*** CAPITAL CASE ***

No. 24-7351

In the Supreme Court of the United States

TERRY PITCHFORD,

Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CURRENT AND FORMER ELECTED PROSECUTORS, FORMER ATTORNEY GENERAL AND FEDERAL AND STATE JUDGES, AND FAIR AND JUST PROSECUTION IN SUPPORT OF PETITIONER

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

1. Does clearly established federal law determined by this Court and applied in six other circuits require reversal of a state appellate court's denial of relief from a capital prosecutor's discriminatory exercise of four peremptory strikes against Black venire members wherein the trial court, for each of the four strikes, failed to determine "the plausibility of the reason in light of all evidence with a bearing on it"? *Miller-El v. Dretke*, 545 U.S. 231, 251-52 (2005).

2. Does Mississippi Supreme Court precedent, which deems waived on direct review arguments of pretext not stated in the trial record, defy this Court's clearly established federal law under *Batson*?

3. Does a finding of waiver on a trial record possessing *Batson* objections, defense counsel efforts to argue the objection, and the trial court's express assurance the issues were preserved, constitute an unreasonable determination of facts?

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INTEREST OF AMICI CURIAE[1]

Amici curiae are a group of current and former elected prosecutors, a former Attorney General, and former federal and state judges hailing from southern states, as well as Fair and Just Prosecution (FJP), a project of the Tides Center. FJP brings together elected prosecutors from around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility. Amici are:

- **Aramis Ayala** (former State Attorney, Ninth Judicial Circuit (Orange & Osceola Counties), Florida);
- **Buta Biberaj** (former Commonwealth's Attorney, Loudoun County, Virginia);
- **John Creuzot** (District Attorney, Dallas County, Texas; former Judge, Dallas County District Court, Texas);
- **Ramin Fatehi** (Commonwealth's Attorney, City of Norfolk, Virginia);
- **William Royal Furgeson, Jr.** (former Judge, U.S. District Court, Western District of Texas);
- **Delia Garza** (County Attorney, Travis County (Austin), Texas);

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Counsel of Record for the parties received timely notice of the intent to file this brief.

- **Deborah Gonzalez** (former District Attorney, Western Judicial Circuit (Athens), Georgia);
- **Stephen Rosenthal** (former Attorney General, Virginia); and
- **Fair and Just Prosecution** (a Project of the Tides Center).

Amici are all committed to protecting the integrity of the justice system, advancing accountability and fairness, and ensuring the safety of everyone in our communities. We all believe that prosecutorial power carries profound responsibility. The prosecutor's role is not merely to secure convictions, but to achieve justice and impartiality. This obligation extends to every stage of the criminal process, including jury selection.

As the Nation grapples with persistent racial disparities in criminal justice outcomes, we recognize that discriminatory jury selection practices undermine both the integrity of individual cases and public confidence in the system as a whole. Numerous states and elected prosecutors have implemented groundbreaking reforms to eliminate racial bias and inequity in jury selection, including policies that limit or eliminate the use of peremptory strikes. As criminal justice leaders from states still reckoning with the historic exclusion of Black citizens from political participation and the racially discriminatory nature of peremptory strikes, we recognize the grave importance of uprooting practices that perpetuate racial inequality.

Amici are deeply concerned about the racially discriminatory use of peremptory strikes in

petitioner's case. We respectfully submit this brief to highlight the profound harms that flow from discriminatory jury selection, the ongoing role of peremptory strikes in perpetuating these harms, and the urgent need for rigorous judicial enforcement of *Batson v. Kentucky*'s constitutional mandate.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly forty years ago, this Court determined in *Batson v. Kentucky*, 476 U.S. 79 (1986), that to ensure defendants receive a fair trial and equal protection under the law, no litigant may exclude a prospective juror because of their race. The ruling was intended to protect against the systematic exclusion of Black and other jurors of color. *Batson* was also supposed to ensure that trial courts do not rubber-stamp transparently pretextual reasons for exercising peremptory strikes to eliminate only jurors of color; instead, *Batson* requires "the judge to assess the plausibility of [the prosecutor's] reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 251-52 (2005).

Almost four decades later, the racially discriminatory practices that *Batson* sought to eliminate persist. Petitioner Terry Pitchford sits on death row after a prosecutor—the very same prosecutor at the heart of the *Batson* challenge in *Flowers v. Mississippi* ("*Flowers VI*"), 588 U.S. 284 (2019)—struck 80% of the Black venire members in this capital case without cause and the trial court failed to conduct the searching inquiry that *Batson* demands.

Trial courts are supposed to assess "the prosecutor's credibility" and "the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances." *See Flowers VI*, 588 U.S. at 302-03; *see also Foster v. Chatman*, 578 U.S. 488, 501 (2016) (this searching review "demands a sensitive inquiry into such circumstantial evidence of intent as may be available" (cleaned up)). Yet the trial court here accepted the prosecutor's race-neutral explanations at face value. And the Court of Appeals below rejected petitioner's claim without the rigorous analysis that six other circuits recognize is required by this Court's precedent. That deep circuit conflict alone warrants this Court's review, as petitioner explains. Amici also agree this is a particularly good case to address the circuit conflict, even if it weren't a matter of life and death; the federal district court correctly applied this Court's clearly established federal law in demanding that the state courts examine the totality of the circumstances in adjudicating a *Batson* claim and granting the habeas petition, only to have the Fifth Circuit overturn that decision in an opinion that shirks engagement with the controlling authorities of this Court.

This case is not only about achieving the justice denied in petitioner's case, however. This case has broad implications regarding the scrutiny courts will apply when assessing *Batson* claims challenging prosecutors' use of peremptory strikes.

I. As current and former prosecutors and judges, we know that every instance of racially discriminatory jury selection inflicts a constitutional triple harm: it harms defendants by depriving them of their right to a fair trial; it harms Black citizens by excluding them

from participating in their fundamental civic duty of jury service—"the most substantial opportunity that most citizens have to participate in the democratic process" other than voting, *Flowers VI*, 588 U.S. at 293; and it harms the community as a whole by undermining the integrity of a justice system that promises equal treatment under the law and corroding public trust in that system. Those harms are most acute when the stakes are highest in capital cases like this one.

II. The evidence of widespread discrimination in prosecutorial exercises of peremptory strikes is staggering. Empirical studies from jurisdictions across the country reveal that prosecutors continue to strike Black jurors in alarmingly disproportionate rates compared to white jurors.

III. This Court should make clear that trial courts cannot abdicate their constitutional duty to conduct the searching inquiry that meaningful *Batson* enforcement requires. In turn, the collateral review of such trial court failings and prosecutorial abuses needs the faithful adherence to clearly established federal law to further safeguard these vital rights. Courts must examine all relevant evidence of discriminatory intent, not offer perfunctory review that enables continued discrimination. The prosecutor who brought the case against Mr. Pitchford, Doug Evans, has a long history of racially motivated peremptory strikes that has already been considered by this Court. That the lower courts allowed his conduct to go unchecked in this case despite the proceedings in *Flowers* shows what happens when courts fail to faithfully adhere to this Court's precedent. The data emerging from jurisdictions that

have enacted reforms to limit or even eliminate the use of peremptory strikes shows that vigorous *Batson* enforcement will not hinder but rather enhance prosecutors' ability to achieve justice. Mr. Pitchford deserves better than a death sentence tainted by a prosecutor's racialized jury-selection tactics. And the American people deserve better than a justice system that promises equal protection while failing to guard it.

The Court should grant the petition and reverse.

ARGUMENT

I. THE FAILURE TO FAITHFULLY APPLY *BATSON* LEADS TO MANY HARMS.

The constitutional prohibition on racial discrimination in jury selection serves multiple vital interests. When prosecutors systematically exclude Black jurors, they violate defendants' Sixth and Fourteenth Amendment rights, deny excluded jurors their constitutional right to participate in democratic governance, and undermine the legitimacy of the justice system. These harms are particularly acute in capital cases, where discriminatory jury selection can determine not only conviction or acquittal, but whether a defendant lives or dies—as it did here.

A. Striking jurors based on race or color causes direct harm to defendants by compromising trial fairness.

Empirical evidence demonstrates that racially homogeneous juries produce systematically different and less fair outcomes than diverse juries. Research shows that less diverse juries spend less time deliberating, consider fewer perspectives, and are

more likely to convict defendants of color. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. Personality & Soc. Psychol. 597, 608 (2006); *see also* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Quart. J. Econ. 1017 (2012); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 J. Const. L. 171 (2001). All-white and nearly all-white juries make more mistakes and are more likely to presume guilt, particularly when judging Black defendants. Sommers, *supra*, at 603-04. Diverse juries, on the other hand, have proven to be better equipped when it comes to accurately assessing witness credibility from multiple perspectives, identifying problems like racial profiling and stereotyping, and holding prosecutors to their burden of proof. *Id.* at 600-06; *see also* William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 Depaul L. Rev. 1497, 1507-08, 1511, 1531 (2004).

Thus, this Court has long recognized that racialized jury selection "places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Prosecutors who truly seek justice and not merely convictions, in line with their role as "minister[s] of justice,"[2] ought to welcome

[2] *See* American Bar Association, Model Rules of Prof. Conduct R. 3.8 cmt.1 (2010); *see also United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (The prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose

diverse juries that can fairly evaluate the evidence, rather than hunt for tactical advantages through racially motivated peremptory strikes. And because we cannot reverse an execution, the nature of capital punishment demands the highest level of procedural fairness.

B. Striking jurors because of their race or color inflicts profound harm on excluded jurors and undermines democratic participation.

Exclusion from jury service based on race denies an essential aspect of citizenship to its victims, inflicting dignitary harm on excluded citizens in addition to the harm it causes to defendants.

Jury service is a "duty, honor, and privilege." *Powers v. Ohio*, 499 U.S. 400, 415 (1991). "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 588 U.S. 284, 293 (2019). This exclusion of Black citizens because of their race signals that Black citizens are presumed unqualified by state actors to decide important questions. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (racial exclusion from jury service places "a brand upon [excluded citizens], affixed by the law, an assertion of their inferiority"), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522, 536 n.19 (1975). "A venireperson excluded from jury service because of race" therefore "suffers a profound

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interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." (cleaned up)).

personal humiliation heightened by its public character." *Powers*, 499 U.S. at 413-14.

The harm is made worse because excluded jurors have virtually no practical recourse and thus little reason to challenge their exclusion. "The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *See Powers*, 499 U.S. at 415. And even when excluded jurors muster the courage to try, courts are reluctant to hear their collateral claims. *See, e.g.*, *Pipkins v. Stewart*, 105 F.4th 358, 362-63 (5th Cir. 2024) (per curiam) (affirming W.D. La. summary judgment in Equal Protection action under 42 U.S.C. § 1983 against the Caddo Parish District Attorney's alleged custom of discriminatory peremptory strikes); *Hall v. Valeska*, 849 F. Supp. 2d 1332, 1337-40 (M.D. Ala. 2012) (dismissing § 1983 action by excluded jurors challenging systematic racial discrimination in peremptory strikes), *aff'd*, 509 F. App'x 834 (11th Cir. 2012).

Peremptory strikes have historically and to this day been used to exclude potential Black jurors and other jurors of color. *Cf.* Hon. Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809, 819 (1997) (describing peremptory strikes as "the last great tool of Jim Crow"). Peremptory strikes have been and are used to racialize juries not only based on explicit race-based policies, but also by using "race-neutral" criteria that have the same intended discriminatory effect. *See* Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021).

And the harm caused by discriminatory jury selection is compounded by the backdrop of systemic barriers that already compromise equal participation of jurors of color. From the start, Black citizens face underrepresentation in jury pools largely because jury selection systems rely heavily on voter registration and driver's license lists that systematically exclude communities of color. Julie A. Cascino, *Following Oregon's Trail: Implementing Automatic Voter Registration to Provide for Improved Jury Representation in the United States*, 59 Wm. & Mary L. Rev. 2575, 2578-79 (2018) ("Due to the low registration rates of these groups, voter rolls often do not accurately represent the proportion of eligible minority, low-income, or young voters in a specific community. Accordingly, jury pools are less representative of that community as well."). People of color also face disproportionate disqualification due to past involvement with the criminal justice system and resulting financial hardship; hardship that is more prevalent in marginalized communities to begin with. *See* Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, Prison Policy Initiative (Feb. 18, 2021). Further, Black jurors encounter higher rates of for-cause challenges, frequently based on their lived experiences with law enforcement and the courts. *See, e.g.*, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785, 790-95 (2020) (studies in Mississippi and Louisiana found that Black prospective jurors were more than three times more likely as white prospective jurors to be excluded "for cause"). Each of these realities operates to reduce jury

diversity; together, they aggravate the injuries that racialized peremptory strikes already inflict, which are constitutionally intolerable on their own.

C. Racialized jury selection harms all citizens by depriving the public of a fundamentally fair justice system, which ultimately makes us all less safe.

Finally, racial discrimination in jury selection compromises the democratic legitimacy that jury participation brings to our justice system, severing the vital connection between community participation and judicial legitimacy. The resulting erosion of the public's trust in the justice system, in turn, impedes law enforcement efforts to keep communities safe by forfeiting the trust of those they serve.

Racial bias in the jury system is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *See Pena-Rodriguez v. Colorado*, 580 U.S. 206, 222 (2017). Racial bias thus "implicates unique historical, constitutional, and institutional concerns" that demand vigilant judicial attention. *Id.* at 223 (holding that the Sixth Amendment requires an exception to the no-impeachment rule when a juror makes clear statements indicating reliance on racial stereotypes to convict, as racial bias differs from other jury misconduct and threatens systemic harm to the administration of justice); *see also id.* at 221 (the constitutional "imperative to purge racial prejudice from the administration of justice" has deep historical roots). "The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the

Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Id.* at 222. The Court has consistently held that "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Id.* at 223 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). "Enforcing th[e] constitutional principle" of equal protection in jury selection helps "protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system." *Flowers VI*, 588 U.S. at 301.

This Court has warned repeatedly of these dangers because racialized jury selection "places the fairness of a criminal proceeding in doubt," which "casts doubt on the integrity of the judicial process" itself. *Powers*, 499 U.S. at 411. "Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Id.* at 407. The jury serves as "a vital check against the wrongful exercise of power by the State and its prosecutors," and striking jurors because they aren't white damages "both the fact and the perception of this guarantee." *Id.* at 411. That is why prosecutors who exclude jurors because of race do not just deny those individuals' civic participation, but they also undermine the democratic legitimacy of the justice system itself. For that reason, the "harm from discriminatory jury selection ... touch[es] the entire community." *Johnson v. California*, 545 U.S. 162, 172 (2005); *see also Davis v. Ayala*, 576 U.S. 257, 285 (2015) (Court has repeatedly emphasized that racially motivated jury selection "undermines our criminal justice system"

and "poisons public confidence in the evenhanded administration of justice").

The erosion of the public's trust in the justice system is consequential. When people have trust in legal authorities and view the police, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses, and accept police and judicial system authority. *See* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. 78, 78-79 (2014); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008). On the flip side, when the public does not trust law enforcers, community members may be less willing to participate in the criminal justice system. This reluctance hampers the ability of the courts, police, and prosecutors to fulfill their public safety obligations. Without cooperating victims and witnesses, police are unable to investigate, prosecutors are unable to bring charges, and juries are unable to convict the guilty or free the innocent. *See, e.g.*, Giffords Law Center to Prevent Gun Violence, *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence* (Sept. 9, 2021). In short, we all become less safe. Guarding against racialized jury selection is crucial not only to protecting the rights of defendants and prospective jurors; it is crucial to protecting us all.

II. DESPITE *BATSON*, PROSECUTORS CONTINUE TO STRIKE BLACK JURORS WITHOUT CAUSE AT ALARMINGLY DISPROPORTIONATE RATES.

Despite *Batson*'s promise to eliminate racial discrimination in jury selection, that discrimination persists at alarming levels. The primary vehicle remains prosecutorial use of peremptory strikes, which provide a ready mechanism for excluding Black jurors and other jurors of color (as well as for other constitutionally impermissible reasons such as sex or faith) under the cover of facially neutral explanations. Empirical evidence from disparate cases across the country documents persistent and pervasive racial disparities that cannot be explained by legitimate, race-neutral factors.

A California study examining nearly 700 appellate cases from 2006 to 2018 found that prosecutors used peremptory strikes to remove Black jurors in 72% of cases while striking white jurors in only 0.5% of cases (three total). Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* 13-14 (Berkeley Law Death Penalty Clinic, 2020). "Defense counsel objected to prosecutors' strikes in 670 [of the] cases, 98.0% of the total number of cases involving *Batson* claims," and "[o]f these 670 cases, 71.6% (480) involved objections to prosecutors' use of peremptory challenges to remove Black jurors." *Id.* at 13. Prosecutors also struck Latino jurors in 28.4% of cases, and Asian-American jurors in 3.5%. *Id.* at 13-14.

Similar patterns have been documented in Mississippi, where a 2018 study in District Attorney

Evans's judicial district covering seven counties examined criminal cases over a 25-year period and found that Black prospective jurors were more than four times as likely to be struck as white prospective jurors. Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, APM Reports (2018). And a review of more than 5,000 Louisiana cases from 2011 to 2017 found that prosecutors struck Black jurors at 175% the expected rate based on their proportion of the jury pool. Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1626-27 (2018); *see also* Ursala Noye, *Blackstrikes: A Study of Racially Disparate Use of Peremptory Challenge by the Caddo Parish District Attorney's Office* (Reprieve Australia, Aug. 2015) (Louisiana study finding that prosecutors struck Black prospective jurors at more than three times the rate of their non-Black counterparts). Studies in North Carolina found similar results. Barbara O'Brien et al., *Report on Jury Selection Study* (2012) (Black jurors struck without cause at more than twice the rate of their white peers, in both capital and non-capital cases); Francis X. Flanagan, *Race, Gender, and Juries: Evidence for North Carolina*, 61 J.L. & Econ. 189 (2017). Similar statistics were found in Cook County, Illinois (Chicago). Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. Empirical Legal Stud. 425, 450 (2009).

III. *BATSON* MUST BE FAITHFULLY ENFORCED TO FULFILL ITS CONSTITUTIONAL PURPOSE.

The persistence of discriminatory jury selection nearly four decades after *Batson* reflects courts' failure to apply the decision with appropriate rigor. Too often, judges accept prosecutors' facially race-

neutral explanations without examining the totality of circumstances that may reveal the prosecutors' discriminatory intent. This judicial deference conflicts with this Court's clear instruction that all relevant circumstances must be considered.

This case is a perfect example: Petitioner sits on death row because the Fifth Circuit gave Doug Evans and the trial court, the same tandem in *Flowers VI*, every benefit of the doubt despite recognizing Evans's well-documented history of striking jurors without cause based on their race or color and the trial judge's demonstrated failure to apply *Batson*. Enforcing *Batson* does not hinder prosecutors' work but rather helps to fulfill their obligation to pursue justice. This is evidenced by the experience of prosecutors and jurisdictions that have gone beyond what *Batson* requires, limiting or eliminating peremptory strikes entirely in an effort to ensure that the Constitution's promise of equal protection is met.

A. This Court's precedent prohibits courts from rubber-stamping a prosecutor's bare assertion of race-neutral reasons for disproportionately striking Black jurors.

This Court has held that courts must critically examine a prosecutor's seemingly race-neutral reasons for disproportionately striking Black jurors and other jurors of color to resolve a *Batson* challenge. *Foster v. Chatman*, 578 U.S. 488, 501 (2016) (determining discriminatory purpose "demands a sensitive inquiry into such circumstantial evidence of intent as may be available") (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S.

252, 266 (1977); cleaned up). As this Court elaborated in *Flowers*, courts considering *Batson* challenges must "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances" and assess "the prosecutor's credibility." *Flowers VI*, 588 U.S. at 302-03. Trial judges, the Court admonished, must undertake more than a superficial review. *Id.* at 303 ("The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race.").

For the reasons explained by petitioner, the trial judge did not do that in this case. As the District Court correctly noted, "no state court—whether it be the majority in the Mississippi Supreme Court or the trial court—conducted a full three-step *Batson* inquiry on the State's use of its peremptory strikes" of almost all the Black venire members in Mr. Pitchford's case. *Pitchford v. Cain*, 706 F. Supp. 3d 614, 626 (N.D. Miss. 2023). At a minimum, this Court should grant the petition and remand for the lower courts to faithfully apply this Court's precedent in resolving petitioner's *Batson* claim against Doug Evans.

B. This case animates how race-based peremptory strike practices persist without meaningful *Batson* enforcement.

In *Flowers v. Mississippi*, this Court found that District Attorney Evans had engaged in a systematic pattern of striking Black jurors across multiple trials of the same defendant. *Flowers VI*, 588 U.S. at 288 ("In the six trials combined, the State employed its

peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court."). District Attorney Evans's "relentless, determined effort to rid the jury of black individuals strongly suggest[ed] that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury." *Id.* at 306. Over a decade before this Court considered the case, the Mississippi Supreme Court in *Flowers III* itself recognized that Evans's conduct was racially motivated. *See id.* at 291 (quoting *Flowers v. State* ("*Flowers III*"), 947 So. 2d 910, 935 (Miss. 2007) ("The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.")). Yet the system's failure to impose meaningful consequences allowed these violations to persist across multiple trials and years—and now, we see, multiple cases.

Despite the documented pattern of discrimination and this Court's condemnation, Evans continued in office without oversight or disciplinary action. *See, e.g.*, Parker Yesko, *Mississippi DA, Exposed for Striking Black Jurors, Leaves His Office On His Own Terms*, Bolts (June 30, 2023) (bar complaints against him did not result in any known professional discipline). His history is consequential for both petitioner's individual case and the broader context of unchecked jury discrimination it illuminates. In terms of this case, Evans's history carries significant weight in petitioner's challenge to his conviction—a conviction secured after Evans struck 80% of the potential Black jurors, compared to 8.5% of the white venire pool. Again, this Court has explained that a

prosecutor's history of discriminatory practices is critical evidence of discriminatory intent that courts must consider in evaluating subsequent *Batson* claims. *See Flowers VI*, 588 U.S. at 301 (defendant permitted to present a variety of evidence in support of a *Batson* challenge, including "relevant history of the State's peremptory strike in past cases"); *see also, e.g.*, *id.* at 306-07 (explicitly considering Evans's pattern of discrimination across multiple trials because "We cannot ignore that history. We cannot take that history out of the case."). And in fact, the Mississippi Supreme Court had held that Evans's peremptory-strike practice was "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge" *three years* before petitioner's direct appeal. *See Flowers III*, 947 So. 2d at 935.

Pattern evidence like this helps courts distinguish between isolated mistakes and systematic discrimination. And such historical evidence is particularly probative when the same prosecutor is involved in multiple cases showing similar discriminatory conduct. *Cf. Flowers VI*, 588 U.S. at 306 (Evans's "relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury"). Yet the Mississippi Supreme Court continued to give Evans the benefit of every doubt in rejecting petitioner's *Batson* challenge, despite itself recognizing strong evidence that Evans racially discriminated in the jury selection process across multiple trials and cases.

C. Reform efforts show that requiring courts to vigorously apply *Batson* will not hinder law enforcement.

As this Court has recognized, prosecutors have a fundamental duty that transcends winning individual cases. *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (prosecutor's "interest in a criminal prosecution is not that it shall win a case, but that justice shall be done") (cleaned up). In death penalty cases, where the stakes are highest, prosecutors have a heightened obligation to ensure that convictions are obtained through fair procedures free from racial bias. Prosecutors who oppose meaningful *Batson* enforcement signal that they value tactical advantages and racialized victories over constitutional principles and the pursuit of justice.

As many prosecutors have recognized, though, achieving true justice requires embracing procedures that eliminate racial bias. Thus, some prosecutors and jurisdictions across the country have recognized the lack of vigorous court scrutiny into *Batson* claims and implemented policies that go beyond *Batson*—severely restricting or even eliminating the use of peremptory strikes in recognition of their discriminatory potential. They have done so without experiencing any undue difficulty in achieving justice.

For example, Commonwealth Attorney Parisa Dehghani-Tafti (Arlington County, Virginia) implemented a policy in her jurisdiction that largely eliminates the use of peremptory strikes. Office of the Commonwealth's Attorney, *The Justice Digest*, Issue VI (Jan. 2022). As she explained in an interview, her policy includes "deciding whether to waive or accept

the use of the challenges based on bias that may have been passed on by the judge during for cause striking"; "[o]nce this decision has been made, juror selection is decided based on random selection instead of through peremptory challenges." Nicole Rinconeno et al., *Striking Peremptory Challenges in Jury Trials: Costs, Benefits, and the Restoration of Rights* 9-10 (2022). CA Dehghani-Tafti reports that "this policy has had no impact on [her office's] win rates," emphasizing that "if the prosecutor cannot convince any 12 people of their case, then that is the problem of their argument, not the jurors." *Id.* at 10.

Former District Attorney Mike Schmidt (Multnomah County (Portland), Oregon) has also implemented comprehensive reforms to address racial bias in jury selection. DA Schmidt announced that "[t]his office recognizes that the use of peremptory strikes to exclude prospective jurors has long created credible evidence of racial and ethnic exclusion of jurors, and is deeply disfavored by our office except in cases of manifest need." Conrad Wilson, *On His Way Out, Multnomah County District Attorney Makes Change To Jury Selection*, OPB (July 24, 2024). DA Schmidt's policy eliminates the practice of dismissing jurors without cause during jury selection for misdemeanor trials, with limited exceptions requiring objective justification and supervisor review. *Ibid.*

And District Attorney Satana Deberry (Durham County, North Carolina) has publicly advocated for eliminating prosecutorial peremptory strikes. DA Deberry argued that prosecutors should "take the lead and enact policies that prohibit their staff from using peremptory strikes—meaning that unless a prosecutor convinces a judge to strike a juror for

cause, they won't strike the juror." Satana Deberry et al., *Guest Commentary: How Jury Selection Discriminates Against Black Citizens*, Davis Vanguard, July 25, 2020. DA Deberry emphasized that prosecutors have "a different ethical starting point—their duty is not to win at all costs, but rather to present a fair and thorough case to a jury that reflects the community." *Ibid.* These reforms reflect prosecutors' recognition that achieving justice requires eliminating racial bias from all aspects of the criminal process. *See, e.g.*, Deberry et al., *supra* ("This current moment is forcing us all to admit the uncomfortable truth that past efforts to address racism in the criminal justice system have, at best, proven inadequate. This includes the effort to remove racism from jury selection.").

Some states and local jurisdictions have also enacted reforms to limit or eliminate the use of peremptory strikes. The early results also reflect that the changes have not hampered law enforcement efforts. Arizona, for example, eliminated peremptory strikes in 2021 entirely, recognizing the persistence of race-based discrimination inherent in the practice. *See* Paul J. McMurdie et al., *Arizona's Elimination of Peremptory Challenges: A First Look*, 56 Ariz. St. L.J. 1793, 1794 (2024). Data from Maricopa County shows promising results. After removing peremptory challenges, "the non-white loss rate fell by about one-third in criminal cases and one-sixth in civil cases." *Id.* at 1816. For criminal trials, the data shows "a 6% increase in empaneled jurors who identified as a person of color and a 15% increase in those who identified as Hispanic." *Ibid.* The change did not produce the negative consequences critics had

predicted. *See id.* at 1818 ("[T]here is no substantial evidence that removing peremptory challenges adversely impacted the jury's ability to reach verdicts.").

Other states have implemented various reforms including modified *Batson* procedures, data collection requirements, and enhanced judicial oversight of peremptory strikes to ensure *Batson*'s promise. Washington, for instance, adopted a rule in 2018 that "eliminates *Batson*'s requirement that a party opposing the peremptory challenge show purposeful discrimination, requires the court to deny a challenge if an objective observer could view race or ethnicity as a factor in its use, and includes presumptively invalid reasons for challenging jurors." General Rule 37, Wash. Sup. Ct. (adopted Apr. 5, 2018). California passed similar legislation in 2020, Cal. Assemb. B. 3070, 2019-2020 Reg. Sess. (Cal. 2020), and Connecticut and New Jersey have adopted comparable rules barring peremptory strikes based on implicit or unconscious racial bias, N.J. Ct. R. 1:8-3A (2023); Conn. Super. Ct. R. § 5-12 (2023).[3]

These reforms recognize the difficulties in rooting out the stubbornly enduring racial discrimination in jury selection that flout *Batson*'s commands. Their nascent success and spread demonstrate that justice-system actors like amici support and carry out affirmative efforts to eliminate racial bias in the justice system. Going beyond what *Batson* requires has not impeded prosecutorial efforts. Ensuring that courts vigorously apply *Batson* will not get in the way

[3] *See also Batson Reform: State by State*, UC Berkeley School of Law, https://tinyurl.com/y2zanf2r (last visited July 3, 2025).

of effective law enforcement. Quite the opposite. It will reaffirm what we all know first-hand: that we are all safer when our justice system treats people—in this case prospective jurors—equally.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted,

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