No. 25-5665

IN THE

Supreme Court of the United States

ALI AWAD MAHMOUD IRSAN,
Petitioner,

— v.—

TEXAS,
Respondent.

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

AMICUS BRIEF OF EXCLUDED JUROR SHERRYLL HOWE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

This amicus curiae brief is submitted by Sherryll Howe, who was dismissed from the jury pool by agreement of the parties along with Jocelyn Henderson. Ms. Howe's interest in this case stems from the agreement to excuse jurors like her from jury service based on their race and the constitutional harm resulting from the trial court's enforcement of that agreement.

SUMMARY OF ARGUMENT

The "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson* v. *Kentucky*, 476 U.S. 79, 85 (1986). The core holdings of *Batson* were based on the recognition that when race discrimination permeates the jury selection process it wreaks havoc on the rights and interests promised by the constitution—not only to the defendants, but also to the potential jurors and their community. While the adversarial process allows defendants to advocate for their own right to be free of race discrimination, the members of the jury pool and their community are left without a voice to protect their own constitutional interests.

This is an example of the constitutional harm that can result when the adversarial process breaks

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[1] Pursuant to Rule 37.2, counsel of record for petitioner received notice at least 10 days prior to the due date of Amicus's intent to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party wrote this brief in whole or in part and that no person other than amici curiae and their counsel made a monetary contribution to its preparation or submission.

down and trial courts fail to protect the rights of potential jurors. The Texas Code of Criminal Procedure allows trial courts to excuse potential jurors from the pool based solely on the agreement of both parties. *See* Tex. Code Crim. Pro. art. 35.05. In this case, the trial court enforced such an agreement despite clear admissions that defense counsel agreed to these dismissals *because of the jurors' race*.

While these discriminatory agreements certainly implicate the rights of the Petitioner in this case, they also inflict a blatant constitutional injury on the members of the jury pool that were the direct victims of the discriminatory agreement—members like *Amicus Curiae* Sherryll Howe. Because Texas criminal proceedings allow potential jurors like Amicus no procedural safeguards, the only remedy for the discrimination they experience is for this Court to grant the petition for *certiorari* and issue a rule prohibiting trial courts from enforcing racially discriminatory juror-excusal agreements.

ARGUMENT

Along with the constitutional harm that *Batson* violations impose on defendants, *Batson* recognized that racial discrimination in jury selection inflicts constitutional harm on those that make the jury system possible: the venirepersons and members of the community from which they are drawn. As to the venirepersons, *Batson* and its progeny have repeatedly recognized and reaffirmed that race discrimination results in the exclusion of citizens "from participation in the legal system solely on the basis of their race," 476 U.S. at 87, in violation of the Fourteenth Amendment. In addition, the Court has

long recognized that the existence of racial bias in jury selection degrades the integrity of the legal system by "undermining public confidence in the system's fairness." *Id*.

When, as here, juror-excusal agreements are motivated by racial discrimination, the excusals that result inflict the same constitutional injuries that *Batson* recognized and sought to prevent. Because Amicus and other potential jurors were excused from participating in the jury because of their race, they suffered a violation of their right to equal protection. Further, the existence of this discrimination degrades the integrity of the judicial system and erodes trust in the courts within the communities from which the jury pool was drawn. Without any alternative path to recourse, the rights of the Amicus and the public confidence in the judicial system among the Amicus's broader community can only be vindicated through a full merits review and, ultimately, reversal of a judgment that was procured through discrimination against the citizen-jurors like Amicus.

I. THE TRIAL COURT'S EXCUSAL OF AMICUS AND SIMILARLY SITUATED VENIREMEMBERS ON THE BASIS OF THEIR RACE THREATENS *BATSON*'S SECOND AND THIRD CONSTITUTIONAL INTERESTS.

A. Amicus was the Victim of Unconstitutional Race Discrimination in Violation of Her Fourteenth Amendment Rights.

1. *Batson* and its progeny protect the constitutional rights of citizens excluded from jury service based on their race.

Though often thought of as merely addressing peremptory challenges, *Batson* and its progeny were primarily concerned with ending race discrimination in the jury-selection process as a whole. *See Batson*, 476 U.S. at 89 ("T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."). The concern extends to citizens who have been excluded from serving on juries because of their race. The Court has rightly perceived that "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Powers* v. *Ohio*, 499 U.S. 400, 413–14 (1991). This humiliation, in turn, causes so-excluded jurors to "lose confidence in the court and its verdicts." *Id*. at 414.

The need to protect the interests of citizens who are excluded from jury service because of their race compelled the Court to permit defendants to object to the race-based exclusion of jurors even in cases where the objecting party was a different race from the defendant. *Id.* at 414–15. The Court used a two-prong approach—first determining that a racially discriminatory strike occurred and, second, granting third-party standing to the defendant to assert the rights of the juror. *Id.* at 415; *see also Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (holding that civil litigants have a similar third-party standing). *Powers* represents an intentional decision to place the concern for the potential jurors' rights on equal footing with the defendants' rights and to allow defendants to assert the violation of those rights in their cases.

In *Georgia* v. *McCollum*. 505 U.S. 42 (1992), the Court held that prosecutors also have the right to object to the use of race in excluding potential jurors. *Id.* at 59. The use of race to prevent seating a juror was so abhorrent that the prosecutor's ability to object was deemed a necessary mechanism to ensure race was not used, even if it *benefited* the defendant. *See* Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1318 (1997). *McCollum* rejects the idea that the rights of potential jurors are subordinate to the rights of the defendants. The *McCollum* Court emphasized that, "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same," and that "[s]election procedures that purposefully exclude

African-Americans from juries undermine the public confidence in the verdict—as well they should." *See McCollum*, 505 U.S. at 50–56. Thus, as this Court has established, the rights of Amicus are on the same plane of constitutional importance as the rights of the defendant.

2. Amicus's exclusion constituted race discrimination by the State.

As described in the Petition for a Writ of Certiorari, defense counsel expressed on the record that they agreed to the dismissal of several potential jurors from the opportunity to serve because of their race. *See* Pet. for Writ of Certiorari, at 3, *Irsan* v. *State*, 708 S.W.3d 584 (Tex. Crim. App. 2025) (No. 25-5665) ("Also, for the record, Judge, she is 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."). Notwithstanding the expressly racial motivation for defense counsel's agreement, the trial court continued to dismiss both the venireperson and additional Black potential jurors without further inquiry into the parties' motivations.

While this case may be procedurally distinguishable from a standard peremptory challenge, the constitutional principles at play are identical to a traditional peremptory challenge case. To start, the ultimate decision-maker is the trial court. In fact, the state-action question here is even clearer. What differentiates this case from cases like *McCollum* is the fact that, under Texas law, the dismissal of jurors pursuant to the agreement of the

parties is at the discretion of the trial courts. *See* Tex. Code Crim. Pro. art. 35.05 ("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."). Article 35.05's use of the permissive "may," places the actual excusal of the potential jurors entirely within the discretion and judgment of the trial court. The agreement of both parties is therefore a necessary, but not sufficient, condition for the dismissal of a potential juror from the pool.

In this context, the trial court is, in effect, given the power to grant the parties infinite peremptory strikes so long as the parties can agree on who to strike. When understood through this lens, there is little doubt that the prohibition on race-based peremptory challenges squarely maps on to the facts of this case. Thus, as the trial court would have an obligation to do under *Batson*'s second step, a trial court operating in the context of Art. 35.05 is also obligated to prohibit the exclusion of a juror based on racial grounds when that motivation becomes apparent.

As in *Batson*, when the trial court becomes aware that race is motivating one of the parties' decisions to move to dismiss particular jurors, the power to deny becomes a constitutional imperative to deny. Because the trial court was informed that race was motivating one of the parties' decisions to agree to excuse potential jurors, Amicus suffered unconstitutional racial discrimination at the hands of the trial court in this case.

B. The Trial Court's Enforcement of the Discriminatory Excusal Agreement Threatens the Community's Confidence in the Court System.

As with the rights of the Amicus herself, the interests of the broader community are threatened by the trial court's approval of discriminatory excusal agreements. In addition to *Batson*'s third constitutional interest, this Court's "representative cross-section of the community" requirement affirms the idea that the jury is not merely twelve individuals with individual rights, but a political entity necessary for democratic governance. *See Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.").

In this case, the damage done to the community trust in the court system is likely more severe because the court itself dismissed jurors after learning that one of the parties' reasons for agreeing to it was the race of the potential juror. This Court has specifically held that "[d]iscrimination within the judicial system is most 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.'" *Batson*, 476 U.S. at 88 (citing *Strauder* v. *West*

Virginia, 100 U.S. 187, 195 (1879)). A community's interest in punishing criminals grants the state the power to prosecute and incarcerate the members of that community. But the power to *convict* is retained by the community itself. When that power is used to prevent Black community members from participating in that system, the system plainly implies the "inferiority in civil society" of all Black citizens within the community from which the pool was drawn. *See Strauder*, 100 U.S. at 308. If the Court permits trial courts to enforce openly discriminatory juror-excusal agreements, the Court renders the confidence of communities in their judicial systems an afterthought.

II. GRANTING CERTIORARI IS NECESSARY TO PROTECT THE RIGHTS OF POTENTIAL JURORS AND DETER FUTURE ENFORCEMENT OF DISCRIMINATORY EXCUSAL AGREEMENTS.

The only way to vindicate the individual rights of Amicus, affirm the community's confidence in the integrity of the judicial system, and deter future trial courts from enforcing discriminatory juror-excusal agreements is for this Court to grant the Petition for Certiorari. This is so for two reasons. First, these agreements represent a breakdown of the adversarial process which venirepersons rely upon to safeguard their constitutional rights. Second, reversal is necessary to deter future trial courts from enforcing discriminatory agreements and restore broader community confidence in an impartial judicial system.

To start, potential jurors like Amicus are especially vulnerable to discrimination during the

jury selection process. *See Powers*, 499 U.S at 414. Harris County, from which this case arises, is a jurisdiction with a history of race discrimination in jury selection. *See, e.g., Smith* v. *Texas*, 311 U.S. 128 (1940) (finding unconstitutional racial discrimination in Harris County grand-jury selection); *Harris* v. *Texas*, 467 U.S. 1261, 1263 (1984) (Marshall, J., dissenting from denial of certiorari) (recounting testimony from a Harris County district judge that he could not recall a single instance where a Black juror was permitted to serve as a juror in a criminal case with a white victim and Black defendant). And Harris County trial courts, in particular, have frequently been determined to have wrongly dismissed jurors whom a party sought to exclude because of their race.[2]

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[2] *See Moore* v. *State*, 265 S.W.3d 73, 85–90 (Tex. App.—Houston [1st Dist.] 2008) (concluding that Harris County trial court "clearly erred" by ruling that a prosecutor's strike was not impermissibly motivated by race); *State* v. *Thomas*, 209 S.W.3d 268, 275 (Tex. App.—Houston [1st Dist.] 2006) (concluding that Harris County trial court's ruling that the prosecutor's request to dismiss a Black potential juror was not racially motivated was "clearly erroneous"); *Emerson* v. *State*, 851 S.W.2d 269, 271–74 (Tex. Crim. App. 1993) (reversing Harris county trial court's ruling that prosecutor's reasons for striking Black prospective juror were not racially discriminatory); *Esteves* v. *State*, 859 S.W.2d 613, 614–17 (Tex. App.—Houston [1st Dist.] 1993) (reversing Harris County trial court's ruling that prosecutor's reasons for exercising peremptory challenges to three Black venirepersons were not motivated by race); *Vargas* v. *State*, 859 S.W.2d 534, 535 (Tex. App.—Houston [1st Dist.] 1993) (Harris County trial court's finding that prosecutor's use of peremptory challenges was not motivated by race was "clearly erroneous"); *Wright* v. *State*, 832 S.W.2d 601, 605 (Tex. Crim. App. 1992) (Harris County trial court's finding that the prosecutor's peremptory strike of

Venirepersons are at a distinct disadvantage in protecting their rights not to be excluded from service on juries because of their race. When potential jurors are dismissed, they are not entitled to know why, and they have no recognized ability to object or be heard.[3] *See Powers*, 499 U.S. at 414 (describing the "daunting" barriers to excluded jurors' ability to protect their rights).

Potential jurors are even more vulnerable in the context of agreements between the parties to dismiss than in the context of unilateral peremptory challenges by a single party. Since these agreements often take place off the record and outside of the courtroom, the jurors are left even more in the dark about the reasons for their dismissal. And because

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veniremember was not based on any racial consideration was "clearly erroneous"); *Brooks* v. *State*, 802 S.W.2d 692, 695 (Tex. Crim. App. 1991) (Harris County trial court's ruling that prosecutor's use of peremptory challenges to strike five Black venirepersons was not racially motivated was "clearly erroneous"); *Lewis* v. *State*, 775 S.W.2d 13, 15–17 (Tex. App.—Houston [14th Dist.] 1989) (Harris County trial court's finding that prosecutor did not purposefully discriminate when exercising peremptory challenges was not supported by the record); *Whitsey* v. *State*, 796 S.W.2d 707, 713 (Tex. Crim. App. 1989) (Harris County trial court's ruling that prosecutor's use of peremptory challenges were not racially discriminated was not supported by the record).

[3] Barriers exist even if a juror knows or suspects he or she was excluded because of race. Because these agreements require enforcement by the trial courts, potential jurors would have to sue the trial courts for any remedy that they may have—which would plainly be precluded by judicial immunity. *See Mireles* v. *Waco*, 502 U.S. 9, 12–13 (1991) (per curiam) ("[T]his Court's precedents acknowledge that, generally, a judge is immune from a suit for money damages.").

the parties are in agreement about dismissal, there is no adversarial process to operate as a check. The Court should hear this case to make clear that agreements to dismiss jurors by the parties are subject to the same scrutiny by trial courts as peremptory challenges made by a single party. At the very least, when a party volunteers that its agreement to dismiss a juror is motivated by the race of the potential juror, the trial court must abstain from ratifying the agreement.

Further, without a rule that precludes the enforcement of discriminatory juror-excusal agreements, the community affected by this case can have no confidence that future proceedings will be free of racial bias. If there is no consequence for the conduct in this case, with the consideration of race in jury selection being explicitly acknowledged in open court, the community from which Petitioner's jury was drawn has no reason to believe that trial courts in the future will prevent racially discriminatory conduct. To vindicate the Equal Protection rights of the community from which Petitioner's jury was drawn, there must be a clear consequence for the overt consideration of race in jury selection.

CONCLUSION

For the reasons stated above, Amicus urges the Court to grant the petition for *certiorari* and reverse the judgment below. In the alternative, Amicus respectfully requests that the Court grant *certiorari* and allow full briefing and argument.

Respectfully submitted,

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