender balance among voters; indeed, that is not a far-

fetched analogy. *See* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1105 (2014) ("At the founding, jury service and voting were twin political rights, equal in stature and importance."). This Court would have no trouble recognizing that scenario as a clear instance of gender discrimination forbidden by the Equal Protection Clause. It should have no difficulty doing so in the case of prospective jurors struck from the jury box on the basis of their gender to promote gender balance.

D. This Court Should Clarify that Strikes of the Objecting Party are Irrelevant When Determining Whether a Party Engaged in Unconstitutional Gender-Based Juror Discrimination.

North Carolina appellate courts recognize that *Batson* case law applies to *J.E.B.* claims, *see, e.g.*, *State v. Bates*, 343 N.C. 564, 596 (1996), but the Court below nevertheless failed to apply this Court's controlling precedent to allegations of gender discrimination. It did so in part taking into consideration the irrelevant factor of the objecting party's strikes.

This Court has held that the peremptory strikes of the party challenging an allegedly discriminatory juror strike are not relevant to a court's consideration of *Batson* challenge. *Miller-El v. Dretke*, 545 U.S. 231, 245, fn 4 (2005). The North Carolina Supreme Court recognized and applied this holding in *State v. Hobbs*, 374 N.C. 345, 357 (2020). The logic of this holding is similar to that undergirding the prohibition on discriminatory strikes in service of demographic balance on the jury: individual discrimination cannot be justified or excused with a "both-sides-can-do-it argument." *Flowers v. Mississippi*, 588 U.S. 284, 300 (2019). However, in the opinion below, the majority

concludes its decision by condemning not the State's admittedly discriminatory approach to juror selection, but instead what it describes as "the defense's practice of systematically eliminating men from the jury." *State v. Bell*, 387 N.C. 262, 281 (2025). This legally irrelevant fact further reflects the court's failure to faithfully apply *Batson* precedent to *J.E.B.* claims, and, once again, demands greater clarity from this Court.

II. This Court, Consistent With its Duties to Educate the Public, Uphold the Rule of Law, and Maintain Faith and Integrity in the Courts, Should Issue an Opinion Reaffirming Constitutional Protections Against Gender-Based Jury Discrimination.

A. Individual Jurors Have a Constitutional Right to be Free from Discrimination in Jury Selection.

Jury service is an essential aspect of citizenship. A "central foundation of our justice system and our democracy," juries express the voice of the people in matters of justice. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017). "The jury system postulates a conscious duty of participation in the machinery of justice . . . One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse." *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922).

This Court recognizes that, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). "Just as suffrage ensures the people's ultimate control in the legislative and

executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (citations omitted). Simply put, "[t]he jury is a tangible implementation of the principle that the law comes from the people." *Pena-Rodriguez*, 580 U.S. at 210.

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). Discriminatory juror strikes undermine the democratic role of the jury, cause "profound personal humiliation," *Powers*, 499 U.S. at 413, and constitute a legal "assertion of [the struck juror's] inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). For this reason, this Court recognizes that juror discrimination is "at war with our basic concepts of a democratic society and a representative government." *Smith*, 311 U.S. at 130.

Two bodies of constitutional law protect the representative nature of the jury. The Fair Cross Section guarantee, based in the Sixth Amendment's impartial jury provision, prohibits the systematic exclusion of distinctive groups from jury pools. *Duren v. Missouri*, 439 U.S. 357 (1979). And *Batson* and its progeny, based in the Fourteenth Amendment's Equal Protection clause, protect against individual juror discrimination during voir dire. *Batson v. Kentucky*, 476 U.S. 79 (1986). Importantly, *Batson* and *J.E.B.* are not concerned with the eventual composition of the seated jury, but the fair, non-discriminatory treatment of individual prospective jurors. If jurors are fairly seated, the final composition of the seated jury is not a matter of constitutional concern. Consequently, deciding which individual jurors should be seated with an eye to the gender makeup of the jury is doubly

objectionable; an impermissible means to a legally irrelevant goal.

The *Batson* right is two-fold: The defendant has a right to a jury that is formed in a nondiscriminatory manner, and the individual prospective juror has a right to non-discriminatory treatment in jury selection. The *J.E.B.* court's extension of the *Batson* doctrine to strikes motivated by gender "affirmed the principles that the creation of a jury should uphold not only a defendant's rights (under the Equal Protection Clause and the Sixth Amendment right to a fair and impartial trial), but also the rights of the jurors themselves not to be excluded based on protected status characteristics." Vivian N. Rotenstein & Valerie P. Hans, *Gentlewomen of the Jury*, 29 MICH. J. GENDER & L. 243, 254 (2022).

The misapplication of *J.E.B.* described above degrades the rights of prospective jurors in American courtrooms. It is neither appropriate nor constitutional for lawyers and judges to discriminate on the basis of gender in the service of achieving a gender-balanced jury, or for any other reason. While the Constitution protects the right to a jury assembled from a *jury pool* representing a fair cross-section of the community, it is not concerned with the gender balance on any particular seated jury. Unfortunately, in the time since *J.E.B.* was decided, doctrinal confusion has tainted both *Batson* and fair cross-section jurisprudence, eroding these core constitutional rights protecting jury formation. *See, e.g.,* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 145 (2012) (concluding that courts often wrongly apply an intent requirement from

equal protection jurisprudence when reviewing Sixth Amendment fair cross-section claims).

Nowhere is this doctrinal confusion more apparent than in the litigation and review of *J.E.B.* claims, at the expense of individual prospective jurors. This case presents an opportunity to untangle and clarify the constitutional rights applicable to jury formation, and to guard against future errors of constitutional interpretation that contribute to further erosion of individual constitutional rights.

B. A Decision Clarifying *J.E.B.* is Crucial to the Uniform Application of the Law and Will Protect the Fairness and Integrity of the Courts.

As this Court recognizes, fair and impartial juries are critical to the acceptance of legal judgments, which is "essential to respect for the rule of law." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017). The removal of jurors on the basis of gender is an affront to the rule of law, and weakens the democratic foundation of our legal and judicial systems. Clearly, this Court's holding in *J.E.B.* has not been embraced or understood by the bench and the bar. Lawyers baldly seek approval from courts to make gender-based strikes and, as in the case at bar, defend against race-based *Batson* challenges by explaining that their discrimination was based on gender, not race. Judges dismiss *J.E.B.* claims when seated juries appear gender balanced, as though that goal justifies the discrimination. This Court should grant petitioners' cert petition and uphold the Superior Court's finding of intentional discrimination against potential juror Viola Morrow on the basis of her gender. In doing so, the Court can use its decision to educate the public, the bench, and the bar regarding the application of the

Equal Protection Clause in such cases, and reaffirm the promise of equal access to jury service for all American citizens, regardless of gender.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioners' briefs, this Court should grant Petitioners' petition for certiorari.

Respectfully submitted,

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