No. 25-5665
(CAPITAL CASE)

IN THE

Supreme Court of the United States

ALI AWAD MAHMOUD IRSAN,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITON TO 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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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. Introduction

Petitioner seeks review of the knowing judicial enforcement of defense counsel's explicitly race-based agreement to exclude a Black woman from the venire, in violation of the Equal Protection Clause. The parties agree that judicially-enforced agreed excusals of venirepersons—and not peremptory strikes or challenges for cause—are the primary vehicle for winnowing the jury pool in Texas capital prosecutions. In this case, such an agreement was enforced by the trial court even though a party's racially discriminatory motive for seeking dismissal of a juror was explicitly stated to the trial judge at the time of the agreement. The Texas Court of Criminal Appeals' ("TCCA") decision below allows parties, and a judge tolerant of such discrimination, to employ the most prevalent method for dismissing potential jurors to openly evade the Equal Protection Clause.

Seeking to shield the TCCA's decision from this Court's scrutiny, the State of Texas misstates the record in several significant respects. The TCCA decided Petitioner's Equal Protection claim squarely on the merits, thus creating an ideal vehicle to resolve whether courts may enforce explicit, race-based agreed excusals of prospective jurors. The petition should be granted to close a loophole in the jury selection process that has evaded this Court's *Batson*[2] jurisprudence, vindicate the rights of excluded jurors, and clarify judges' affirmative obligations when explicit race-based motives surface in jury selection.

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

II. Because the Texas Court of Criminal Appeals ruled on the merits of Mr. Irsan's Equal Protection claim, no procedural bar precludes this Court's review.

The Respondent mischaracterizes both the record and the law to argue that the Court's review of the Equal Protection violation at trial is barred. BIO at 7–13. Because the TCCA denied Petitioner's Equal Protection on the merits, there is no procedural bar to review. Furthermore, this Court's precedents forbid the judiciary from being a "willing participant" in race-based jury exclusion and impose an affirmative duty to prevent such discrimination once it becomes apparent. *Geogia v. McCollum*, 505 U.S. 42, 49–50 (1992). The constitutional defect here does not turn on a defense objection; it turns on the trial court's own conduct.

A. The TCCA ruled on the merits of Petitioner's Equal Protection argument.

The Respondent erroneously states that the "Texas Court of Criminal Appeals held in this case that the petitioner's Equal Protection claim was procedurally defaulted because no objection was made at trial." BIO at 13. This is incorrect. As the Petition explained, the TCCA made two rulings with respect to his Equal Protection arguments. Pet. at 5–6. First, it held that any *Batson* violation, regardless of how extreme, was defaulted by the absence of an objection. Pet. App. at 19a. This holding is irrelevant because the petitioner did not raise a *Batson* issue—*i.e.* an objection to the discriminatory exercise of a peremptory strike—either on direct appeal or in his petition to this Court. Second, and most germane to this proceeding, the TCCA evaluated the merits of the Equal Protection issue actually briefed by the Petitioner, which it characterized as "go[ing] beyond the traditional *Batson* framework." *Id*. Assessing the Petitioner's argument against the Equal Protection violation in *Mata v. Johnson*, 99 F.3d 1261, 1264 (5th Cir. 1996), *vacated in part by* 105 F.3d 209, 210 (5th Cir. 1997) (*op on reh'g*), the TCCA factually distinguished Petitioner's case on the ground that, unlike in *Mata*, there was no record of the prosecutors' or trial judge's

motive when acquiescing to defense counsel's racially motivated agreement to exclude the juror. *Id*. Indeed, despite a clear record to the contrary, the TCCA incorrectly absolved the trial court of knowing even the race of the excluded venireperson, let alone defense counsel's clearly announced racially motivated reason for seeking her exclusion. Pet. App. at 19a ("Indeed, the record suggests that the trial judge did not even realize that Veniremember 467 was (in defense counsel's words) a 'black female.'"). As explained in Section III, *infra*, the TCCA unquestionably misread the record, which is undisputed by the parties.[3] Distinguishing the facts of this case from the Equal Protection violation in *Mata* was not a procedural holding, it was an application of the law to the facts and thus a merits ruling, albeit one based on a fatally flawed reading of the trial record.

B. The Equal Protection violation at issue is the trial court's and prosecutor's knowing participation in the race-based exclusion of potential jurors—something that cannot be insulated by defense counsel's failure to object.

Even if the State had correctly identified a relevant state court procedural ruling, it would not bar this Court's review. The Petitioner challenges the trial judge's and prosecutor's knowing enforcement and acquiescence in the excuse of Ms. Henderson after defense counsel twice identified race as motivating his willingness to excuse her; once the State actors were informed of the racial motive, they had a constitutional duty to refuse to implement it. Pet. at 10–15.

This Court has repeatedly held that the Equal Protection Clause prohibits the judiciary from being a "willing participant" in race-based jury exclusion and imposes an affirmative duty to prevent such discrimination once it becomes apparent. *McCollum*, 505 U.S. at 49–50 ("'[B]e it at the hands of the State or the defense,' if a court allows jurors to be excluded because of group bias,

[3] *See* BIO at 5–6 (quoting the exchange in which the trial judge is clearly apprised that Ms. Henderson is Black and her race was a reason for defense counsel's request to excuse her); *id*. at 15–16 (arguing that the trial court and prosecutor had no duty to intervene after defense counsel announced his racially motivated reason for excluding the juror and not—as the TCCA held—that the trial court was ignorant of counsel's discriminatory purpose).

'[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.'") (quoting *State v. Alvarado*, 534 A.2d 440, 442 (N.J. 1987)); *Avery v. Georgia*, 345 U.S. 559, 561 (1953) ("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.'") (internal citation omitted). This Court has recognized that jury selection discrimination injures excluded both jurors and the community, Pet. at 19–20, rights that cannot be bargained away by an attorney acting in open violation of the Equal Protection Clause while opposing counsel and the court acquiesce.

The Respondent's default arguments are based on inapposite authority. BIO at 8–12. *Batson* governs the parties' peremptory strikes and prescribes a party-driven objection protocol. Here the excusal occurred through a discretionary judicial mechanism that the judge knowingly implemented despite defense counsel's on-the-record announcement of his race-based motive for requesting the juror's dismissal. This is precisely when a judge's Equal Protection obligation to prohibit racial discrimination is triggered. As noted in the Petition, numerous courts recognize the judicial authority to intervene *sua sponte* when discrimination is open and apparent. Pet. at 14 n.8.

None of Respondent's authorities license the trial judge to knowingly execute a race-based removal or allow the prosecutor to silently acquiesce once a party's racial motive is disclosed. The State's notice and preservation arguments miss the target when, as here, a party announces in open court that he seeks to exclude jurors based on their race and the trial judge affirms her

understanding that the exclusion is racially motivated. No objection is needed to inform a judge of what she already knows; the Equal Protection Clause required her to stop the exclusion, not exercise her discretionary authority to rubber-stamp it.

Because the TCCA unambiguously rejected Petitioner's Equal Protection claim on the merits, no procedural bar precludes this Court's review.

III. The dispositive facts—defense counsel's race-based agreement to exclude a juror, the trial court's acknowledgment of defense counsel's race-based motive and assent, and the State's acquiescence—are established in the record and require no further development to establish an Equal Protection Violation.

The Respondent suggests that the issue presented is not fully developed for this Court's review. BIO at 12–13, 15–16; *see*, *e.g., id*. at 13 ("The type of claim made in this case is much more suited to a post-conviction writ of habeas corpus, in which the record can be fully developed by all parties."). But Petitioner's Equal Protection claim is factually straightforward and simple: the knowing judicial enforcement of defense counsel's explicitly race-based agreement to exclude a Black woman from the venire violated the Equal Protection Clause. The issue to be resolved by the Court is purely a legal one because all factual elements are uncontrovertibly established by the record on appeal.

First, Respondent's implausible suggestion to the contrary notwithstanding, BIO at 15, there is no question that defense counsel's decision to invoke the trial court's authority to dismiss Jocelyn Henderson was "motivated in substantial part by discriminatory intent." *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019) (quoting *Foster v. Chapman*, 578 U.S. 488, 513 (2016)). The transcript shows that defense counsel, after the prospective juror could no longer hear, stated "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"

dismissal. Pet. at 3; BIO at 5–6. Defense counsel thus clearly explained to the trial judge and the prosecution that his motive to eliminate Black jurors (or possibly only Black women) from the jury was based on potential evidence in the case. The nature of that unidentified evidence is irrelevant, all that matters is that defense counsel had decided that Black jurors were generally undesirable.[4]

Second, the record demonstrates that the trial judge plainly understood that defense counsel's request to dismiss Ms. Henderson was based on her race, and that counsel's race-based concern about Ms. Henderson was connected to some aspect of the evidence. The trial court incorrectly guessed that counsel's concerns were related to the race of the victims: "Are some of the victims black females?" Pet. at 3. After defense counsel responded, "No ma'am. There are other issues," the trial court replied: "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." *Id*. Thus, the record establishes that the trial judge (1) understood that defense counsel was asking her to dismiss a Black potential juror for race-based reasons; and, (2) explicitly condoned defense counsel's racially motivated conduct when exercising her discretionary authority to dismiss the juror. This record not only refutes any

[4] The Respondent speculates that defense counsel may have had other motives for agreeing to release Ms. Henderson, such as her potential unavailability to serve or some aspect of her questionnaire. BIO at 15. Respondent's suggestions are contradicted by the record. First, during the on-the-record colloquy, it was clear that the potential juror was eager to serve and was arranging her schedule to facilitate her jury service. Pet. at 2–3; BIO at 4–5. The trial court thought Ms. Henderson would be "a great juror" and asked the parties to confirm that *despite* Ms. Henderson's availability and willingness to serve, they were "still okay with excusing her." Pet. at 3; BIO at 5. Immediately after this exchange, defense counsel announced that Ms. Henderson's race was a "reason I take into consideration in our decision to agree to her" dismissal. Pet. at 3; BIO at 6. Thus, the defense agreed to excuse Ms. Henderson based on her race despite her availability and willingness to serve. The operative cause was the race-based agreement implemented by the judge, not hardship.

Second, Ms. Henderson's questionnaire situated her within the mainstream of venirepersons with respect to criminal justice and capital punishment related issues. Pet. at 4. Respondent fails to identify any aspect of her questionnaire—such as an opposition to capital punishment or unwillingness to impose the death penalty—that would warrant dismissing her without individual voir dire. To the contrary, based on her questionnaire, Ms. Henderson was a death-qualified juror. *Id*.

suggestion that the trial judge *remained* unaware that Ms. Henderson is Black, as the TCCA erroneously concluded, it documents the trial court's approval of a racially motivated exclusion as being based on "a good reason."

Petitioner's claim does not depend on the type of factual development necessary for divining *unstated* rationales for dismissing potential jurors because Petitioner is not asking this Court to impose an affirmative duty on trial courts to discern the parties' hidden motives for agreeing to excuse jurors from service. The Equal Protection violation at issue here is the trial court's and prosecutor's *knowing* implementation of an *explicitly race-based* excusal. Thus, Respondent's invocation of this Court's concerns in *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008), regarding the difficulty of performing a comparative analysis or other analyses used to rebut race-neutral explanations for dismissing a juror are irrelevant here. No further development is necessary to establish defense counsel's motive or the trial court's and prosecution's knowledge and participation.

Flowers affirms that exclusion from juries "motivated in substantial part by discriminatory intent" violates the Equal Protection Clause. The trial court's knowing judicial enforcement of—and the prosecutor's knowing acquiescence in—defense counsel's explicitly race-based agreement to exclude a Black woman from the venire satisfies this test.

IV. Petitioner's case is an excellent vehicle for resolving whether agreed excusals of potential jurors are subject to the Equal Protection Clause.

Petitioner's case is not fact-bound: it involves an express race-based statement by defense counsel, judicial acknowledgment and implementation, and the prosecutor's acquiescence—all within a statutory framework that permits abuse and evasion of *Batson*'s limits. As the Respondent acknowledges, "[i]n this case, as in most death penalty cases in Harris County, a huge number of prospective jurors were excused by agreement, and the vast majority of them were excused without

discussion or any questioning." BIO at 2. Thus, agreed excusals in Texas capital cases have a far greater impact on jury selection than peremptory strikes or removals for cause, yet this known pathway for discrimination—as Petitioner's case demonstrates—may continue to evade *Batson*'s safeguards. Pursuant to the decision below, those who are of a mind to discriminate can do so openly and without constraint. This case cleanly presents that scenario because counsel expressly articulated a race-based reason for agreeing to excuse a Black juror and the court nevertheless enforced the agreement as based on "good reason."

Moreover, there are compelling reasons for this Court's intervention. This case showcases the need to clarify a judge's duty when discrimination is apparent. The decision below holds there is no duty to act even when discrimination is explicit, an approach that invites recurrence and requires correction. Indeed, the decision below licenses explicitly racially discriminatory juror excusals so long as only one party openly declares their racial bias. Pet. App. at 19a ("Because 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.") (quoting *Mata*, 99 F.3d at 1269).

More fundamentally, the Court's intervention is necessary to vindicate jurors' independent Equal Protection rights and protect community confidence in the criminal justice system. Equal Protection protects not only defendants but also veniremembers who suffer the "profound personal humiliation" of exclusion based on race. *Powers v. Ohio*, 499 U.S. 400, 413–14 (1991). Allowing judges to enforce admitted race-based agreements leaves jurors without recourse and erodes trust in the courts. Amicus Sherryll Howe, a Black veniremember excluded by agreement from jury service in this case, explains that potential jurors cannot object in real time and are blocked by judicial immunity from after-the-fact remedies. Amicus Brief of Excluded Juror Sherryll Howe

In Support of Petition For Writ of Certiorari at 9–12. This Court's intervention is the only meaningful protection available to Ms. Howe and other similarly situated Harris County citizens.

CONCLUSION

This Court's review would reaffirm foundational Equal Protection principles in a context where they have been openly flouted, close a loophole that permits discrimination through agreed excusals, vindicate the victims of discrimination, promote confidence in the fairness of the criminal justice system and the application of the death penalty, and provide concrete guidance to trial judges and the trial bar nationwide on their affirmative obligations when race-based motives are made explicit. This Court should grant certiorari, or in the alternative, hold this case for the disposition of *Pitchford v. Cain*, No. 24-7351, 2025 WL 3620434, at *1 (U.S. Dec. 15, 2025) (order granting certiorari), which also concerns the scope of an appellate court's duty to consider all of the record facts establishing race discrimination in jury selection regardless of the arguments made in the trial court, and therefore is likely to yield a decision that will bear upon the proper resolution of the issue presented here.

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