No. _____
(CAPITAL CASE)

IN THE

Supreme Court of the United States

ALI AWAD MAHMOUD IRSAN,
Petitioner,

v.

STATE OF TEXAS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Texas law invests trial courts with the discretion to excuse venirepersons in capital cases when the parties agree to do so: "One summoned upon a special venire *may* by consent of both parties be excused from attendance *by the court* at any time before he is impaneled." Tex. Code Crim. Proc. Ann. art. 35.05 (emphasis added). The statute constrains neither the bases for the parties' agreement nor the trial judge's discretion to implement those agreements. Such agreements—which are commonplace in Texas and elsewhere—often exclude far more prospective jurors from service than either for-cause or peremptory challenges, as happened in this case.

Here defense counsel agreed to excuse an apparently qualified Black venireperson and—after the venireperson could no longer hear what counsel was saying—informed the trial court and the prosecutor that he agreed to excuse her because she was a Black woman. After a short exchange that made plain the trial court apprehended counsel's race-based motivation, the trial court speculated that defense counsel must have a "good reason" for it. The trial court not only exercised its discretion to excuse the juror at issue, but subsequently excused other Black women at the request of the parties.

This case presents the following questions:

1. Does the knowing judicial enforcement of defense counsel's explicitly race-based agreement to exclude a Black woman from the venire violate the Equal Protection Clause?

2. Does a prosecutor's knowing acquiescence in defense counsel's racially motivated efforts to exclude Black women from jury service violate the Equal Protection Clause?

3. Do the Equal Protection rights of prospective jurors and the integrity of the courts require a remedy when the "officials responsible for the selection of [a jury] panel" fail in their "constitutional duty to follow a procedure . . . which would not 'operate to discriminate in the selection of jurors on racial grounds'"?[1]

[1] *Avery v. Georgia*, 345 U.S. 559, 561 (1953) (internal citation and quotation marks omitted).

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the case caption.

LIST OF DIRECTLY RELATED CASES

State of Texas v. Ali Awad Mahmoud Irsan, Cause No. 1465609 (184th Dist. Ct., Harris Co., Texas); judgment entered Aug. 14, 2018.

Irsan v. State of Texas, 708 S.W.3d 584 (Tex. Crim. App. 2025).

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PETITION FOR A WRIT OF CERTIORARI

Ali Awad Mahmoud Irsan petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals ("TCCA").

OPINIONS BELOW

The TCCA's February 26, 2025, published opinion, *Irsan v. State*, 708 S.W. 3d 584 (Tex. Crim. App. 2025), and April 16, 2025, order denying rehearing are attached as appendices.

STATEMENT OF JURISDICTION

The TCCA entered its judgment on February 26, 2025. Irsan's timely petition for rehearing was denied on April 16, 2025. On July 9, 2025, and again on August 1, 2025, this Court extended the time to file this petition to September 13, 2025. *Irsan v. Texas*, No. 25A15 (U.S. 2025). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution: "…[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Also at issue is Tex. Code Crim. Proc. Ann. art. 35.05, which states: "One summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled." *Id.*

STATEMENT OF THE CASE

Texas law gives trial courts the power to excuse venirepersons in capital cases if the parties agree: "One summoned upon a special venire *may* by consent of both parties be excused from attendance *by the court* at any time before he is impaneled." Tex. Code Crim. Proc. Ann. art. 35.05. (emphasis added). While the parties' agreement is a precondition to its exercise, the trial court has

exclusive authority to excuse jurors, and such excusals are at the trial court's *discretion*. The parties are under no obligation to *sua sponte* disclose their reasons for agreeing to exclude a juror, and Texas courts often summarily excuse the "agreed" jurors without inquiry into the bases for the agreements. However, there is no impediment to a judge inquiring into the parties' reasons or declining to implement the agreement and excuse the juror. In this case, defense counsel informed the trial court of his racially motivated reason for agreeing to dismiss a juror, and the trial court nonetheless proceeded with the agreed-upon excusal.

On June 4, 2018, prospective juror Jocelyn Henderson told the trial judge that her employer would pay her for only two weeks of trial. When the trial court asked Ms. Henderson whether that would create a financial hardship for her, she responded, "Can I run some numbers and look at that . . .?" The trial court then told Ms. Henderson that she could "come back Wednesday [and] let me know. . . [b]ecause I think you'd be a great juror, so we'd love to have you if it's not a financial hardship." 25 RR 105.[2] On Wednesday, June 6, 2018, defense counsel and the prosecutor told the trial court that they had agreed to excuse Ms. Henderson. 27 RR 143. After Ms. Henderson was told by telephone that she would be excused, she stated that she wanted to serve on the jury, adding that she was "really interested in doing it," and had made a request of her employer that she be given weekend work hours. *Id*.

With Ms. Henderson still on the phone, the judge asked the parties if they still wanted to excuse her:

[2] We cite to the transcribed testimony from Petitioner's trial as "RR" ("Reporter's Record") and to the motions, court orders, and other documents filed with the trial court clerk as "CR" ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary (defining "Clerk's Record" and "Reporter's Record"). We cite to the Supplemental Sealed Clerk's Record—containing the juror questionnaires and other information—as "SSCR." In each instance, the citation form is as follows: [volume number] RR/CR/SSCR [pages].

THE COURT: Did y'all hear that? She really wants to be on the jury, she's trying to get temporary work on the weekends so that she can serve. Are y'all still okay with excusing her?

MS. PRIMM: Yes, ma'am.

MR. TANNER: And I am—after reviewing her questionnaire again, we'll agree if the State wants to agree.

MS. PRIMM: Yes, we want to agree.

THE COURT: Everyone agrees. I think after looking at your questionnaire, they think you probably won't be on the jury anyway. So that way, it will save you a trip down here.

VENIREPERSON: Okay. Well, thank you.

THE COURT: Thank you. I'm sorry. All right. Thanks.

VENIREPERSON: That's okay.

THE COURT: All right. Bye-bye.

27 RR 144. As soon as this teleconference had concluded (and Ms. Henderson would no longer hear his comment), defense counsel volunteered "for the record" that Ms. Henderson was a "[B]lack female" and that this was "another reason" for his decision to agree to excuse Ms. Henderson:

MR. TANNER: Also for the record, Judge, she is a black female.

THE COURT: I don't think so. Was she?

MR. TANNER: *She's a black female*. And knowing what the evidence could—could come out in evidence is a possible—*is a reason—another reason I take into consideration in our decision to agree to her*.

THE COURT: Are some of the victims black females?

MR. TANNER: No, ma'am. There are other issues.

THE COURT: Other issues? Okay. Well, I don't know what those are, but if it's important to you, I imagine there's a good reason.

27 RR 145 (emphasis added).

Ms. Henderson was a 40-year-old clinical pharmacist who had lived in Harris County for five years, after relocating from Dallas, Texas. She rated herself as a "3" on a five-point scale ("I am neither generally opposed nor generally in favor of the death penalty."). 11 SSCR 3544. She also rated herself as a "3" on a five-point scale regarding willingness to impose a death sentence ("I would consider all of the penalties provided by law and the facts and circumstances of the particular case."). *Id*. Thus, she was within the mainstream of venirepersons on the issues most relevant in a death penalty case. It is unclear from the record whether prior to this colloquy the prosecution was apprised of (or for that matter, shared) defense counsel's race-based desire to exclude Black women from the jury. The prosecutor did not withdraw his agreement or say anything else, and the trial court proceeded without further comment.

Just minutes after the colloquy about Ms. Henderson, the trial court excused a batch of 19 jurors based on the agreement of the parties. 27 RR 151. Among them was Deandra Nixon, a 39-year-old, self-described moderate Black woman who had lived in Harris County all her life. 13 SSCR 4054–56. Like Ms. Henderson, Ms. Nixon rated herself as a "3" on a five-point scale ("I am neither generally opposed nor generally in favor of the death penalty."). 13 SSCR 4069. She also rated herself as a "3" on a five-point scale regarding willingness to impose a death sentence ("I would consider all of the penalties provided by law and the facts and circumstances of the particular case."). *Id*. Ms. Nixon, like Ms. Henderson, wanted to serve on the jury and wrote "I feel like I would be great at listening to both sides and making the correct decision." *Id.* at 4071. Despite being within the mainstream of venirepersons accepted by both parties, she too was excused by agreement before voir dire.

No Black women were seated on Mr. Irsan's jury.

Mr. Irsan was convicted of capital murder on July 26, 2018, 55 RR 93, and sentenced to death on August 14, 2018. 66 RR 11.

In his appeal to the TCCA, Mr. Irsan argued, *inter alia*, that the trial court's implementation of, and prosecution's acquiescence in, the race-based exclusion of a prospective juror violated the Equal Protection Clause. Appellant's Brief at 38–56; Appellant's Reply Brief at 1–12. The State conceded that in "stark" cases of racial discrimination, agreements to excuse jurors for race-based reasons "demand exploration at the very least, if not actual relief to the defendant." State's Brief at 112. The State, however, contested whether such an agreement happened in Mr. Irsan's case and—in an apparent contradiction with its concession about "stark" cases—argued that defense counsel's participation in the discrimination should preclude reversal. State's Brief at 110–13.

The TCCA rejected Mr. Irsan's equal protection argument on two grounds. First, the TCCA held that even when, as here, a party announces that he seeks to exclude prospective jurors based on their race and gender, the Equal Protection Clause imposes no duty on the trial court to intervene regardless of the "egregiousness of an alleged error." 708 S.W.3d at 601. This holding founded the TCCA's conclusion that any "*Batson* error"[3] was defaulted, *id*. at 600–01—even though Mr. Irsan had not pleaded a *Batson* issue. Second, addressing the claim that Mr. Irsan had briefed, the TCCA acknowledged the Fifth Circuit's holding that judicial enforcement of the parties' race-based agreement to exclude prospective jurors violates the Equal Protection Clause. *Id*. at 601 (citing *Mata v. Johnson*, 99 F.3d 1261, 1264 (5th Cir. 1996), *vacated in part by* 105 F.3d 209, 210 (5th Cir. 1997). However, the TCCA distinguished Mr. Irsan's case from *Mata* because

> The record does not reveal why the State agreed to excuse [Ms. Henderson], nor why the trial judge saw fit to enforce the agreement. And there is simply no reason, on this record, to attribute to the trial judge or the State the kind of attentiveness to race that defense counsel displayed.

[3] *Batson v. Kentucky*, 476 U.S. 76 (1986).

Id. The TCCA concluded that "[b]ecause there is no indication that the trial judge or prosecutors in this case were attempting to 'avoid the constitutional infirmity of race-based peremptory strikes by mutual agreement,' the record does not support a *Mata*-like equal protection violation." *Id*. (quoting *Mata v. Johnson*, 99 F.3d at 1269).

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S IMPLEMENTATION OF A PARTY'S EXPLICITLY RACE-BASED DESIRE TO EXCLUDE A PROSPECTIVE JUROR CONTRAVENES MORE THAN A CENTURY OF THIS COURT'S EQUAL PROTECTION JURISPRUDENCE.

> The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt. That is the law established by decisions of this Court spanning more than seventy years of interpretation of the meaning of 'equal protection.'

Avery v. Georgia, 345 U.S. 559, 561 (1953) (internal citation omitted).

A. The Racially Motivated Removal of a Prospective Juror Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Nearly 140 years before Petitioner was tried, *Strauder v. West Virginia*, 100 U.S. 303 (1880), held that a statute violates the Equal Protection Clause when it excludes African Americans from jury service. *Strauder* observed that exclusion of Black citizens from service as jurors was a prime example of the evil at which the Fourteenth Amendment was aimed, *id.* at 306–07, and it "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Batson v. Kentucky*, 476 U.S. at 85.

Racial discrimination in jury selection violates the equal protection rights of the accused whose life or liberty the jurors are summoned to try, but also "unconstitutionally discriminate[s] against the excluded juror." *Batson*, 476 U.S. at 87 (citing *Strauder*, 100 U.S., at 308; *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330 (1970)). Discrimination within the judicial system is especially pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others." *Strauder,* 100 U.S. at 308.

Strauder itself invalidated a state statute that expressly provided that only white men could serve as jurors. *Strauder*, 100 U.S. at 305. Such out-loud discrimination then disappeared, soon to be replaced by conspiratorial administrative discrimination, to which this Court responded by "f[inding] a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, . . . ma[king] clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." *Batson*, 476 U.S. at 88; *see also*, *Avery,* 345 U.S. at 562 (holding that because the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process).

As this Court held in *Batson*, the prohibition against racial discrimination in jury selection applies to a prosecutor's racially motivated exercise of the peremptory challenge as well as to the actions of jury commissioners and court clerks. Moreover, because of the public function that jury selection serves *and the court's involvement in it,* defense counsel's racially motivated exercise of the peremptory challenge constitutes state action, and therefore also violates the Equal Protection Clause. *Georgia v. McCollum*, 505 U.S. 42 (1992). Thus, the racially motivated exclusion of a

juror, however accomplished, violates the Equal Protection Clause rights of both the defendant and the excluded juror, and also threatens public confidence in the judicial system.

B. Defense Counsel Explicitly Acknowledged the Racial Motivation for His Agreement to Excuse Jocelyn Henderson.

The record plainly establishes defense counsel's racial motivation for agreeing to excuse a qualified and willing Black juror. While Ms. Henderson was still on the phone, defense counsel described his motivation for agreeing to excuse her in race-neutral terms, saying "after reviewing her questionnaire again, we'll agree if the State wants to agree." This description, however, was pretextual, for as soon as she was off the phone, counsel revealed his true reason to the court and the prosecution: "Also, for the record, she's a black female." 27 RR 145.

Perhaps this first reference to Ms. Henderson's race could be construed as ambiguous, an off-hand remark identifying who the juror was, though the preface "For the record" suggests otherwise. But regardless of whether that reference standing alone would establish racial motivation, the remainder of the colloquy leaves no doubt that race—or race and gender[4]—were the reason counsel sought to excuse her. After the first explanatory reference to Ms. Henderson's race the trial court expressed uncertainty, and inquired, "Was she?" Defense counsel then reiterated, "She's a black female," and added, "*And knowing what the evidence could—could come out in evidence is a possible—is a reason—another reason I take into consideration in our decision to agree to her*." 27 RR 145 (emphasis added). The trial court then guessed that the racial motivation related to the identity of the victims, asking "Are some of the victims black females?"

[4] If defense counsel was motivated by gender as well as race, such motivation is also constitutionally forbidden. *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).

Id. Mr. Tanner's reply, "No, ma'am. There are other issues," denied the specific racial motivation suggested by the trial court but did not dispute its racial nature.

Equal Protection constraints do not depend upon the particulars of racial motivation. This Court has specifically condemned the racial generalization suggested by the trial court: that a juror will feel an affinity to one of the parties based on a shared race. *Batson*, 476 U.S. at 97 ("But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."). However, the rationale for condemning the shared-affinity generalization reaches all varieties of racial motivation because "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial [and a] person's race simply 'is unrelated to his fitness as a juror.'" *Id*. at 87 (quoting *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). Thus, *any* racialized concerns counsel had about how "a black female" would react to "what could come out in evidence," 27 RR 145, were impermissible; they constitute "nothing more than an assumption of partiality based on race and a form of racial stereotyping, both of which have been repeatedly condemned by the courts." *United States v. Huey*, 76 F.3d 638, 641 (5th Cir. 1996). Ms. Henderson's race was "unrelated to [her] fitness as a juror," and defense counsel's effort to excuse her, based as it was upon a demeaning assumption to the contrary, was constitutionally forbidden. *Batson*, 476 U.S. at 87 (citations omitted).

Examination of Ms. Henderson's juror questionnaire reveals no race-neutral basis for counsel's desire to excuse a willing and qualified juror.[5] Her entirely even-handed answers to

[5] Even if counsel had been motivated both by Ms. Henderson's race *and* her questionnaire answers, his assent to her excusal would have been impermissible because removal of a juror based "in substantial part" by race is impermissible. *See Flowers v. Mississippi*, 588 U.S. 284, 315–16 (2019) ("All that we need to decide . . . is that all of the relevant facts and circumstances taken together establish that the trial court . .

relevant questions on death penalty attitudes were answers that, evaluated in a colorblind fashion, would not have led *either* party to desire her excusal.[6] Indeed, that defense counsel lied to Ms. Henderson about his racial motivation, revealing it only to the white prosecutors and trial judge, increases the constitutional offensiveness of his conduct.

C. The Trial Court's and Prosecution's Knowing Acquiescence in Defense Counsel's Racially Motivated Agreement to Excuse Ms. Henderson Violated the Equal Protection Clause.

After defense counsel had twice stated his racial motivation, the trial court responded deferentially: "Other issues [than the race of the victims]? Okay. Well, I don't know what those are, but if it's important to you, I imagine there's a good reason." 27 RR 145. This deference, manifested in continued implementation of defense counsel's racially motivated choice, was constitutionally intolerable—as was the prosecution's passive acceptance of counsel's stated reason. Characterizing racial motivation as "important" or "a good reason" contravenes this Court's decision in *McCollum*, which unequivocally forbids defense counsel from acting on assumptions based on race. *McCollum*, 505 U.S. at 57 (citations omitted) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair. . . such a price is too high to meet the standard of the Constitution."). Whether defense counsel's racial motivation to exclude Ms. Henderson was based on racial animosity, discomfort, or a purported trial strategy is irrelevant. Counsel has wide latitude to make legitimate strategic trial decisions but, as the Seventh Circuit held,

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.committed clear error in concluding that the State's peremptory strike . . . *was not motivated in substantial part by discriminatory intent*.") (emphasis added).

[6] For Questions 121 and 122 of the questionnaire, Ms. Henderson answered that she was "neither generally opposed nor generally in favor of the death penalty," and that she "would consider all the penalties provided by law and the facts and circumstances of the particular case" if ultimately placed on the jury, both "3s" on a scale of 1 to 5. 11 SSCR 3544. In response to Questions 99 and 100, which inquired whether Ms. Henderson believed the laws in the United States and Texas were too lenient or too harsh as applied to criminal defendants, Ms. Henderson answered "No" to both questions, but in the margins wrote: "not completely aware [] of the criminal laws to formulate a complete opinion here." 11 SSCR 3541.

"deliberately choosing to engage in [racially motivated] conduct that the Supreme Court has unequivocally banned is both professionally irresponsible and well below the standard expected of competent counsel." *Winston v. Boatwright*, 649 F.3d 618, 630 (7th Cir. 2011); *see also Nix v. Whiteside*, 475 U.S. 157, 166, (1986) ("Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps . . . violating the law.").

Given that Ms. Henderson had just informed the court that jury service would not pose a financial hardship, the only reason for removing her from the jury pool was the parties' agreement. Once the trial court heard that Ms. Henderson's race had motivated defense counsel's agreement, it was obliged to repudiate and thwart defense counsel's racially motivated action. At that point, the trial court had only said to Ms. Henderson that "they think you probably won't be on the jury anyway." Moments after speaking with Ms. Henderson, the trial court could have called her back and informed her that she would indeed be called in for individual voir dire, a far less intrusive or complicated remedy than reseating a struck juror after a successful *Batson* challenge. Defense counsel could have subsequently ascertained whether the juror in fact held views or opinion that made her an undesirable juror instead of just assuming she did because she was a Black woman. However, the trial court instead condoned defense counsel's unconstitutional motivation ("Okay . . . if it's important to you, I imagine there's a good reason") and then exercised its discretion to facilitate the race-based exclusion.

Whether the trial court actions stemmed from a lack of unawareness of *McCollum*'s holding, a lack of understanding that counsel's stated motivation fell within the prohibition against racially motivated jury selection behavior, or from some other failing does not matter. Because defense counsel's unconstitutionally motivated agreement to excuse Ms. Henderson violated the Equal Protection Clause, the trial court's complicit enforcement of it—as well as the prosecution's

knowing participation—likewise violated the Equal Protection Clause. Confronted with a case where the prosecution and the defense counsel explicitly agreed to exclude all Black venire members, and the trial judge approved the agreement by permitting the parties to strike every Black venire member without expending an allotted peremptory challenge, the Fifth Circuit did not mince words: "Unquestionably, such collusion among the prosecution, the defense, and the judge constitutes a flagrant violation of the Equal Protection clause of the Fourteenth Amendment, as set forth by the Supreme Court in an unwavering line of cases dating back more than a century." *Mata v. Johnson*, 99 F.3d at 1268.

The TCCA briefly nodded to *Mata*, quoting with apparent approval the Fifth Circuit's determination that "it would be ludicrous to believe that state actors could avoid the constitutional infirmity of race-based peremptory strikes by mutual agreement." *Irsan v. State*, 708 S.W. 3d at 601 (quoting *Mata*, 99 F.3d at 1269). But the state court then declared that "this case is nothing like *Mata*." *Id*. The critical difference, according to the TCCA, is that the record "does not reveal why the State agreed to excuse [Ms. Henderson], nor why the trial judge saw fit to enforce the agreement." True.[7] But the TCCA's assertion that "the record suggests that the trial judge did not even realize that [Ms. Henderson] was (in defense counsel's words) a 'black female,'" *id*., is clearly contradicted by the record. The judge was uncertain of the juror's race at the outset of the colloquy. But defense counsel immediately resolved the trial court's uncertainty, assured the trial court that Ms. Henderson was indeed Black, and then clearly informed the trial court that race was

[7] The TCCA's further statement that "there is simply no reason, on this record, to attribute to the trial judge or the State the kind of attentiveness to race that defense counsel displayed," is not quite true. The State exercised peremptory challenges disproportionately against Black jurors, some of whom appeared to be quite favorable to the State, thus raising *some* inference of "attentiveness" to race. Those challenges would have led defense counsel who was of a mind to prevent racially motivated strikes to make a *Batson* motion. But defense counsel was not of such a mind.

the basis for his desire to excuse her. Most importantly, the trial court's response—asking about whether there were Black victims in the case—makes it plain that the trial court both heard what counsel said and understood his motive to be the race (or race and gender) of Ms. Henderson.

Had trial counsel concealed his racial motive, the TCCA would have been correct that *Mata*—and the century of precedent standing behind it—would be inapplicable. But given the trial court's awareness of counsel's racial motivation, the TCCA's distinction misses the point of *Mata*, and the point of the "unwavering line of cases dating back more than a century" on which *Mata* depends. *Mata*, 99 F. 3d at 1268. As this Court explained four decades before *Mata*, "officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—a course of conduct—*which would not operate to discriminate in the selection of jurors on racial grounds*." *Avery*, 345 U.S. at 561 (internal quotation omitted) (emphasis added). Moreover, *Avery* itself declared that it was relying on "law established by decisions of this Court spanning more than seventy years of interpretation of the meaning of 'equal protection.'" *Id.*

The trial court is plainly among the "officials responsible for the selection of this panel" but failed in its "constitutional duty to follow a procedure—a course of conduct—which would not operate to discriminate in the selection of jurors on racial grounds." Although the record here does not establish the explicit agreement between prosecution and defense to remove African-American venire members present in *Mata,* it does establish both the trial court's and the prosecution's awareness of defense counsel's racial motivation and their facilitation of his unconstitutional ends. Absent counsel's racial motivation *and* the passive acquiescence of both the prosecutor and trial court, Ms. Henderson would not have been excused based on her race.

The trial court had a constitutional duty to avoid participation in the violation of Ms. Henderson's equal protection rights. Trial judges have an "affirmative duty to enforce the strong

statutory and constitutional policies embodied in [the] prohibition" on discrimination in jury selection. *Powers v. Ohio*, 499 U.S. 400, 416 (1991). A court's duty to act *sua sponte* to eliminate discrimination in jury selection—*when that discrimination is apparent*—parallels its affirmative duties to prevent other potential constitutional violations, such as the trial of an incompetent person when that incompetency is suggested by facts in front of the court. *See Pate v. Robinson*, 383 U.S. 375 (1966); *see also United States v. Renteria*, 625 F.2d 1279, 1283 (5th Cir. 1980) ("Involuntary confessions, about which the court is alerted, should not be admitted in evidence merely because of defense counsel's oversight or incompetence."). "[I]f a court *allows* jurors to be excluded because of group bias, it is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice . . . ." *McCollum*, 505 U.S. at 49–50 (citations omitted) (emphasis added).[8] Similarly, the prosecution, upon hearing defense counsel's impermissible

[8] At least a dozen courts have agreed that when circumstances suggest discrimination is afoot, judges may *sua sponte* inquire as to the racial motivation of the parties. *State v. Mootz*, 808 N.W.2d 207, 215 (Iowa 2012) (holding that a trial judge may inquire on her own into a party's use of peremptory strikes); *People v. Bell*, 702 N.W.2d 128, 134 (Mich. 2005) ("Trial courts are in the best position to enforce the statutory and constitutional policies prohibiting racial discrimination"); *Brogden v. State*, 649 A.2d 1196, 1200 (Md. App. 1994) (in order to safeguard the "integrity of the judicial system as a whole," trial judges are "clearly entitled to intervene" in jury selection); *Evans v. State*, 998 P.2d 373, 379–380 (Wash. App. 2000) ("[The] judge may, in his or her discretion, act to protect the rights secured by the equal protection clause by raising a *Batson* issue"); *Lemley v. State*, 599 So.2d 64, 70 (Ala. Crim. App. 1992) ("[T]he judge has the authority to question the use of those apparently racially discriminatory jury strikes."); *Williams v. State*, 669 N.E.2d 1372, 1379 (Ind. 1996) (holding trial courts' discretion to manage proceedings allows them to intervene to protect the equal protection rights of jurors and litigants); *People v. Nelson*, 625 N.Y.S.2d 176, 177 (N.Y. App. Div., 1st Dept. 1995) (holding that the trial court properly intervened after noticing a *prima facie* case of a *Batson* violation); *People v. Maisonet*, 618 N.Y.S.2d 718, 719 (N.Y. App. Div., 1st Dept. 1994) (upholding trial court's *sua sponte* finding of a prima facie showing of gender discrimination); *McCoy v. State*, 112 A.3d 239, 251 (Del. 2015) ("We hold that a trial judge may raise the issue of purposeful racial discrimination *sua sponte*."); *People v. Rivera*, 852 N.E.2d 771, 785 (Ill. 2006) (holding that a trial court has authority to raise a *Batson* issue *sua sponte*); *Unzueta v. Akopyan*, 42 Cal.App.5th 199, 202 (Cal. App., 2nd Dist. 2019) (crediting the trial court for raising *Batson* issue *sua sponte* but reversing because the court failed to inquire into nondiscriminatory reasons). In those cases, courts have had to decide how suspect the actions of the party must be to permit or require inquiry. This case is much simpler; no further inquiry was necessary because counsel had announced his racial motivation.

motivation, had a duty to object, and avoid participation in the unconstitutional removal of Ms. Henderson from the venire.

A trial court's *unknowing* implementation of defense counsel's racially motivated jury selection actions would not create the equal protection violation at issue here because absent knowledge, no equal protection violation would be attributable to the court. Were the state as employer to rely upon a negative recommendation to deny a Black applicant a job, unaware that the recommender was animated by racial animus, a wrong would be done, but not one of constitutional dimension, nor one for which the state bore blame. But were the state to rely on such a recommendation knowing of the racial animus of the recommender, the state would have violated the equal protection clause. Likewise, in this case, the trial court's knowledge, coupled with its discretionary action, violated this Court's long-established equal protection constraints.

II. THIS COURT'S INTERVENTION IS NECESSARY TO PROTECT POTENTIAL JURORS FROM RACE-BASED DISCRIMINATION THROUGH AGREEMENTS THAT EVADE SANCTION.

A. Defense Counsel's Failure to Object to His Own Unconstitutional Misconduct Does Not Waive the Equal Protection Violation Created by the Trial Court's Complicity in That Misconduct.

That defense counsel failed to object to his own conduct cannot insulate the actions of the trial judge and prosecutor from review. Here, Petitioner is a person of color, and therefore, the racially motivated exclusion of a Black juror by white defense counsel with the tacit agreement of a white prosecution team and a white judge has historical antecedents; those antecedents should not be ignored, and Petitioner's counsel should not be deemed to have waived Petitioner's equal protection rights. The ugliness of this usurpation of Petitioner's interest in race-blind selection of his jury "is especially pernicious" because it is "a stimulant to that race prejudice" which impedes securing equal justice. *Strauder,* 100 U.S. at 308.

Moreover, even if defense counsel did have the authority to waive Petitioner's own rights, neither he nor the prosecution nor the trial court had the authority to waive the equal protection rights of a juror—and the record could not be plainer that Ms. Henderson herself would not have waived those rights. Under these circumstances, "it would be ludicrous to believe that state actors could avoid the constitutional infirmity of race-based peremptory strikes by mutual agreement." *Mata*, 99 F.3d at 1269.

Despite its determination "that any reasonable jurist—nay, *every* reasonable jurist—would have held that, whether it be at the hands of one, all, or some combination of, the three relevant state actors, discrimination in the selection of jurors constitutes a violation of the jurors' right to equal protection under the law," *Mata,* 99 F.3d at 1269, the Fifth Circuit reasoned that "it does not necessarily follow that we should grant a new trial." *Id.* at 1270. It ultimately declined to do so, but for reasons that underline the need for this Court's review.

First, the Fifth Circuit noted that it heard Mata's claim ten years after his conviction, after the completion of direct appeal and state habeas corpus proceedings, and the cost in public confidence in the system caused by a decade of delay had to be weighed against the loss in confidence created by letting the conviction stand. Relatedly, the Fifth Circuit was reviewing a claim in federal habeas corpus proceedings, where deference to prior state court decisions is at its apogee. Also, as the Fifth Circuit observed, "Mata was convicted in 1986 shortly before the Supreme Court issued its seminal *Batson* decision." *Mata,* 99 F.3d at 1271. The lawyers and trial court in *Mata* had a plausible claim that their conduct had not yet been explicitly prohibited by the Court, but none of the three relevant state actors in Petitioner's case have such an excuse. The most important distinction, however, lies in what has proven to be the Fifth Circuit's unduly optimistic prediction:

> We are convinced that the agreement in this case was unique at the time and is certainly an anachronism now. We are equally convinced that such jury selection collusion among litigants and judges is virtually certain never to be repeated.

Id. But analogous jury selection collusion was repeated here when all three relevant state actors participated, either actively, or through culpable passive acquiescence, in the racially motivated exclusion of a qualified African American from jury service. The judicial facilitation of race-based exclusion from jury service heightens "the profound personal humiliation" experienced by the excluded venire people. *Powers*, 499 U.S. at 413–14. Vindication of the Fourteenth Amendment Equal Protection rights of Ms. Henderson and the need to deter such conduct in the future all require reversal of Petitioner's conviction.

B. Agreed Excusals are a Common "Practice [That] Makes It Easier for Those to Discriminate Who are of a Mind to Discriminate."

Tex. Code Crim. Proc. art. 35.05 provides that "[o]ne summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled." *Id*. Thus, even in the absence of cause, Texas law gives trial courts discretion to excuse venirepersons in a capital case—but only if the parties agree. Both the bases for the parties' agreements and the trial court's discretion to exclude venirepersons are unfettered:

> There is a complete lack of guidance for the courts when deciding whether to grant these agreed-upon excusals. There is no regulation of what these agreements may be founded upon nor any specific procedure by which constitutional rights are safeguarded. In essence, the statute states that if parties agree—through *any* process and for *any* reason—the court *may* act to enforce that agreement.

Seth Cook, *The Constitutional Perils of Juror-Excusal Agreements*, 57 Tex. Tech L. Rev. 401, 409 (2025). Though some judges only permit agreement in the face of juror hardship, and others use agreements to expedite the excusal of jurors whose questionnaires suggest they are unqualified to serve in a capital case, still other judges enforce sweeping agreements to dismiss jurors in numbers far exceeding removal for either for-cause or peremptory challenges.

In this case, after prospective jurors with conflicts were removed from the jury pool, 205 prospective jurors remained. The prosecution and defense agreed to purge the pool *of more than half* of those prospective jurors, among them Jocelyn Henderson—and 14 other Black women. This case is not an outlier with respect to the number of jurors excused by agreement. In another Texas death penalty case, 775 of 840 (92%) of venirepersons were excused, including 211 of the 216 (98%) venirepersons of color. *Wilson v. Cockrell*, 2002 WL32487879 (N.D. Tex. Sept. 24, 2002). After for-cause and peremptory challenges, the 5 remaining persons of color were excused, leaving an all-white jury, a result that almost certainly would not have happened without the trial court's wholesale approval of party agreements.

Moreover, the risk of arbitrariness and discrimination created by agreed excusals is not confined to Texas. For-cause challenges generally are within a trial court's broad discretion, and observation and interviews confirm that judges routinely defer to the parties when both attorneys agree to excuse a prospective juror, often without placing any reasons on the record. Anna Offit, *Benevolent Exclusion*, 96 Wash. L. Rev. 613, 642 (2021). This case is the tip of the iceberg, visible only because counsel volunteered his racially motivated reasons. Agreed upon excusals are another "jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (quoting *Avery*, 345 U.S. at 562). And unlike peremptory challenges, which are limited in number and now subject to regulation pursuant to the procedures established in *Batson*, agreed excusals are without limit or constraint.

Granting certiorari here, where a standardless juror excusal practice "pregnant with discrimination," *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Douglas, J., concurring), was openly employed to facilitate racial discrimination, would vindicate Jocelyn Henderson and deter the open insult of articulated racial stereotyping in jury selection. But beyond deterring the voicing

of such motivation, a grant of certiorari may prompt trial courts to refuse to permit wholesale and unregulated agreements. And it will remind law-abiding prosecutors, who are more likely than courts to hear racially inflected reasoning, to be mindful that their acquiescence is unconstitutional, regardless of their own motivations.

III. FAILURE TO ENFORCE THE EQUAL PROTECTION CLAUSE IN THE FACE OF EXPLICITLY RACIAL MOTIVATION WILL "UNDERMINE PUBLIC CONFIDENCE IN THE FAIRNESS OF OUR SYSTEM OF JUSTICE" AND LET STAND A "STIMULANT TO … RACE PREJUDICE."

"[B]latant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 229 (2017). Here, defense counsel announced in open court that his objective was to exclude Black women from the jury. The judge condoned defense counsel's conduct by telling him "if it's important to you, I imagine there's a good reason" for his race-based choice. 27 RR 145. This Court must confront and remedy explicit on-the-record racial discrimination because failure to do so threatens integrity of the criminal justice system.

The Court has "recognized that *Batson* was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors"; it is also "to remedy the harm done to the dignity of persons and to the integrity of the courts." *McCollum*, 505 U.S. at 48 (quoting *Powers*, 499 U.S. at 402, 406) (internal quotation marks omitted); *see also Batson*, 476 U.S. at 87 ("[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community" because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). "Selection procedures that purposefully exclude African-Americans from juries undermine . . . public confidence" because the "overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court

to adhere to the law through the trial of the cause." *McCollum*, 505 U.S. at 49 (quoting *Powers*, 499 U.S. at 412).

Here, *all three* relevant state actors participated, either actively, or through knowing agreement, in the racially motivated exclusion of qualified Black women from jury service. Judicial complicity in such exclusion erodes public confidence in the entire proceeding, creates the perception that the court has "place[d] its power, property, and prestige behind the . . . discrimination," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (citation omitted), and heightens "the profound personal humiliation" experienced by the excluded venire people. *Powers*, 499 U.S. at 413–414. Vindication of the Fourteenth Amendment Equal Protection rights of Ms. Henderson, protection of the community's interest in "public confidence in the fairness of our system of justice," *Batson*, 476 U.S. at 87, and the need to deter such conduct in the future all require this Court's intervention.

IV. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE JUDICIAL ENFORCEMENT OF RACIALLY DISCRIMINATORY AGREEMENTS TO EXCLUDE PROSPECTIVE JURORS.

Although many jurors might be happy to be excused, this race-based agreement resulted in the exclusion of Ms. Henderson, a Black juror who had clearly expressed her desire to serve. Moreover, even after defense counsel announced his racial motive for his agreeing to excuse Ms. Henderson, the prosecutor continued to agree to excuse other Black jurors, and the trial judge continued to exercise her discretion to enforce these tainted agreements. Rather remarkably, almost immediately after this colloquy, the court approved the excusal of another thoughtful moderate Black woman who wanted to serve, Deandra Nixon. And ultimately, not surprisingly, these agreements led to agreed excusal of 68.4% of the Black prospective jurors (26 of the 38

prospective jurors) remaining in the venire after hardships were determined, but only 43% (47 of 107) of the White prospective jurors.

This case is an ideal vehicle for addressing the judicial enforcement of racially discriminatory agreements to exclude prospective jurors because the record reflects: (1) an explicit, unambiguous statement of racially motivated juror exclusion by the defense; (2) a clear articulation of defense counsel's racial motivation to the prosecution and trial judge in open court; (3) a statement by the trial judge that reflects her understanding that counsel sought to exclude Black women; (4) the judicial enforcement of additional agreed excusals of Black women *after* the trial court learned of counsel's race-based motive; and, (5) timely notice to the trial court, which could have prevented the race-based exclusion instead of facilitating it. Indeed, the trial judge essentially condoned the practice by remarking "I imagine there's a good reason" for defense counsel's desire to exclude Black women. 27 RR 145.

Finally, this case arises from a jurisdiction which has codified discretionary judicial enforcement of the parties' agreement to exclude prospective jurors without limiting either the bases for the parties' agreements or the trial court's enforcement of them, thus authorizing off-the-record, standardless discretion in the exclusion of potential jurors.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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