(ORDER LIST: 600 U.S.)

FRIDAY, JUNE 30, 2023

CERTIORARI -- SUMMARY DISPOSITIONS

22-204 KLEIN, MELISSA E., ET VIR V. OR BUREAU OF LABOR

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Oregon for further consideration in light of *303 Creative LLC* v. *Elenis*, 600 U. S. ___ (2023).

22-362 HUFFMAN, MATT, ET AL. V. NEIMAN, MERYL, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Moore* v. *Harper*, 600 U. S. ___ (2023).

22-374 OLHAUSEN, TROY V. ARRIVA MEDICAL, LLC, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *United States ex rel. Schutte* v. *Supervalu Inc.*, 598 U. S. ___ (2023). Justice Alito took no part in the consideration or decision of this petition.

22-582 UNITED STATES V. HERNANDEZ-CALVILLO, JOSE, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *United States* v. *Hansen*, 599 U. S. ___ (2023).

22-593 U.S., EX REL. SHELDON V. ALLERGAN SALES, LLC

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *United States ex rel. Schutte* v. *Supervalu Inc.*, 598 U. S. ___ (2023). Justice Alito took no part in the consideration or decision of this petition.

CERTIORARI GRANTED

22-193 MULDROW, JATONYA C. V. ST. LOUIS, MO, ET AL.

The petition for a writ of certiorari is granted limited to the following question: Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

22-666 WILKINSON, SITU K. V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted.

22-674) CAMPOS-CHAVES, MORIS E. V. GARLAND, ATT'Y GEN.
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22-884) GARLAND, ATT'Y GEN. V. SINGH, VARINDER

The petitions for writs of certiorari are granted. The cases are consolidated, and a total of one hour is allotted for oral argument.

22-721 McELRATH, DAMIAN V. GEORGIA

22-859 SEC V. JARKESY, GEORGE R., ET AL.

The petitions for writs of certiorari are granted.

22-915 UNITED STATES V. RAHIMI, ZACKEY

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

CERTIORARI DENIED

21-763 HAM, JOHN F. V. BRECKON, WARDEN

21-926 COOPER TIRE & RUBBER CO. V. McCALL, TYRANCE

21-8190 LUCZAK, THOMAS V. UNITED STATES

22-118 SHAW, MARQUIS V. UNITED STATES

22-369 SILVA, CARLOS M. V. GARLAND, ATT'Y GEN.

22-738 MANGINE, ROBERT A. V. WITHERS, WARDEN

22-991 JARKESY, GEORGE R., ET AL. V. SEC

22-5345 KARR, GARY P. V. UNITED STATES

22-5828 BULLOCK, DeSHAUN V. UNITED STATES

22-5993 ROSS, MALIK V. UNITED STATES

22-6212 CAIN, ERIC V. UNITED STATES

22-6386 SANCHEZ, FRANK V. UNITED STATES

22-6680 STAPLETON, MICHAEL V. UNITED STATES

22-6736 MARTIN, JUSTIN D. V. UNITED STATES

22-6815 MERRY, DAVID E. V. UNITED STATES

22-6838 BEACHEM, DEMETRI D. V. UNITED STATES

22-6940 LITTLE, LEON V. UNITED STATES

22-7148 JENKINS, KARTEU O. V. UNITED STATES

The petitions for writs of certiorari are denied.

22-398 SANTIAGO, MARCOS F. V. STREEVAL, J. C.

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition. See 28 U.S.C. §455(b)(3) and Code of Conduct for U.S. Judges, Canon 3C(1)(e) (prior government employment).

22-672 NORTHSTAR WIRELESS, LLC V. FCC, ET AL.

The petition for a writ of certiorari is denied. Justice Jackson took no part in the consideration or decision of this

petition. See 28 U.S.C. §455 and Code of Conduct for U.S. Judges, Canon 3C (prior judicial service).

22-5329 FULKS, CHADRICK V. WATSON, WARDEN

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition. See 28 U.S.C. §455(b)(3) and Code of Conduct for U.S. Judges, Canon 3C(1)(e) (prior government employment).

22-7438 NELLOM, FRANK V. USDC ED PA

22-7508 REYNA, HERMA B. M. V. PNC BANK, N.A., ET AL.

The petitions for writs of certiorari are denied. Justice Alito took no part in the consideration or decision of these petitions.

SUPREME COURT OF THE UNITED STATES

DAYONTA MCCLINTON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 21–1557. Decided June 30, 2023

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

The prosecution in this case argued that Dayonta McClinton, then 17 years old, shot and killed his friend in a dispute over the proceeds of a pharmacy robbery. The jury unanimously acquitted him of killing his friend and convicted him only of robbing the pharmacy.

After that, however, something happened that might strike the average person as quite strange. At McClinton's sentencing for the robbery conviction, the prosecution again argued that McClinton had killed his friend. When the judge agreed, this caused McClinton's Sentencing Guidelines range to skyrocket. While the ultimate sentencing decision is discretionary, "[t]he Guidelines are the framework for sentencing and anchor the district court's discretion." *Molina-Martinez* v. *United States*, 578 U. S. 189, 198–199 (2016) (internal quotation marks and alterations omitted). McClinton's Guidelines range had initially been approximately five to six years. Yet taking into account the killing, the judge sentenced McClinton to 19 years in prison.

As many jurists have noted, the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence[1] raises important questions that go to the fairness and perceived fairness of the criminal justice system. See *Jones* v. *United States*, 574 U. S. 948, 949–950 (2014) (Scalia, J., joined by THOMAS and Ginsburg, JJ., dissenting

[1] For brevity, I will refer to this as "acquitted-conduct sentencing."

from denial of certiorari); see also *United States* v. *Bell*, 808 F. 3d 926, 928 (CADC 2015) (Kavanaugh, J., concurring in denial of reh'g en banc); *United States* v. *Sabillon-Umana*, 772 F. 3d 1328, 1331 (CA10 2014) (Gorsuch, J.); *United States* v. *Watts*, 519 U. S. 148, 170 (1997) (Kennedy, J., dissenting).[2]

These concerns arise partly from a tension between acquitted-conduct sentencing and the jury's historical role. Juries are democratic institutions called upon to represent the community as "a bulwark between the State and the accused," and their verdicts are the tools by which they do so. *Southern Union Co.* v. *United States*, 567 U. S. 343, 350 (2012) (internal quotation marks omitted); see also *Blakely* v. *Washington*, 542 U. S. 296, 305–306 (2004) ("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"). Consistent with this, juries were historically able to use acquittals in various ways to limit the State's authority to punish, an ability that the Founders prized. See *Jones* v. *United States*, 526 U. S. 227, 245–246 (1999). With an acquittal, the jury as representative of the community has been asked by the State to authorize punishment for an alleged crime and has refused to do so.

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[2]Many other state and federal judges have questioned the practice. See also, *e.g.*, *State* v. *Melvin*, 248 N. J. 321, 349–352, 258 A. 3d 1075, 1092–1094 (2021); *People* v. *Beck*, 504 Mich. 605, 625–629, 939 N. W. 2d 213, 224–227 (2019); *State* v. *Marley*, 321 N. C. 415, 424–425, 364 S. E. 2d 133, 138–139 (1988); *State* v. *Cote*, 129 N. H. 358, 375–376, 530 A. 2d 775, 785 (1987); *Jefferson* v. *State*, 256 Ga. 821, 827, 353 S. E. 2d 468, 474 (1987); *United States* v. *Tapia*, 2023 WL 2942922, *2, n. 2 (CA2, Apr. 14, 2023); *United States* v. *Brown*, 892 F. 3d 385, 408–409 (CADC 2018) (Millett, J., concurring); *United States* v. *White*, 551 F. 3d 381, 391–397 (CA6 2008) (Merritt, J., dissenting); *United States* v. *Canania*, 532 F. 3d 764, 776–778 (CA8 2008) (Bright, J., concurring); *United States* v. *Mercado*, 474 F. 3d 654, 658, 662–665 (CA9 2007) (Fletcher, J., dissenting); *United States* v. *Baylor*, 97 F. 3d 542, 550–553 (CADC 1996) (Wald, J., concurring); *United States* v. *Concepcion*, 983 F. 2d 369, 395–396 (CA2 1992) (Newman, J., dissenting).

This helps explain why acquittals have long been "accorded special weight," *United States* v. *DiFrancesco*, 449 U. S. 117, 129 (1980), distinguishing them from conduct that was never charged and passed upon by a jury.[3] This special weight includes traditionally treating acquittals as inviolate, even if a judge is convinced that the jury was "mistaken." *Id.*, at 130. In contrast, there appears to be little record of acquitted-conduct sentencing before the 1970s. See C. Murray, Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing, 84 St. John's L. Rev. 1415, 1444, 1427–1437, 1450–1455 (2010) (describing the role of federal statutes and especially the Guidelines in the rise of acquitted-conduct sentencing).[4]

The argument for acquitted-conduct sentencing is generally based on standards of proof. A sentencing judge makes findings by a preponderance of the evidence, whereas a jury applies the higher beyond-a-reasonable-doubt standard. Because an acquittal could reflect a jury's conclusion that the evidence of guilt fell just short of the beyond-a-reasonable-doubt standard, the argument goes, there is no conflict with a judge making a contrary finding of guilt under a lower evidentiary standard.

Yet there is a tension between this narrower conception of an acquittal and the manner in which juries historically used acquittals. See *Jones*, 526 U. S., at 245–246; see also *Blakely*, 542 U. S., at 305–306 (jury trial "is no mere procedural formality, but a fundamental reservation of power in

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[3] The history and nature of acquittals distinguishes the narrow question of acquitted-conduct sentencing from broader questions posed by JUSTICE ALITO about the other kinds of facts judges may consider at sentencing.

[4] Many sentencing courts throughout history have thus gone without acquitted conduct and various States have expressly limited such consideration for decades. See *Cote*, 129 N. H., at 375–376, 530 A. 2d, at 785; *Jefferson*, 256 Ga., at 827, 353 S. E. 2d, at 474; *Marley*, 321 N. C., at 424–425, 364 S. E. 2d, at 138–139. This suggests that JUSTICE ALITO's workability concerns may not be as dire as he fears.

our constitutional structure"). Further, an acquittal could also reflect a jury's conclusion that the State's witnesses were lying and that the defendant is innocent of the alleged crime. In that case, it is questionable that a jury's refusal to authorize punishment is consistent with the judge giving the defendant additional years in prison for the same alleged crime. The fact is that even though a jury's specific reasons for an acquittal will typically be unknown, the jury has formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue. So far as the criminal justice system is concerned, the defendant "has been set free or judicially discharged from an accusation; released from a charge or *suspicion* of guilt." *State* v. *Marley*, 321 N. C. 415, 424, 364 S. E. 2d 133, 138 (1988) (internal quotation marks and alterations omitted).

There are also concerns about procedural fairness and accuracy when the State gets a second bite at the apple with evidence that did not convince the jury coupled with a *lower* standard of proof. Even defendants with strong cases may understandably choose not to exercise their right to a jury trial when they learn that even if they are acquitted, the State can get another shot at sentencing.

Finally, acquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system. Various jurists have observed that the woman on the street would be quite taken aback to learn about this practice. See, *e.g.*, *United States* v. *Canania*, 532 F. 3d 764, 778 (CA8 2008) (Bright, J., concurring).

This is also true for jurors themselves. One juror, after learning about acquitted-conduct sentencing, put it this way: "'We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not

given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty.'" *Id.*, at 778, n. 4. In this Nation, juries have historically been venerated as "a free school . . . to which each juror comes to learn about his rights." 1 A. de Tocqueville, Democracy in America 316 (A. Goldhammer transl. 2004). One worries about the lesson jurors learn from acquitted-conduct sentencing.

The Court's denial of certiorari today should not be misinterpreted.[5] The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.

[5]The Court today will deny certiorari in a series of similar cases involving acquitted-conduct sentencing, and the issues discussed here apply to those cases as well.

SUPREME COURT OF THE UNITED STATES

DAYONTA MCCLINTON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 21–1557. Decided June 30, 2023

Statement of JUSTICE KAVANAUGH, with whom JUSTICE GORSUCH and JUSTICE BARRETT join, respecting the denial of certiorari.

As JUSTICE SOTOMAYOR explains, the Court's denial of certiorari today should not be misinterpreted. The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.

SUPREME COURT OF THE UNITED STATES

DAYONTA MCCLINTON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 21–1557. Decided June 30, 2023

JUSTICE ALITO, concurring in the denial of certiorari.

This Court does not lobby government entities to make preferred policy decisions, and no one should misinterpret my colleagues' statements as an effort to persuade the Sentencing Commission to alter its longstanding decision that acquitted conduct may be taken into account at sentencing. Even if the Commission eventually decides on policy grounds that such conduct should not be considered in federal sentencing proceedings, that decision will not affect state courts, and therefore the constitutional issue will remain.

The fundamental argument advanced in support of the proposition that consideration of such conduct at sentencing violates the Sixth Amendment right to a jury trial relies on what, I submit, is a flawed understanding of the meaning of that right when the Amendment was adopted, namely, that a defendant's sentence may be based only on facts that a jury has found beyond a reasonable doubt. As scholars have noted, there is strong evidence that this was not the understanding of the jury-trial right in 1791. See, *e.g.*, S. Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1123–1132 (2001); R. Little & T. Chen, The Lost History of *Apprendi* and the *Blakely* Petition for Rehearing, 17 Fed. Sentencing Rep. 69 (2004). In that era, federal criminal statutes often gave sentencing judges the authority to impose any sentence that fell within a prescribed range, and in exercising that authority, judges necessarily took into account facts that the jury had not found at trial. See K. Stith &

J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9–10 (1998). It is particularly significant that several federal criminal statutes enacted by the First Congress followed this approach. See Act of Apr. 30, 1790, 1 Stat. 112–118. That same Congress framed and proposed the Sixth Amendment and sent it to the States for ratification, and we have often reasoned that statutes enacted by that Congress are "persuasive evidence of what the Constitution means." *Harmelin* v. *Michigan*, 501 U. S. 957, 980 (1991) (opinion of Scalia, J.); see also, *e.g.*, *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986); *Marsh* v. *Chambers*, 463 U. S. 783, 790 (1983).

If, as the First Congress apparently believed, a sentencing judge may consider facts not proved at trial, that principle undermines the fundamental argument advanced to show that so-called acquitted conduct may not be considered.* Facts that simply affect a sentence "can be proved . . . by a preponderance of the evidence," *United States* v. *O'Brien*, 560 U. S. 218, 224 (2010), but facts needed to es-

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*Without the benefit of full briefing and argument, I am reluctant to opine on the history of the consideration of acquitted conduct at sentencing. See *ante*, at 2–3 (SOTOMAYOR, J., statement respecting denial of certiorari). But because, as I explain, there is no relevant difference for these purposes between acquitted conduct and uncharged conduct, the historical evidence supporting consideration of uncharged conduct is highly relevant to the consideration of acquitted conduct. Indeed, the sources JUSTICE SOTOMAYOR cites in her historical discussion support my arguments regarding the propriety of considering conduct not implicated by the jury's verdict and the logical connection between that and considering acquitted conduct. See *Jones* v. *United States*, 526 U. S. 227, 248 (1999) ("It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution"); C. Murray, Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing, 84 St. John's L. Rev. 1415, 1423–1425 (2010) (explaining that the reasons that justify considering uncharged conduct apply as a matter of logic to considering acquitted conduct).

tablish an element of a criminal offense must be proved beyond a reasonable doubt, *In re Winship*, 397 U. S. 358, 364 (1970). Therefore, the most that can be inferred from a not-guilty verdict is that this high standard was not met. *United States* v. *Watts*, 519 U. S. 148, 155 (1997) (*per curiam*). It cannot be inferred that the facts needed to convict were not shown by even a preponderance of the evidence, and that is why, it has been thought, acquitted conduct may be considered at sentencing. *Ibid.*

JUSTICE SOTOMAYOR mentions three other arguments in favor of a rule barring consideration of acquitted conduct, *ante*, at 4–5 (statement respecting denial of certiorari), but all of these arguments have weaknesses. The first argument is that a jury that returns a not-guilty verdict may have thought that even the preponderance-of-the-evidence standard was not met, but it would be odd indeed to base a constitutional rule on such speculation. Second, JUSTICE SOTOMAYOR claims that jurors who vote for acquittal may be surprised and even offended when they learn that the judge took acquitted conduct into account at sentencing, but jurors are not typically given the authority to choose the sentence that is imposed on a defendant they convict. That is usually the prerogative of the judge, and therefore any jurors who feel that the judge has infringed on their authority do not understand the scope of their role. In addition, juror surprise about either the severity or leniency of the sentence that a judge selects is almost certainly not confined to situations in which the sentence was affected by acquitted conduct. Third, JUSTICE SOTOMAYOR asserts that "the woman on the street" would be surprised to learn that a sentence was based on acquitted conduct. *Ante*, at 4 (statement respecting denial of certiorari). If that is true, it shows only that many people do not understand that "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a rea-

sonable doubt as to his guilt." *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 361 (1984).

If we eventually take up the acquitted-conduct issue, we will have to consider whether *stare decisis* stands in the way. In *United States* v. *Watts*, we said that there is no "prohibition against considering certain types of evidence at sentencing," including "uncharged or acquitted conduct." 519 U. S., at 152–155. Although the only specific constitutional challenge to consideration of acquitted conduct in *Watts* was based on the Double Jeopardy Clause, rather than due process or the jury-trial right, we framed our holding in broad terms, stating that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.*, at 157. Justice Stevens's dissent evinces the same broad understanding of the Court's decision. *Id.*, at 165 ("The precise question here" is "the burden of proof applicable to sentencing facts"). And subsequent decisions reflect this same understanding. *United States* v. *Booker*, 543 U. S. 220, 251 (2005) (characterizing *Watts* as holding "that a sentencing judge [can] rely for sentencing purposes upon a fact that a jury had found unproved" (emphasis deleted)); *Alabama* v. *Shelton*, 535 U. S. 654, 665 (2002) (Defendant was sentenced "in accord with *due process* . . . even if he [was] acquitted of the" conduct the sentence was in part based on (citing *Watts*; emphasis added)).

If holding that the Constitution prohibits the consideration of acquitted conduct at sentencing would require us to overrule *Watts*, we would also have to assess whether the resulting rule would be workable. See, *e.g.*, *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 459–460 (2015) (analyzing the workability not only of the precedent, but of the proposed new rule as well). And while the *Watts* regime has been shown to be eminently workable, significant practical concerns pervade the alternatives.

First, it will frequently be "impossible to know exactly why a jury found a defendant not guilty on a certain charge." *Watts*, 519 U. S., at 155. Take the example of an acquittal in a felony-murder case. How could a court tell whether the failure of proof concerned the killing or the underlying felony? If a defendant was acquitted for murder in aid of racketeering activity, see 18 U. S. C. §1959(a)(1), how could a court know whether the verdict was because the murder was unproved or because racketeering was not established? In the case of an acquittal for traveling in interstate commerce with the intent to commit a crime of violence from which death in fact results, see §1952(a)(2)(B), how could it be determined whether the prosecution failed to prove the requisite intent or failed to show that the defendant traveled in interstate commerce? No doubt, special-verdict forms would proliferate in such a system, despite the fact that they are generally disfavored in criminal cases and thought to disadvantage defendants.

Second, barring consideration of acquitted conduct would raise the issue of considering the conduct needed to convict on a count on which the jury was unable to reach a verdict. Suppose that a jury convicts on one count of an indictment but deadlocks on the other, and suppose that the prosecution is content to proceed to sentencing. Can the sentencing court consider conduct underlying the deadlocked count?

Finally, consider the following hypothetical. Suppose a crime has three elements, A, B, and C. Suppose that the jury acquits a defendant of the charge, and suppose that a special-verdict form reveals that every juror found that the prosecution had not proved A. If the facts needed to prove B or C have a bearing on the appropriate sentence for a separate offense for which the defendant was found guilty, what is the trial judge to do? Must the jury keep deliberating on B and C? Perhaps the jury, having decided that the showing on A was obviously deficient, gave little thought to

either of those elements. But sending the jury back to continue deliberating on B or C after it has already reached a verdict of acquittal would be odd and unprecedented.

If the Court in some future case takes up the question of the constitutionality of considering acquitted conduct at sentencing, better arguments on both sides of the issue may be presented to us, and nothing that I have written here should be understood as the expression of a firm position on that question. But because my colleagues have laid out some of the arguments in favor of one side, I thought it appropriate to outline some of the countervailing arguments.

SUPREME COURT OF THE UNITED STATES

JONATHAN ROBERTS, ET AL. *v.* JAMES V. MCDONALD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 22–757. Decided June 30, 2023

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE THOMAS joins, respecting the denial of certiorari.

The circumstances underlying the dispute below have long since come and gone, and I therefore agree with the Court's decision to deny review. But I write to note that this case involves an issue of ongoing importance: whether the Equal Protection Clause permits governments to use race or ethnicity as a proxy for health risk and therefore "prioritize the treatment of patients" on that basis. *Roberts* v. *Bassett*, 2022 WL 16936210, *3, n. 2 (CA2, Nov. 15, 2022) (Cabranes, J., concurring) (noting the "portentous legal issues" implicated by such policies).

When "several new COVID–19 treatments for high-risk patients" were approved in late 2021, the treatments were "briefly in short supply" relative to need. *Id.*, at *1 (summary order). New York State "instruct[ed] providers to follow" its guidance on "higher priority risk group[s]" so long as the "supply shortage persisted." *Ibid.* Echoing similar guidance from the federal Centers for Disease Control and Prevention, the State's guidance specified that " '[n]on-white race or Hispanic/Latino ethnicity should be considered a risk factor' " when prioritizing patients. *Id.*, at *1, *3 (alteration in original); *Roberts* v. *Bassett*, 2022 WL 785167, *2 (EDNY, Mar. 15, 2022). The State justified the use of

race and ethnicity as proxies for health risk by appealing to "'longstanding systemic health and social inequities.'" *Roberts*, 2022 WL 785167, at *2.

As we have stated many times and have recently reaffirmed, the Equal Protection Clause places a "daunting" obstacle in the way of any government seeking to allocate benefits or burdens based on race or ethnicity, typically giving way only when the measure in question is "'narrowly tailored'"—that is, "'necessary'"—to "remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U. S. ___, ___ (2023) (slip op., at 15). Therefore, government actors may not provide or withhold services based on race or ethnicity as a response to generalized discrimination or as a convenient or rough proxy for another trait that the government believes to be "'characteristic'" of a racial or ethnic group. *Id.*, at ___ (slip op., at 20).

Under that precedent, New York's general reference to "longstanding systemic health and social inequities" would not have sufficed to allow the State to deny a person medical treatment simply because that person is viewed by the State as being a member of the wrong racial or ethnic group. The shortage at issue in this case appears, thankfully, to have concluded. But in the event that any government again resorts to racial or ethnic classifications to ration medical treatment, there would be a very strong case for prompt review by this Court.

SUPREME COURT OF THE UNITED STATES

ALICIA THOMPSON *v.* JANELLE HENDERSON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 22–823. Decided June 30, 2023

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE THOMAS joins, respecting the denial of certiorari.

I concur in the denial of certiorari because this case is in an interlocutory posture, and it is not clear whether it presents any "federal issue" that has been "finally decided by the" Washington Supreme Court. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480 (1975); see 28 U. S. C. §1257. But if the Washington courts understand the decision below to be as sweeping as it appears, review may eventually be required.

This case started as an ordinary tort suit over a car accident. The victim of the accident, plaintiff Janelle Henderson, is black, as was her trial counsel. Alicia Thompson, the defendant, is white, as was her trial counsel. Thompson admitted fault, so the suit was over damages. Henderson claimed that the whiplash she suffered from the accident "seriously exacerbated" her Tourette's syndrome, and she asked for $3.5 million in damages. 200 Wash. 2d 417, 422–424, 518 P. 3d 1011, 1017 (2022). Defense counsel naturally tried to convince the jury that such a large award was not justified, and the jury, which awarded Henderson only $9,200, was apparently persuaded. *Id.*, at 422, 518 P. 3d, at 1017. Henderson moved for a new trial, claiming that the small award was based on racial bias, but the trial court denied the motion without a hearing. *Id.*, at 428, 518 P. 3d, at 1019–1020.

In a remarkable decision, the Washington Supreme

Court reversed due to the possibility that the jury's award was tainted by prejudice, and it remanded for a hearing that appears to have no precedent in American law. In support of its decision, the court cited several statements made by defense counsel in her closing argument. It pointed to defense counsel's description of Henderson as "*quite combative*" on the witness stand and her description of Thompson as "*intimidated and emotional* about the process." *Id.*, at 425, 518 P. 3d, at 1018 (internal quotation marks omitted; emphasis in original). The court found that these comments played on stereotypes about the "'angry Black woman'" and the "victimhood" of white women. *Id.*, at 436–437, and n. 8, 518 P. 3d, at 1023–1024, and n. 8. The court also cited defense counsel's insinuation that Henderson was motivated by a desire for a financial windfall, as well as her suggestion that Henderson could not have suffered $3.5 million in damages since she had not even mentioned the accident when she saw her doctor a short time thereafter. *Id.*, at 425, 518 P. 3d, at 1018. The court thought that this argument "alluded to racist stereotypes"—that black women are "lazy, deceptive, and greedy" and are "untrustworthy and motivated by the desire to acquire an unearned financial windfall." *Id.*, at 437, 518 P. 3d, at 1024. The court also faulted defense counsel for suggesting that Henderson's lay witnesses, all of whom were black, had been prepared or coached because they all used the same phrase—"'life of the party'"—to describe Henderson's personality before the accident. *Ibid.* The court viewed this tactic as inviting jurors to make decisions about these witnesses "as a group and . . . based on biases about race and truthfulness." *Id.*, at 438, 518 P. 3d, at 1024.

Because of these comments by defense counsel, the court found that an objective observer "*could* conclude that racism was a factor in the verdict," and it therefore held "that Henderson is entitled to an evidentiary hearing on her new

trial motion." *Id.*, at 429, 439, 518 P. 3d, at 1020, 1025 (emphasis in original). The court added that "[a]t that hearing, the [trial] court must presume racism was a factor in the verdict and Thompson bears the burden of proving it was not." *Id.*, at 429, 518 P. 3d, at 1020.

The Washington Supreme Court's decision raises serious and troubling issues of due process and equal protection. In some cases, it will have the practical effect of inhibiting an attorney from engaging in standard and long-accepted trial practices: attempting to undermine the credibility of adverse witnesses, seeking to bolster the credibility of the attorney's client, raising the possibility of a counterparty's pecuniary motives, and suggesting that witnesses may have been coached or coordinated their stories. Such tactics are common and have long been viewed as proper features of our adversarial system. See, *e.g.*, *Geders* v. *United States*, 425 U. S. 80, 89–90 (1976) (emphasizing that "[s]killful cross-examination" is a remedy to deal with "'coached' witnesses"); *Marcic* v. *Reinauer Transp. Cos.*, 397 F. 3d 120, 125 (CA2 2005) ("A claim for money damages does create a financial incentive to be untruthful, and it was not improper for opposing counsel to invoke this incentive in an attempt to impeach plaintiff"); Fed. Rule Evid. 801(d)(1)(B)(i) (contemplating impeachment based on "improper influence or motive").

"'Due process requires that there be an opportunity to present every available defense,'" *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) (quoting *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168 (1932)), but the decision below attaches a high price to the use of these run-of-the-mill defenses in cases where parties are of particular races. The Washington Supreme Court endorsed an evidentiary hearing based on the mere "*possibility*" of bias, and its analysis appears to hold that such litigation strategies *per se* raise at least the "possibility" of such bias. 200 Wash. 2d, at 434, 518 P. 3d, at 1023 (emphasis added). Moreover, the State

Supreme Court's rule requires the nonmoving party to prove at a hearing *not* that it did not intend to appeal to racial bias, but that racial bias (perhaps even subconscious bias) had no *impact on the jurors*. See *ibid.* How the Washington Supreme Court thinks this can be done is unclear.

In sum, the opinion below, taken at face value, appears to mean that in any case between a white party and a black party, the attorney for the white party must either operate under special, crippling rules or expect to face an evidentiary hearing at which racism will be presumed and the attorney will bear the burden of somehow proving his or her innocence. It is possible that the Washington Supreme Court will subsequently interpret its brand-new decision more narrowly, but the procedures it appears to set out would raise serious due-process concerns.

The Washington Supreme Court's opinion is also on a collision course with the Equal Protection Clause, as our recent opinion in *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U. S. ___ (2023) (*SFFA*), demonstrates. The procedures the state court has imposed appear likely to have the effect of cordoning off otherwise-lawful areas of inquiry and argument solely because of race, violating the central constitutional command that the law must "be the same for the black as for the white; that all persons . . . shall stand equal before the laws of the States." *Id.*, at ___ (slip op., at 10) (quoting *Strauder* v. *West Virginia*, 100 U. S. 303, 307 (1880)). The Washington Supreme Court justified its prophylactic rules in part by reasoning that "[r]acism is endemic" in our society, 200 Wash. 2d, at 421, 518 P. 3d, at 1016, and that "*implicit, institutional, and unconscious biases, in addition to purposeful discrimination*, have influenced jury verdicts in Washington State," *id.*, at 435, 518 P. 3d, at 1023 (emphasis in original). But as we reaffirmed in *SFFA*, the Fourteenth Amendment's equal-treatment principle yields only when necessary to remediate "specific, identified instances of . . .

discrimination that violat[e] the Constitution or a statute," not generalized past or ongoing discrimination. 600 U. S., at ___ (slip op., at 15). The decision of the Washington Supreme Court, however, threatens "to inject racial considerations into every [litigation] decision" parties make. *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U. S. 519, 543 (2015).

Nothing in the papers before us suggests that defense counsel would have tried this case differently or that the jury award would have been larger if the races of the plaintiff and defendant had been different. As a result, the decision below, far from combating racism, institutionalizes a variation of that odious practice. See *SFFA*, 600 U. S., at ___ (slip op., at 38) (discussing the unfitness of the judiciary to determine whether reliance on race is benevolent rather than malign).

The decision below, like the decision in *Roberts* v. *McDonald*, No. 22–757, in which I have filed a separate statement, illustrates the danger of departing from the foundational principle that in the United States all people are entitled to "equal justice under law," as the façade of our building proclaims. Every one of the 330 million inhabitants of our country is a unique individual and must be treated as such by the law. It is not an exaggeration to say that our extraordinarily diverse population will not be able to live and work together harmoniously and productively if we depart from that principle and succumb to the growing tendency in many quarters to divide Americans up by race or ancestry.

SUPREME COURT OF THE UNITED STATES

ROY HARNESS, ET AL. *v.* MICHAEL WATSON, MISSISSIPPI SECRETARY OF STATE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22–412. Decided June 30, 2023

The petition for a writ of certiorari is denied.

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins, dissenting from the denial of certiorari.

The President of the 1890 Mississippi Constitutional Convention said it plain: "Let us tell the truth if it bursts the bottom of the Universe . . . We came here to exclude the negro. Nothing short of this will answer."[1] To further that agenda, the Convention placed nine crimes in §241 of the State's Constitution as bases for disenfranchisement, believing that more Black people would be convicted of those crimes than White people. See *Williams* v. *Mississippi*, 170 U. S. 213, 222–223 (1898) (acknowledging that purpose, but expressing "no concern" regarding the Conventioneers' objective); *Ratliff* v. *Beale*, 74 Miss. 247, 265, 20 So. 865, 868 (1896) (similar); 47 F. 4th 296, 300 (CA5 2022) (*per curiam*) (en banc) (case below) (recognizing §241's discriminatory aim).

Eight of those crimes have remained in §241 since 1890, without interruption. Thus, the Convention's avowed goals continue to be realized via its chosen mechanism: Today (just as in the Convention's aftermath), thousands of Black Mississippians cannot vote due to §241's operation.[2] Peti-

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[1] N. McMillen, Dark Journey: Black Mississippians in the Age of Jim Crow 41 (1989) (McMillen) (internal quotation marks omitted); see also *id.*, at 39–43.

[2] See McMillen 44–48; Report of Dov Rothman in No. 3:17–cv–00791

tioners brought this legal action to challenge §241's continued use of the eight crimes as bases for felon disenfranchisement. 47 F. 4th, at 302.

The Court of Appeals for the Fifth Circuit properly recognized that, under this Court's settled precedent, the mere passage of time cannot insulate from constitutional challenge a law that was invidious at its inception. See *id.*, at 300, 304. That court could not escape acknowledging the similarities between this case and *Hunter* v. *Underwood*, 471 U. S. 222 (1985) (Rehnquist, J., for the Court), in which this Court unanimously invalidated an Alabama constitutional provision passed in 1901 because its "enactment was motivated by a desire to discriminate against blacks on account of race" and it "continue[d] to th[at] day to have that effect." *Id.*, at 233. But en route to affirming the District Court's grant of summary judgment against petitioners, the Fifth Circuit proceeded to make two egregious analytical errors that ought to be corrected.

First, it seized upon the idea that §241 had somehow been "reenacted" in full when the citizens of Mississippi twice amended parts of that provision years later. 47 F. 4th, at 306. To be sure, later amendments changed bases for disenfranchisement other than the eight at issue here: In 1950, burglary was removed from the list of disenfranchising crimes via the State's amendment processes, and, in 1968, murder and rape were added via the same processes. See *id.*, at 300–301. But, for federal constitutional purposes, the State never enacted any "new" version of the original eight grounds for disenfranchisement. In 1950, voters could have either removed burglary from §241 or left §241 unchanged. So, too, in 1968—voters could have added murder and rape or left §241 unchanged. *Id.*, at 319, 323–324 (Graves, J., dissenting). No other change to the original list

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(SD Miss., Oct. 25, 2018), ECF Doc. 77–9, p. 6, ¶10.

of crimes was ever on offer. Therefore, the same discriminatory list of crimes that the 1890 Constitution's ratifiers "ma[d]e into law by authoritative act" operates to disenfranchise Mississippians who commit those crimes today. Black's Law Dictionary 666 (11th ed. 2019) (defining "enact").

Accordingly, the Fifth Circuit was wrong to believe that the amendments rendered the 1890 Convention's discriminatory purpose irrelevant and to reject petitioners' claim on the ground that they could show no discriminatory purpose, see 47 F. 4th, at 307, 309–310. Quite to the contrary, here, just as in *Hunter*, the "remaining crimes" from §241's pernicious origin still work the very harm the 1890 Convention intended—denying Black Mississippians the vote. 471 U. S., at 232–233.

Second, the Fifth Circuit's alternative holding—that even if §241 is tainted by discriminatory purpose, petitioners have no viable claim because the disenfranchisement provision would have been adopted anyway, see 47 F. 4th, at 310–311—was equally misguided. Under our well-established precedents, in order to defeat a challenge to a state law that was motivated by discriminatory purpose, the State bears the burden of showing that "the law would have been enacted without" that purpose. *Hunter*, 471 U. S., at 228. Here, the Fifth Circuit assumed for argument's sake that petitioners had shown discriminatory purpose, but concluded that the State had discharged its burden because certain legislators and a state task force considered recommending changes to §241's list of crimes in the 1980s. 47 F. 4th, at 302, 310. And the Fifth Circuit held that the State's burden was satisfied even though that consideration never yielded an actual change to §241. See *id.*, at 310–311.

This alternative holding was infused with the faulty "reenactment" rationale, insofar as the Fifth Circuit assumed, *arguendo*, "discriminatory intent arising *from the 1968* amendment." *Id.*, at 310 (emphasis added). Moreover,

and even more fundamentally, the Fifth Circuit misread (or misunderstood) this Court's holdings about the nature of the necessary inquiry. The burden is not to demonstrate a theoretical possibility that *any* legislature could have adopted the enactment at issue absent discrimination. Rather, courts must assess whether *the discriminatory actor* (here, the 1890 Convention) "would have" enacted the provision sans the discriminatory intent that was its actual motivation. *Hunter*, 471 U. S., at 228; see also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270–271, and n. 21 (1977) (State's "burden" is to "establis[h] that the same decision *would have resulted*" (emphasis added)). And *that* question cannot possibly be answered by looking to the unconsummated considerations of legislative actors a near century after the enactment.

In sum, I would have granted this petition to correct the Fifth Circuit's clear and constitutionally momentous errors, and the Court could have done so in a straightforward and narrow (but significant) manner. All that is needed to resolve this dispute is (1) the indisputable fact that §241's disenfranchisement provisions were adopted for an illicit discriminatory purpose, and (2) the (unusually undeniable) understanding that, far from being subsequently "reenacted," §241 has persisted, without change—doing the harmful work that it was designed to do—ever since its initial invidious inception.

* * *

The other day, this Court declared that the "'Constitution deals with substance, not shadows,' and the [constitutional] prohibition against racial discrimination is 'levelled at the thing, not the name.'" *Students for Fair Admissions* v. *President and Fellows of Harvard College*, 600 U. S. ___, ___–___ (2023) (slip op., at 39–40). There are no shadows in §241, only the most toxic of substances.

Thus, the majority's decision *not* to take up this matter is

doubly unfortunate. We were asked to address this problem 125 years ago in *Williams*, and declined to do so. See 170 U. S., at 219–223, 225 (rejecting challenge to §241). And this Court blinks again today. So, at the same time that the Court undertakes to slay other giants, Mississippians can only hope that they will not have to wait another century for a judicial knight-errant. Constitutional wrongs do not right themselves. With its failure to take action, the Court has missed yet another opportunity to learn from its mistakes.

SUPREME COURT OF THE UNITED STATES

JODY LOMBARDO, ET AL. *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–510. Decided June 30, 2023

The petition for a writ of certiorari is denied. JUSTICE JACKSON would grant the petition for a writ of certiorari.

JUSTICE SOTOMAYOR, dissenting from the denial of certiorari.

"It hurts. Stop." These were the words of Nicholas Gilbert just before he died at the hands of St. Louis police officers. *Lombardo* v. *St. Louis*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 2). The police arrested Gilbert for trespassing and for failing to show up in court for a traffic ticket. They took him into custody. Six hours later, Gilbert was dead. The facts, taken in the light required at this stage of litigation, show that six officers in a small holding cell held Gilbert face down on the ground in handcuffs and leg irons while at least one officer pressed down on his back for 15 minutes—that is, until Gilbert stopped breathing.

Gilbert's parents sued. They argued that the police used excessive force against their son, in violation of the United States Constitution. The parents demanded a jury trial. The courts below, however, decided that a trial was unnecessary because qualified immunity shielded the officers. A Federal District Court concluded that the officers did not violate a constitutional right that was clearly established at the time of Gilbert's death. *Lombardo* v. *Saint Louis City*, 361 F. Supp. 3d 882, 895 (ED Mo. 2019). The Court of Appeals for the Eighth Circuit went a step further, deciding that the officers did not violate any constitutional right at all. 956 F. 3d 1009, 1014 (2020). Both courts focused on

Gilbert's perceived "resistance": Prior to his death, Gilbert tied a piece of clothing around the bars of his cell and put it around his neck, attempting to hang himself. When three officers responded, Gilbert struggled. According to Gilbert's parents, however, the evidence shows that after the police handcuffed Gilbert's arms behind his back; shackled his legs; surrounded him with six officers; held Gilbert's limbs down at the shoulders, biceps, and legs; and put deadly pressure on his back, Gilbert's only movements were that of a restrained man desperately trying to breathe. Or, at least, a jury could so find. The Court of Appeals for the Eighth Circuit ignored that possibility, the parents argued.

This Court summarily vacated the decision of the Eighth Circuit. *Lombardo*, 594 U. S., at ___ (slip op., at 4). The Court explained that the inquiry into whether the officers used excessive force required "'careful attention to the facts and circumstances of'" the case. *Id.*, at ___ (slip op., at 3) (quoting *Graham* v. *Connor*, 490 U. S. 386, 396 (1989)). The Court then identified evidence that the Eighth Circuit improperly "failed to analyze" or "characterized" "as insignificant": "the duration of the restraint"; "the fact that Gilbert was handcuffed and leg shackled at the time"; the fact "that officers placed pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation"; "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk"; and the fact that such "guidance further indicates that the struggles of a prone subject may be due to oxygen deficiency, rather than a desire to disobey officers' commands." 594 U. S., at ___–___ (slip op., at 3–4). This evidence, the Court said, was "pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat—to both Gilbert and others—reasonably perceived by the officers." *Id.*, at ___ (slip op., at 4).

On remand, the Eighth Circuit did not attend to these facts in deciding whether the officers used excessive force. Instead the court simply decided that, even if Gilbert had a constitutional right to be free from excessive force in such circumstances, that right was not "clearly established." 38 F. 4th 684, 686 (2022). In reaching that conclusion, the Eighth Circuit, once again, focused myopically on Gilbert's perceived resistance. The court also ignored that a jury could determine that any actions by Gilbert did not warrant the use of deadly force. The St. Louis police were well aware that prolonged prone restraint with chest compression can cause suffocation.* Yet the officers applied such force to Gilbert anyway, even though he was handcuffed and shackled, and even though six officers were present to hold his limbs down. The Eighth Circuit assumed Gilbert's subsequent movements amounted to "ongoing resistance," *id.*, at 692, rather than efforts to breathe, and the court therefore analogized his case to Circuit precedent in which the subject was actively resisting. On that basis, the Court of Appeals concluded that whatever Gilbert's constitutional rights were in this situation, they were not clearly established. See *id.*, at 691.

Respectfully, I would not let this Court's mandate be so easily avoided. Instead, I would again vacate the decision of the Eighth Circuit and remand for that court to resolve the question of qualified immunity without assuming that Gilbert's final movements were those of a dangerously noncompliant person posing a threat, rather than of a dying

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*When asked whether holding a subject in a prone position and pressing on his back could cause suffocation, a representative of the city of St. Louis confirmed, "We train to that, yes." *Lombardo* v. *Saint Louis City*, No. 4:16–cv–01637 (ED Mo., Aug. 31, 2018), ECF Doc. 77–10, p. 26 (deposition of Officer Philip Green). The city's expert likewise agreed that officers should "not compress [a subject's] chest" because "if you compress the chest you can kill somebody." ECF Doc. 77–14, at 7 (deposition of Ronald E. Schwint).

man struggling to breathe while adequately restrained by handcuffs and leg shackles and surrounded by six officers in a secure cell. That factual determination, between resistance or desperation, belongs to the jury. It should not be assumed by a court in assessing whether clearly established law exists. By usurping the jury's role, the courts below guaranteed that Gilbert's parents will never obtain the trial they have long sought.

The "clearly established" prong of the qualified immunity analysis can pose a very high bar for plaintiffs seeking to vindicate their rights. Even when government officials violate the law, qualified immunity shields them from damages liability unless the "the violative nature of [the] *particular* conduct is clearly established." *Mullenix* v. *Luna*, 577 U. S. 7, 12 (2015) (*per curiam*) (internal quotation marks omitted). When taken too far, as here, this requirement allows lower courts to split hairs in distinguishing facts or otherwise defining clearly established law at a low level of generality, which impairs the ability of constitutional torts to deter and remedy official misconduct. See, *e.g.*, J. Jeffries, The Liability Rule for Constitutional Torts, 99 Va. L. Rev. 207, 256 (2013) ("It is as if the one-bite rule for bad dogs started over with every change in weather conditions").

Making matters worse, a court may grant qualified immunity based on the clearly established prong without ever resolving the merits of plaintiffs' claims. This inhibits the development of the law. "Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books." *Zadeh* v. *Robinson*, 902 F. 3d 483, 499 (CA5 2018) (Willett, J., concurring *dubitante*). If this Court is going to endorse this "Escherian Stairwell," *ibid.*, then it should instead reex-

amine the doctrine of qualified immunity and the assumptions underlying it. The doctrine is a creation of our own design.

The Constitution's command is clear: Police officers may not use deadly force unless they reasonably believe that a suspect poses a significant threat of death or serious injury to the officers or others. *Tennessee* v. *Garner*, 471 U. S. 1, 3 (1985). We must give officers leeway to use judgment in close situations, but not so much leeway that we nullify the Constitution's protections or permit officers to escape scrutiny by juries. Here, the Eighth Circuit improperly seized the jury's role and went too far in holding that there is no claim for unconstitutionally excessive force when six police officers handcuff, leg-shackle, and surround a man in a secure cell, put him face down on the floor, and push into his back for 15 minutes until he slowly dies. Nicholas Gilbert deserved better from the police. His parents and society deserve better from our courts.

SUPREME COURT OF THE UNITED STATES

N. S., ONLY CHILD OF DECEDENT, RYAN STOKES, BY AND THROUGH HER NATURAL MOTHER AND NEXT FRIEND, BRITTANY LEE, ET AL. *v.* KANSAS CITY BOARD OF POLICE COMMISSIONERS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–556. Decided June 30, 2023

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, dissenting from the denial of certiorari.

The evidence in this case, taken in the light required at this stage of litigation, tells a disturbing story. Ryan Stokes was an unarmed Black man in the process of surrendering to the police when Officer Thompson, without warning, shot him in the back and killed him. Stokes was only suspected of cell phone theft, there had been no reports he was violent or threatening, and the unarmed Stokes was peacefully surrendering to a different officer after a brief foot chase. This arresting officer, Officer Straub, had already holstered his gun because he could tell that Stokes did not present a risk. Indeed, Stokes was facing Straub and lifting his hands to surrender. Straub was therefore "shocked" when, without any warning, Stokes was shot from behind by Thompson. App. in No. 20–1526 (CA8), p. 2058.

Stokes' daughter sued over her father's killing and sought a jury trial. The Court of Appeals for the Eighth Circuit, however, ensured that this case never made it to a jury. At the summary judgment stage, the court granted Thompson qualified immunity on the ground that it was not clearly established that Thompson had used excessive force when he shot and killed Stokes. The court reached this result

through a two-step that is all too familiar.

First, the Eighth Circuit improperly drew factual inferences in the police officer's favor. It is the jury's role to decide factual disputes over what happened and draw factual inferences from the evidence presented. Summary judgment deprives the jury of this crucial role, and thus "is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Tolan* v. *Cotton*, 572 U. S. 650, 656–657 (2014) (*per curiam*) (quoting Fed. Rule Civ. Proc. 56(a)). In assessing whether summary judgment is warranted, "a court must view the evidence in the light most favorable to the opposing party" and "adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 572 U. S., at 657, 660 (internal quotation marks omitted). This ensures that it is a jury that will hear evidence and determine which story is credible, not a judge reading a paper record. This role of the jury is particularly important in qualified immunity cases, where the stakes are not just about the parties involved, but whether there will be accountability when public officials violate the Constitution. Cf. *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975) (the jury represents "the . . . judgment of the community").

Here, however, the Eighth Circuit did not follow this well-settled law. In this case, as in many qualified immunity cases, a key question at summary judgment was whether, resolving factual disputes in favor of Stokes' daughter, "a jury could reasonably infer that [Stokes' actions], in context, did not amount" to a threat that he would "inflict harm" on Straub. *Tolan*, 572 U. S., at 658. Yet in answering this question and in setting out the version of the facts most favorable to Stokes' daughter, the Eighth Circuit failed to draw all factual inferences in the daughter's favor.

To be sure, the court below correctly acknowledged that

the evidence showed the following when taking the daughter's version of disputed facts: Stokes never had a gun, he was lifting his hands to surrender, and Thompson "fired without warning." 35 F. 4th 1111, 1113–1114 (2022). The Eighth Circuit then departed from the proper approach, however, when it somehow concluded that even viewing this evidence in the light most favorable to Stokes' daughter, Thompson "faced a . . . choice here: use deadly force or face the possibility that Stokes might shoot a fellow officer." *Id.*, at 1114. The court drew this inference from two facts: First, Stokes was raising his hands (while surrendering to Straub) with his back turned toward Thompson; and second, prior to surrendering, Stokes had briefly opened and then closed the door to his friend's car.

Yet even assuming an inference of danger could reasonably be drawn in Thompson's favor (which is debatable), drawing such an inference here would still be inconsistent with "the fundamental principle" that "reasonable inferences should be drawn in favor" of Stokes' daughter. *Tolan*, 572 U. S., at 660. A jury could instead infer that an officer in Thompson's position did not have an objective reason to fear imminent violence from Stokes because: (1) no gun was seen; (2) there was no reason to suspect Stokes was violent, much less prepared to kill a police officer; (3) opening the car door could have multiple nonthreatening explanations, including hiding a stolen cell phone; and (4) Stokes was unwarned, not disobeying any orders, and his actions showed he was surrendering. A reasonable juror could have similarly placed greater weight on the facts that tended toward showing that Stokes' actions, even from Thompson's vantage point, were harmless. In other words, "[a] jury could well have concluded that a reasonable officer would have [seen Stokes' actions] not as a threat" of imminent deadly violence, but as what they were: the actions of an unarmed man surrendering to the police. *Id.*, at 659. The court below may have disagreed with that inference, but it was the

jury's to make.

Second, the Eighth Circuit compounded this error through its analysis of whether Thompson had violated Stokes' clearly established rights. This Court has clearly established that an officer cannot use deadly force against an unarmed suspect who is not behaving violently and does not pose an immediate risk of serious physical injury or death to others. See *Tennessee* v. *Garner*, 471 U. S. 1, 9–12 (1985). Indeed, in *Garner* the suspect was at least refusing to follow a direct order, *id.*, at 4, while here Stokes was peaceably surrendering. Circuit precedent only further established that officers cannot, without warning and without an objective suspicion of imminent violence, shoot unarmed people who are not resisting arrest. See *Nance* v. *Sammis*, 586 F. 3d 604, 610–611 (CA8 2009); *Ngo* v. *Storlie*, 495 F. 3d 597, 599–601, 603–605 (CA8 2007).

The court below dodged this precedent by identifying immaterial differences between the facts of cases. Yet factually identical cases are not required for law to be clearly established. See, *e.g.*, *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002). The evidence here, when properly interpreted at this stage, matches the key holdings of those cases about the use of lethal force against unarmed, unwarned people who do not pose a danger to others.

Instead, the Eighth Circuit analogized the facts here to a case involving "an armed robbery," "a report of shots fired," and an officer ordering the suspect to stop before firing. *Thompson* v. *Hubbard*, 257 F. 3d 896, 898 (CA8 2001). This analogy was "[c]entral" to the court's "conclusion." 35 F. 4th, at 1114. Had the Eighth Circuit drawn the proper inferences in the daughter's favor, it simply could not have plausibly concluded as a matter of law that "Officer Thompson faced a similar choice here." *Ibid.*

These dual mistakes—resolving factual disputes or drawing inferences in favor of the police, then using those inferences to distinguish otherwise governing precedent—have

become the calling card of many courts' qualified immunity jurisprudence. See, *e.g.*, *Lombardo* v. *St. Louis*, 600 U. S. ___, ___–___ (2023) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 2–4); *Ramirez* v. *Guadarrama*, 597 U. S. ___, ___–___ (2022) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 2–3); *James* v. *Bartelt*, 595 U. S. ___, ___–___ (2021) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 1–2); *Kisela* v. *Hughes*, 584 U. S. ___, ___, ___ (2018) (SOTOMAYOR, J., dissenting) (slip op., at 2, 13); *Mullenix* v. *Luna*, 577 U. S. 7, 23–25 (2015) (SOTOMAYOR, J., dissenting).

The result is that a purportedly "qualified" immunity becomes an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations. Officers are told "that they can shoot first and think later," because a court will find some detail to excuse their conduct after the fact. *Kisela*, 584 U. S., at ___ (SOTOMAYOR, J., dissenting) (slip op., at 15). The public is told "that palpably unreasonable conduct will go unpunished." *Ibid.* And surviving family members like Stokes' daughter are told that their losses are not worthy of remedy. I would summarily reverse the court below to break this trend. It is time to restore some reason to a doctrine that is becoming increasingly unreasonable. If this Court is unwilling to do so, then it should reexamine its judge-made doctrine of qualified immunity writ large.

SUPREME COURT OF THE UNITED STATES

STACEY A. KINCAID, SHERIFF, FAIRFAX COUNTY, VIRGINIA *v.* KESHA T. WILLIAMS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 22–633. Decided June 30, 2023

The petition for a writ of certiorari is denied.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting from the denial of certiorari.

This case presents a question of great national importance that calls out for prompt review. The Fourth Circuit has effectively invalidated a major provision of the Americans with Disabilities Act (ADA), and that decision is certain to have far-reaching and highly controversial effects. The ADA provides that "transvestism," "transsexualism," "gender identity disorders not resulting from physical impairments," and "other sexual behavior disorders" are not "'disabilit[ies]'" within the meaning of its terms. 42 U. S. C. §12211(b). Nevertheless, the Fourth Circuit held that because "gender identity disorder" is a "now-obsolete" term in the field of psychiatry, that statutory category "*no longer exists*" and has therefore ceased to have any effect. 45 F. 4th 759, 768–769, and n. 5 (2022) (emphasis in original). As a result, all entities covered by the ADA must make "accommodations" for any "feeling[s] of stress and discomfort" that result from a person's "assigned sex." *Id.*, at 768 (internal quotation marks omitted); see, *e.g.*, §§12112(b)(5)(A), 12182(b)(2)(A)(ii).

This decision will raise a host of important and sensitive questions regarding such matters as participation in women's and girls' sports, access to single-sex restrooms and housing, the use of traditional pronouns, and the ad-

ministration of sex reassignment therapy (both the performance of surgery and the administration of hormones) by physicians and at hospitals that object to such treatment on religious or moral grounds.

If the Fourth Circuit's decision is correct, there should be no delay in providing the protection of the ADA to all Americans who suffer from "feeling[s] of stress and discomfort" resulting from their "assigned sex." But if the Fourth Circuit's decision is wrong—and there is certainly a reasonable argument to that effect—then the 32 million residents of the Fourth Circuit should not have to bear the consequences while other courts wrestle with the same legal issue.

There are times when it is prudent for this Court to deny review of a questionable court of appeals decision because we may learn from the way in which other courts of appeals and district courts handle the same question, but in this case that prudential consideration is not sufficient to justify the denial of prompt review. The majority and dissenting opinions below lay out the opposing arguments, and if we granted review, we would undoubtedly receive thorough briefing from the parties and in *amicus* briefs filed by experts and other interested parties, including in all likelihood the Federal Government. Under these circumstances, in my judgment, there is no good reason for delay.

I

The ADA was landmark legislation that resulted from a bipartisan effort to "eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland* v. *Policy Management Systems Corp.*, 526 U. S. 795, 801 (1999). In light of its bold ambitions, the ADA sweeps across nearly every facet of public life. It binds all employers of meaningful size and demands

that they refrain from various forms of discrimination and, in certain circumstances, requires that they offer needed accommodations. 42 U. S. C. §§12111(5), 12112(a), (b). It requires all state and local government entities to ensure that no one is "excluded from participation in or . . . denied the benefits of" public programs and services "by reason of [a] disability." §12132. It requires a wide variety of private entities, including numerous businesses and private schools, to ensure that persons with disabilities receive "the full and equal enjoyment" of those entities' "goods, services, facilities, privileges, advantages, [and] accommodations" in a variety of ways. §§12181(7), 12182.

The ADA is far-reaching, but like all other statutes, it has its limits. It expressly excludes coverage for a disparate group of traits, habits, and mental conditions, including sexual orientation, conditions arising from drug use, and gambling addiction. §12211. And relevant here, the ADA also excludes mental dispositions and conditions that relate to gender expression or gender identity. See §12211(b)(1) (referring to "transvestism, transsexualism, . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"); accord, §12208.

In this case, the plaintiff, Kesha Williams, brought suit against Stacey Kincaid, the sheriff of Fairfax County, Virginia, based on alleged mistreatment during a stay in a county detention center. Some of Williams's claims arose under state tort law–for example, a gross negligence claim based on injuries allegedly inflicted during a body search–and Kincaid does not ask us to consider any of those claims. Rather, she contends only that she cannot be sued under the ADA for failing to accommodate Williams's "gender dysphoria," by, among other things, placing Williams in men's housing, failing to offer hormone therapy, and permitting "persistent and intentional misgendering and harassment." 45 F. 4th, at 763.

The Fourth Circuit panel majority found that Williams

had pleaded a covered disability, notwithstanding the exclusions noted above, and it relied on two separate rationales.

First, the majority found that the condition alleged by Williams, *i.e.*, "gender dysphoria," does not constitute what the ADA calls a "gender identity disorder." The panel majority concluded that the term "gender identity disorders" in the ADA refers *only* to a so-named psychological condition that was used in the American Psychiatric Association's Diagnostic and Statistical Manual at the time of the ADA's enactment, and because leading organizations in that field no longer recognize that concept, the panel majority held that the term is now "obsolete." *Id.*, at 769. In the panel majority's view, the concept of gender identity disorder encompassed all "cross-gender identification," while the now-accepted concept of "gender dysphoria" is defined by stress that goes beyond "being trans alone." *Id.*, at 768–769 (internal quotation marks omitted). As a result, the panel majority reasoned that "gender identity disorder" as a category "*no longer exists*," and thus the statutory exclusion is without any effect. *Id.*, at 769, n. 5 (emphasis in original).

Second, the majority found that Williams had adequately pleaded an ADA claim by alleging gender dysphoria resulting from a physical impairment. As noted, the ADA's definition of disability excludes "gender identity disorders not resulting from physical impairments," §12211(b)(1), and therefore, if a person's "gender dysphoria" results from a physical impairment, that condition may qualify as a disability. The ground on which the majority concluded that Williams's complaint sufficiently alleged a physical impairment is not entirely clear, but the majority's reasoning appears to be that Williams has a physical need for hormonal treatment because, without it, Williams experiences "'physical distress.'" 45 F. 4th, at 771 (emphasis deleted). In addition, the majority noted "medical and scientific research identifying possible physical bases of gender dysphoria."

Ibid.

The panel majority sought to bolster its interpretation of the ADA by invoking the doctrine of constitutional avoidance. The majority argued that even if the ADA's text did not *require* this interpretation, it would nevertheless be necessary in order "to avoid a serious constitutional question" under the Equal Protection Clause. *Id.*, at 772. Citing Circuit precedent, the majority found that "the ADA's exclusion of 'gender identity disorders'" from the definition of disability was "evidence of . . . discriminatory animus" by Congress, and to support this conclusion, the majority pointed to "moral judgment[s]" expressed by legislators who backed the exclusion for "gender identity disorders." *Id.*, at 773.

This ground-breaking interpretation of the ADA is remarkable in itself, but the Fourth Circuit panel majority went even further and noted that its reasoning applied equally to Williams's claim under the Rehabilitation Act of 1973, which extends disability-accommodation requirements to a different set of entities that benefit from various forms of federal financial assistance. 45 F. 4th, at 765, n. 1; see 29 U. S. C. §794.

Judge Quattlebaum dissented in relevant part, and set out a reasonable contrary argument. Looking to the diagnostic criteria for gender identity disorder in 1990, he concluded that "when the ADA was signed into law, gender identity disorder was understood to include what Williams alleges to be gender dysphoria," that is, "distress and discomfort from identifying as a gender different from the gender assigned at birth." 45 F. 4th, at 782–783. He also argued that the majority's interpretation of the ADA provision excluding gender-identity conditions causes that provision to nullify itself. His understanding of the claim that the majority accepted was that gender dysphoria results from a physical impairment whenever a person has the "physical characteristics" of a gender with which that

person does not identify and suffers distress and discomfort as a result. *Id.*, at 788. But that interpretation, he wrote, "would read 'not resulting from physical impairments' out of the statute." *Ibid.*

By a narrow 8-to-6 vote, the Fourth Circuit denied en banc review. 50 F. 4th 429 (2022).

II

Without full briefing and argument, I would not take a firm view on the proper interpretation of the ADA, let alone on the merits of Williams's particular case. But several aspects of the Fourth Circuit's reasoning are troubling.

First, as Judge Quattlebaum noted in dissent, *both* gender identity disorder and gender dysphoria have long been identified by "'persistent or recurrent discomfort'" in connection with "'one's assigned sex.'" 45 F. 4th, at 782 (quoting American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 77 (rev. 3d ed. 1987)). So the change in the field's terminology does not obviously place gender dysphoria outside the category of gender identity disorders. But even setting aside Judge Quattlebaum's important point, the Fourth Circuit's narrow focus on the phrase "gender dysphoria" does not engage with the broad brush used by Congress, which barred application of the ADA not only to "transsexualism" and "gender identity disorders not resulting from physical impairments," but also to "*other sexual behavior disorders*." §12211(b)(1) (emphasis added). This final catch-all category suggests that Congress sought to prohibit the ADA's application to conditions that are sufficiently similar to the more specific categories of conditions that precede. At a minimum, the Fourth Circuit should have explained why the catch-all provision was insufficient to encompass gender dysphoria.

Second, the Fourth Circuit's understanding of when a gender identity disorder "result[s] from physical impair-

ments" does not meaningfully distinguish physical impairments from "mental impairment[s]," which the ADA recognizes as a distinct category. §§12102(1)(A), 12211(b)(1). Many common mental impairments, such as depression and anxiety disorders, cause real and sometimes powerful physical distress and are treated by chemical interventions. That does not mean, however, that those mental impairments are caused by an independent physical trait that *itself* qualifies as an impairment.[1] Significantly more analysis would be needed to accept an interpretation of the exception to the exclusion that swallows the exclusion whole.

Finally, the Fourth Circuit's animus analysis relies too heavily on statements made by a few Members of Congress and does not sufficiently take into account the many considerations that Congress may have had in mind in adopting a piece of major legislation like the ADA. A legislative body "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." Williams-Yulee v. Florida Bar, 575 U. S. 433, 449 (2015). Congress may also have thought that coverage of gender-identity-related conditions would raise special free speech and free exercise concerns. It seems more than uncharitable to say, as the Fourth Circuit did, that "[t]he only reason we can glean" for excluding gender identity disorders is "'a bare . . . desire to harm a politically unpopular group.'" 45 F. 4th, at 773.

III

The potential impact of the Fourth Circuit's decision is difficult to overstate. Consider, first, the claims that the

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[1] The Fourth Circuit's reasoning is also unneeded to give meaning to the "physical impairments" exception, as gender identity disorders *do* arise in connection with physical traits that clearly qualify as independent impairments. See 45 F. 4th 759, 788, n. 7 (2022) (Quattlebaum, J., dissenting) (discussing "'physical intersexuality'" of the sex organs).

panel majority allowed to go forward in this particular case. Those claims sought relief for the distress caused by sex-specific housing, the failure to provide or facilitate hormone treatment, and the use in relation to Williams of the pronoun "he," forms of address like "mister" and "sir," and the term "gentleman." *Id.*, at 764 (internal quotation marks omitted). Permitting such claims suggests numerous further consequences. If the ADA requires that a person be given access to facilities reserved for the sex with which that person identifies whenever that is needed to avoid substantial distress, then such a claim may be brought against any "place of lodging," "service establishment," "elementary, secondary, undergraduate, or postgraduate private school," or "homeless shelter" with sex-specific bathrooms or dormitories. See §§12181(7)(A), (F), (J), (K).[2] Educational institutions that sponsor girls' or women's athletic competitions, and facilities that host such events, may be sued if they exclude any individual who identifies as female. §§12181(7)(C), (J), (L), 12182(b)(1)(A)(iii). If the ADA allows a cause of action for not facilitating hormone treatment, an ADA claim may presumably be filed against any "hospital" or "health care provider" that declines to provide hormone treatment or surgical procedures as part of a process of gender transition, at least where it would provide such hormones or similar surgery for other medical reasons. §12181(7)(F). If the ADA allows a cause of action against an institution whose employees decline to refer to a coworker using the pronoun or form of address that this coworker prefers, then any of the above institutions or any other (broadly defined) place of public accommodation is put

[2] Of course, the uniquely dangerous context of prison presents dangers well beyond personal distress, and such dangers may trigger numerous legal obligations apart from the ADA. In light of the possibility that Williams was actually endangered by being housed with men, the Fourth Circuit allowed a state tort claim to proceed; that holding is not challenged, and I do not question it here.

to the choice between, on the one hand, firing all employees who refuse (perhaps for religious reasons) to speak contrary to their beliefs on gender transition or, on the other hand, risking ruinous lawsuits.

In short, the Fourth Circuit's ruling leaves a great many people and institutions under the looming threat of liability, forcing them to change their behavior—behavior that may be deeply rooted in moral or religious principles—or face an unending stream of lawsuits. If it is at least *possible* that the ADA does not require these results, we should be willing to resolve the question now rather than later.

* * *

The Fourth Circuit's decision makes an important provision of a federal law inoperative and, given the broad reach of the ADA and the Rehabilitation Act, will have far-reaching and important effects across much of civil society in that Circuit. Voters in the affected States and the legislators they elect will lose the authority to decide how best to address the needs of transgender persons in single-sex facilities, dormitory housing, college sports, and the like. Given that impact, and with the legal issues well aired below and in a variety of prior federal court decisions, I would grant certiorari now.[3] Because the Court declines to do so, I respectfully dissent.

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[3] See, *e.g., Parker* v. *Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (SD Ohio 2018) (surveying case law as of 2018 and concluding that "[t]he majority of federal cases have concluded" that the ADA excludes even those gender identity disorders that "substantially limit a major life activity").

SUPREME COURT OF THE UNITED STATES

TONY TERRELL CLARK *v.* MISSISSIPPI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 22–6057. Decided June 30, 2023

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting from the denial of certiorari.

Just a few years ago, this Court took an admirable stand to defend its landmark decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). *Batson* plays a vital role in preserving the integrity of our judicial system by ensuring that people are not prevented from serving as jurors because of their race. Yet not all courts were heeding *Batson*'s command. In particular, the Mississippi Supreme Court rejected evidence that a juror was struck based on his race in a death penalty case, where the stakes could not have been higher. In reversing that decision, this Court emphasized the importance of "vigorously enforc[ing] and reinforc[ing]" *Batson* and the need to "guar[d] against any backsliding." *Flowers* v. *Mississippi*, 588 U. S. ___, ___ (2019) (slip op., at 16). That decision was a powerful articulation of the equal protection principles that *Batson* vindicates.

In defending *Batson*, this Court was not just protecting the rights of criminal defendants. *Flowers* also safeguarded the rights of other Black Mississippians, who were being denied the chance to fulfill their civic duty of serving as jurors in trials of their peers. "Other than voting," *Flowers* explained, such jury service "is the most substantial opportunity that most citizens have to participate in the democratic process." 588 U. S., at ___ (slip op., at 7). Nor is the

harm of *Batson* erosion limited to minority groups, as *Batson* is crucial to "public confidence in the fairness of the criminal justice system." 588 U. S., at ___ (slip op., at 16). Simply put, when people are prevented from serving as jurors based on their race, it is a stain on our justice system.

Flowers made sure that lower courts understood how to apply *Batson* properly by expressly identifying factors that are relevant to the *Batson* analysis. These include "statistical evidence" of racial disparities in strikes, "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors," and "a prosecutor's misrepresentations of the record when defending the strikes." 588 U. S., at ___–___ (slip op., at 16–17). The Mississippi Supreme Court's misapplication of these and other factors warranted reversal in *Flowers*. *Id.*, at ___ (slip op., at 31).

Apparently *Flowers* was not clear enough for the Mississippi Supreme Court, however. In yet another death penalty case involving a Black defendant, that court failed to address not just one but three of the factors *Flowers* expressly identified. This was a direct repudiation of this Court's decision. This can only be read as a signal from the Mississippi Supreme Court that it intends to carry on with business as usual, no matter what this Court said in *Flowers*. By allowing the same court to make the same mistakes applying the same standard, this Court acquiesces in the Mississippi Supreme Court's noncompliance. Today, this Court tells the Mississippi Supreme Court that it has called our bluff, and that this Court is unwilling to do what is necessary to defend its own precedent. The result is that *Flowers* will be toothless in the very State where it appears to be still so needed. I therefore respectfully dissent.

I

During jury selection in this case, petitioner Tony Terrell Clark twice raised *Batson* challenges based on a pattern of

racial disparities in the prosecution's strikes. This triggered the familiar "three-step process for determining when a strike is discriminatory." *Foster* v. *Chatman*, 578 U. S. 488, 499 (2016). At the first step, the trial court twice found that Clark had satisfied his burden, which requires "a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Ibid.* (internal quotation marks omitted). For the second step, the trial court required the prosecution to provide race-neutral justifications. At the third step, the trial court concluded that Clark had not shown purposeful discrimination.

Later, when the jury was deliberating about appropriate punishment, it had trouble reaching consensus. On the second day of deliberations, the jury sent out a note stating they were "'unable to agree unanimously on punishment'" and asking what would happen if they could not agree. 343 So. 3d 943, 1010–1011 (Miss. 2022) (Kitchens, P. J., dissenting). After the trial court declined to inform the jury of the consequences of disagreement, and after more hours of deliberation, the jury finally agreed on a verdict of death. *Ibid.* A fractured Mississippi Supreme Court affirmed over two separate dissents by Presiding Justice Kitchens and Presiding Justice King. Both dissents were joined by a third Justice, Justice Ishee.

II

Petitioner presented substantial evidence that the prosecution had engaged in racially motivated strikes. This evidence tracked the factors this Court identified as important in *Flowers*. Instead of engaging in the requisite context-specific inquiry, however, the majority below never addressed this evidence in its *Batson* analysis. That should make this an easy case. Because of this plain legal error, there is no need for this Court to engage in *Batson*'s fact-dependent inquiry. Instead, this Court could merely vacate the judgment below and direct the Mississippi Supreme

Court to conduct that analysis properly in the first instance. That appears to be too much for this Court today.

The majority below ignored three *Flowers* factors in its analysis. First, the majority did not address jarring statistical disparities. *Flowers* spoke plainly on this point: When the statistics show that the State struck Black jurors at a significantly higher rate than white jurors, that is "evidence suggesting that the State was motivated in substantial part by discriminatory intent." 588 U. S., at ___ (slip op., at 23). Here, approximately 34.5 percent of the members of the initial venire were Black. 343 So. 3d, at 1015 (King, P. J., dissenting). After the State had used all of its peremptory strikes, however, "[t]he jury ultimately consisted of eleven white jurors, one black juror, and two white alternate jurors." *Ibid*. Black jurors had thus dwindled down to 7 percent. To get there, at the peremptory strike stage, the State struck seven out of the eight remaining Black prospective jurors, or "87.5 percent of the black jurors it encountered and only 16.7 percent of the white jurors." *Ibid*. In other words, the State was over five times more likely to strike a Black prospective juror than a white one.

These are the kinds of numbers that in the past this Court has found to be evidence of discrimination. For example, the Court found there was statistical evidence of discrimination when an initial venire panel was 18.5 percent Black, the peremptory strike rate of eligible Black venire members was 91 percent, and only one Black juror ended up on the jury. See *Miller-El* v. *Dretke*, 545 U. S. 231, 240–241 (2005). These numbers are quite similar to those here.

Just as in *Miller-El*, the fact that the State allowed a single Black juror to serve does not undermine these statistics. To the contrary, this Court has on several occasions "skeptically viewed the State's decision to accept one black juror" as "an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors." *Flowers*, 588 U. S., at ___ (slip op., at 22) (quoting *Miller-El*, 545 U. S., at 250).

That same skepticism is more than warranted here, where the State appears to have struck as many Black prospective jurors as it thought it could get away with.

The majority below responded to these telling statistics with an equally telling silence, failing even to mention them in its *Batson* analysis. There is simply no way to square this with *Flowers*.

Second, the majority below failed to engage with the fact that the State conducted special investigations into some of the most qualified Black prospective jurors in an attempt to disqualify them. "[T]his Court's cases explain that disparate . . . investigation of prospective jurors on the basis of race" can be evidence of racially motivated strikes. *Flowers*, 588 U. S., at ___ (slip op., at 25). When Clark raised his *Batson* challenges, the State sought to justify its strikes with the results of two previously undisclosed investigations it had conducted into two of the Black prospective jurors. Specifically, the State had run database searches and compiled printouts showing people with criminal records who happened to have the same last names as the Black prospective jurors.

For prospective juror Kathy Luckett, a Black woman, the State's investigation detailed all the "'felony convictions and charges we have on Lucketts in the . . . area.'" 343 So. 3d, at 958. The State presented no evidence that any of these individuals were actually related to Kathy Luckett, and "under oath, Luckett indicated that she did not have any close family members who had been prosecuted for a felony." *Id.*, at 1022 (King, P. J., dissenting). During *voir dire*, the State never questioned Luckett about any such family ties, which could have revealed whether these supposedly disqualifying ties even existed. See *Flowers*, 588 U. S., at ___ (slip op., at 28) ("'[F]ailure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination'");

ibid. (noting failure to "ask individual follow-up questions to determine the nature of [a supposedly relevant] relationship").

The exact same thing happened with prospective juror Alicia Esco-Johnson, another Black woman. To justify its strike, the State again "show[ed] all the felony convictions and charges it had on the name Esco in Madison County." 343 So. 3d, at 957. Once again, Esco-Johnson had indicated under oath that she did not have any close family members who had been prosecuted for felonies, and once again, the State never brought up potential family ties in questioning her.

As *Flowers* explained, by "conducting additional inquiry into th[e] backgrounds" of only Black jurors, "a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike." 588 U. S., at ___ (slip op., at 25). Then at the same time, "[p]rosecutors can decline to seek what they do not want to find about white prospective jurors." *Ibid.* This case is a perfect illustration. "No evidence exists that the State had investigated similarly situated white jurors it accepted." 343 So. 3d, at 1016 (King, P. J., dissenting). This closely mirrors *Flowers*, where "[t]he State apparently did not conduct similar investigations of white prospective jurors." 588 U. S., at ___ (slip op., at 24). Indeed, the State here accepted white prospective jurors without questioning them about family members that they admitted had been arrested or prosecuted, or were currently incarcerated. This included close family members, such as one prospective juror's stepson.

Further, the State had asserted during jury selection that when it came to family ties, it was only interested in whether "a close family member [had] ever been charged with a felony," not a "third cousin twice removed that you see every fifth year at the family reunion." Tr. 394. Yet for these two Black prospective jurors, similar last names were

sufficient for the prosecutor to disqualify them from service.

The majority once again responded to this pattern of disparate treatment with silence. Its *Batson* analysis did not address the fact that the State only carried out special investigations into two Black jurors, the State's inconsistent assertion that it was uninterested in extended family, or the oddity of treating people with similar names as family while never actually questioning the prospective jurors about extended family. Once again, this silence alone would be sufficient to vacate the judgment below, as *Flowers* could not have been clearer: "A court confronting that kind of pattern cannot ignore it." 588 U. S., at ___ (slip op., at 25).

Third, the majority failed to address the State's "misrepresentations" when it was "defending the strikes." *Id.*, at ___ (slip op., at 17). In justifying its strikes of Black prospective jurors, the State stated it was "not accepting anybody that equivocates on their questionnaire on the death penalty." Tr. 1587. Yet not only did the State accept white jurors who equivocated about the death penalty, the State accepted jurors who evinced far more reluctance to impose the death penalty than Black jurors it struck on that very same ground. See *Foster*, 578 U. S., at 505 (prosecutor's explanations were "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [a Black juror] an unattractive juror").

For example, Question 36 on the juror questionnaire asked about views on capital punishment, to which answers ranged from A (most opposed) to E (most supportive). Luckett, one of the Black women who was struck, answered "D," the second most pro-death penalty answer: "in favor of capital punishment except in a few cases where it may not be appropriate." 343 So. 3d, at 956, n. 2. At *voir dire*, she testified she would impose the death penalty if the law and facts called for it, which would depend on the case. The

prosecution explained that it struck her because her answers supposedly showed she was insufficiently supportive of capital punishment.

Yet a white juror the prosecution did not strike answered "B," the second most anti-death penalty answer: "opposed to capital punishment except in a few cases where it may be appropriate." *Ibid.* He also stated that it should "'only be an option for extremely heinous cases.'" *Id.*, at 968. On further questioning he "spoke of his involvement in prison ministries," "cried . . . in speaking about it," and reaffirmed that the death penalty "'should only be done in extreme cases.'" *Id.*, at 1021 (King, P. J., dissenting). Two other white prospective jurors that the government did not strike also answered "B." *Id.*, at 1021–1022. One of these jurors stated that "'I am more for a life sentence as opposed to the death penalty,'" *id.*, at 969 (majority opinion); the other stated that the death penalty was only appropriate for "particularly vicious," "evil," and "heinous" crimes, Tr. 1270. Two additional white jurors answered "C," indicating they were "'neither generally opposed to nor in favor of capital punishment,'" and that it would depend on the case. 343 So. 3d, at 1021–1022 (King, P. J., dissenting).

The majority never explained how the State's decision not to strike these white jurors could be squared with the State's categorical assertion that it would not accept "anybody" who even "equivocate[d]" as to "the death penalty." Tr. 1587. The record reveals a double standard where the State struck Black jurors who took anything but the most hardline pro-death penalty position, but not white jurors who expressed serious doubts about the death penalty.

III

The failure of the court below to engage with several factors expressly identified in *Flowers* cannot stand if *Batson* is to retain its force in the State of Mississippi. This Court has "made it clear" beyond any room for doubt "that . . . in

reviewing a ruling claimed to be [a] *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 578 U. S., at 501 (internal quotation marks omitted). This requires "a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Ibid.* (internal quotation marks omitted). Relevant evidence with respect to some jurors can also place evidence about other jurors in a different light. Failing to consider the challenged strikes "in the context of all the facts and circumstances" is thus entirely inconsistent with *Batson*. *Flowers*, 588 U. S., at ___ (slip op., at 30).

While the majority's silence as to each one of these factors would be sufficient to vacate the judgment below, the cumulative effect cries out for intervention by this Court. To take just one example, the only reasons the State gave for striking Luckett were the list of people with the same last name and her views about the death penalty. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose," *id.*, at ___ (slip op., at 18), yet the court below did not even address the serious concerns about both of those justifications, especially in light of the grievous statistical disparity between strikes of Black and white prospective jurors.

Summary disposition is warranted when the decision below "was not just wrong" but "committed fundamental errors that this Court has repeatedly admonished courts to avoid." *Sexton* v. *Beaudreaux*, 585 U. S. ___, ___ (2018) (*per curiam*) (slip op., at 7). Here, the Mississippi Supreme Court was not just wrong, but wrong in the very same way it had been wrong just a few years ago. The absence of important evidence from the majority's analysis meant it "either failed to analyze such evidence" or saw it as "insignificant," neither of which would be consistent with the "careful, context-specific analysis" clearly required by this Court's precedent. *Lombardo* v. *St. Louis*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 4). In such situations, this

Court has "grant[ed] the petition for certiorari, vacate[d] the judgment" and "remand[ed] the case to give the court the opportunity to employ" the proper inquiry. *Ibid.*

Today, however, this Court is unwilling to take even that modest step to preserve the force of its own recent precedent. It is the people of Mississippi who will pay the price of this inaction. Defendants like Clark will watch as they are condemned by juries that may have been racially gerrymandered. Prospective jurors like Kathy Luckett, a nursing aide and mother, will learn that the color of their skin might deprive them of the right to sit as jurors in judgment of their peers. Finally, courts throughout the State will take note and know that this Court does not always mean what it says.

* * *

Because this Court refuses to intervene, a Black man will be put to death in the State of Mississippi based on the decision of a jury that was plausibly selected based on race. That is a tragedy, and it is exactly the tragedy that *Batson* and *Flowers* were supposed to prevent. I respectfully dissent from the Court's denial of certiorari.