No. 25-5469

In the Supreme Court of the United States

BRYAN CHRISTOPHER BELL AND ANTWAUN KYRAL SIMS, PETITIONERS

v.

STATE OF NORTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF FAIR AND JUST PROSECUTION AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae is 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. FJP's network includes prosecutors from both rural and urban communities who collectively represent nearly 20% of Americans.*

FJP is committed to protecting the integrity of our justice system, advancing accountability and fairness, and ensuring the safety of everyone in our communities. FJP believes that prosecutorial power carries profound responsibility. The prosecutor's role is not merely to secure convictions, but to achieve justice. That obligation extends to every stage of the criminal justice process, from jury selection to postconviction proceedings.

FJP has a deep understanding of the crucial role that prosecutors play in upholding the integrity of the jury-selection process and the critical importance of prosecutors acknowledging when constitutional errors have infected that process. FJP recognizes that discriminatory jury-selection practices undermine the integrity of the result in individual cases and public confidence in the system as a whole. FJP believes that prosecutors have a fundamental duty to help correct

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* Pursuant to this Court's Rule 37.2(a), counsel for Fair and Just Prosecution notified counsel of record for both parties of its intent to file this brief on September 10, 2025, more than ten days before the deadline for this brief. No party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

unjust convictions, like Petitioners', that are tainted by unconstitutional discrimination against prospective jurors.

FJP has an interest in preserving the proper role of the prosecutor and the integrity of the criminal justice system, and is deeply concerned about the discriminatory use of peremptory strikes in Petitioners' cases. FJP respectfully submits 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 the constitutional mandate, recognized in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), that jurors be selected free from gender discrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Court recently reaffirmed, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019). That includes using a peremptory strike to exclude a juror based on his or her gender. *See J.E.B.*, 511 U.S. at 129. But in Petitioners' cases, the prosecutor has admitted in an affidavit that he struck a prospective juror based on her gender. That strike denied Petitioners a fair trial. It also denied the potential juror the opportunity to participate in the democratic process. And, if left uncorrected, it will continue eroding the community's trust in the criminal justice system.

When courts have the opportunity to rectify such blatant constitutional violations, the prosecutor's duty is to welcome judicial review—not to encourage the courts to apply a novel procedural bar to prevent the

correction of the constitutional error, like the prosecution has done here. The prosecution's interest is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). And doing justice here means giving Petitioners the fair process in postconviction proceedings that they didn't receive at trial.

1. Striking jurors based on their gender or race harms the defendants, the prospective jurors, and the integrity of the legal system. The defendant is denied a fair trial because a discriminatory jury-selection process can result in a jury that is more likely to act outside the strict requirements of its mandate, and to unfairly convict the defendant. Those harms are particularly acute in capital and life-without-parole cases, where the stakes at trial are highest.

Striking potential jurors based on gender also deprives potential jurors of their right to participate in the judicial system and the democratic process. Jury service is a critical feature of our democracy and one of the only ways citizens get to actively participate in government. Stripping a woman of that opportunity because of her gender reinforces the historical discrimination that denied women the right to serve on juries for centuries.

What's more, selecting jurors based on gender harms the public. When bias infects jury selection, the community correctly perceives the legal system as unfair. That perception, in turn, fuels distrust of the criminal justice system and law enforcement. And when the community distrusts the criminal justice system, community members are less willing to cooperate with law enforcement and the judiciary, making everyone less safe. Those concerns are even more

acute in North Carolina, which has a long history of discrimination in the jury-selection process.

2. Given their unique roles as ministers of justice, prosecutors should welcome appellate and postconviction review of meritorious *J.E.B.* claims, not invoke novel procedural barriers to judicial review. Indeed, prosecutors are tasked with acting for the greater good, convicting only those who can be proven guilty beyond a reasonable doubt, and upholding the integrity of the criminal justice system by acting ethically. Prosecutors thus have a number of important duties at trial, including ensuring the jury-selection process is free from discrimination. Prosecutors' ethical duties also continue into postconviction proceedings. Prosecutors who have learned that gender discrimination infected jury selection should rectify the constitutional violation, not invoke procedural barriers to judicial review like North Carolina has done here.

The Court should grant the petition for a writ of certiorari.

ARGUMENT

I. Striking jurors based on gender or race harms defendants, potential jurors, and the public more broadly.

The Constitution's prohibition of discrimination in jury selection is a cornerstone of the criminal justice system. Everyone loses when prosecutors base peremptory strikes on gender or race. The defendant is denied a fair trial; the struck potential jurors are excluded from the democratic process; and the community loses faith in the integrity of the criminal justice system. Those harms are particularly acute in capital and life-without-parole cases, where the jury's

decision can determine not only the defendant's guilt, but whether a defendant is executed or spends the rest of their life behind bars.

A. Striking jurors based on race or gender deprives the defendant of a fair trial.

Selecting and striking jurors based on their gender or race deprives the defendant of a fair trial, as caselaw recognizes and empirical evidence and research make clear.

Criminal defendants have a constitutional "right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Powers v. Ohio*, 499 U.S. 400, 404 (1991). That rule exists for good reason: Discrimination in jury selection "places the fairness of a criminal proceeding in doubt." *Id.* at 411. Indeed, "[d]iscrimination in jury selection, whether based on race or gender," harms the defendant by creating "the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings." *J.E.B.*, 511 U.S. at 140.

Empirical evidence and research show that homogeneous juries produce systematically different and less fair outcomes than diverse juries. For instance, homogenous juries make more mistakes and are more likely to presume the defendant is guilty. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Social Psychology 597, 604-05 (2006). Indeed, less diverse juries spend less time deliberating, consider fewer perspectives, and are more likely to convict defendants of color. *Id.* at 604, 608; Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Quarterly J. Economics 1017, 1048 (2012).

By contrast, studies on jury behavior have shown that diverse juries more effectively assess witness credibility, identify racial profiling and stereotyping in deliberations, and hold prosecutors to their burden to prove the defendant's guilt beyond a reasonable doubt. Sommers, *supra*, at 604-06; 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, 1502-03 (2004). For example, diverse juries tend to discuss more of the facts of the case and inaccurately recount those facts at lower rates. Sommers, *supra*, at 606.

A prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88. And prosecutors who seek to do justice—rather than simply to score convictions—should welcome diverse juries that fairly evaluate the evidence, rather than use gender-motivated peremptory challenges to shape the jury into one they think is more likely to convict.

A jury-selection process free from gender or race discrimination is particularly important in capital and life-without-parole cases, like Petitioners', where the risks inherent in a nondiverse jury are particularly intolerable given the length and severity of the sentences. The permanence of death sentences makes them "unique in [their] severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Justice Stewart, Justice Powell, and Justice Stevens). And for juveniles, life imprisonment without the possibility of parole is "akin to the death penalty." *Miller v. Alabama*, 567 U.S. 460, 475 (2012). These cases thus demand the highest level of procedural fairness and prosecutorial integrity.

B. Gender or race discrimination in jury selection deprives the struck jurors of their right to participate in the democratic process.

Striking jurors based on gender or race also harms those prospective jurors by excluding them from a critical democratic process and inflicting a serious dignitary harm.

Trial by jury in criminal cases has been an essential feature of criminal justice and democratic principles for centuries and remains so today. Before the Founding, "jury trial in criminal cases had been in existence in England for several centuries," serving, among other things, "as a protection against arbitrary rule." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968). Blackstone observed in the 18th century that juries in criminal cases served as a necessary barrier "between the liberties of the people and the prerogative of the crown." *Id.* (quoting 4 William Blackstone, *Commentaries on the Laws of England* *349). And it was essential that "the truth of every accusation … should afterwards be confirmed by the unanimous suffrage of twelve of his equal and neighbours, indifferently chosen and superior to all suspicion." *Id.* at 151-52 (quoting Blackstone, *Commentaries* *349-50).

English colonists brought trial by jury across the Atlantic to America. *Id.* at 152. The colonists "deeply resented" "[r]oyal interference with the jury trial" and thus sought to protect the right to trial by jury. *Id.* For instance, "[a]mong the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 … was the declaration: 'That trial by jury is the inherent and invaluable right of every British subject in these colonies.'" *Id.*

And by providing a jury-trial right, the Framers recognized that the right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure," "intended," among other things, to "ensure [the people's] control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

Today, juries in criminal cases remain "fundamental to our system of justice," as this Court repeatedly has recognized. *Duncan*, 391 U.S. at 153; *see Ramos v. Louisiana*, 590 U.S. 83, 93 (2020). "[S]erving on a jury" is one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers*, 588 U.S. at 293. That is why jury service is a "duty, honor, and privilege." *Powers*, 499 U.S. at 415. And "[t]he opportunity for ordinary citizens to participate in the administration of justice" through jury service "has long been recognized as one of the principal justifications for retaining the jury system." *Id.* at 406. Excluding a potential juror because of her gender or race takes away that "significant opportunity to participate in civic life," *id.* at 409, and "wrongfully exclude[s]" her from "the judicial process," *J.E.B.*, 511 U.S. at 140.

Striking jurors based on their gender or race also inflicts serious dignitary harm on the excluded jurors. "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *Id.* at 141-42. The discriminatory exclusion of a juror subjects that individual to "a profound personal humiliation heightened by its public character." *Powers*, 499 U.S. at 413-14. Discriminating against potential jurors who are "fully qualified, is practically a brand upon them, affixed by

the law, an assertion of their inferiority." *Id.* at 408. Discriminating against jurors based on their gender "denigrates [their] dignity." *J.E.B.*, 511 U.S. at 142.

Striking women from juries based on their gender is particularly nefarious because it reinforces historical discrimination and "reinvokes a history of exclusion from political participation." *Id.* "For centuries, state laws barred women from jury service on the theory that women were too fragile to participate in public life and needed protection from the 'indecent' aspects of criminal trials." Equal Justice Initiative, *Sidebar: Gender-Based Jury Exclusion*, https://tinyurl.com/47e9pffd (last visited September 24, 2025); *see J.E.B.*, 511 U.S. at 132. In some states, women could not serve on juries into the 1960s. *J.E.B.*, 511 U.S. at 131 n.3. And in *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), this Court found it reasonable for states to exempt women from mandatory jury service because women, unlike men, were "still regarded as the center of home and family life." The Court deferred to Florida's view that "it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption" from mandatory jury service. *Id.* at 63. Even after this Court decided *Hoyt*, state-created exemptions from jury service disproportionately removed women from the jury pool, often causing gross underrepresentation of women on juries. Rhonda Copelon et al., *Constitutional Perspectives on Sex Discrimination in Jury Selection*, 2 Women's Rights L. Reporter 3, 5-6 (1975). Research also shows that in at least one county, Black women are more likely than members of other groups to be peremptorily struck in death penalty cases. Jacinta M. Gau, *Racialized Impacts of Death*

Disqualification in Duval County, Florida, https://tinyurl.com/486vhvcr (last visited September 24, 2025).

Striking jurors based on gender thus sends a "message … to all those in the courtroom" and to anyone "who may later learn of the discriminatory act, … that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *J.E.B.*, 511 U.S. at 142.

C. Striking jurors based on gender or race harms the public by undermining the community's faith in the fairness of the justice system and making the system less effective.

Striking jurors based on their gender or race also harms the public more broadly because it undermines the community's faith in the fairness of the justice system. That erosion of trust, in turn, makes the system less effective by hampering law enforcement's and prosecutors' abilities to protect members of the public who no longer trust the system.

1. Selecting jurors based on gender or race undermines the public's trust in the justice system. "The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors." *Powers*, 499 U.S. at 411. Consequently, discrimination in jury selection, "odious in all aspects, is especially pernicious in the administration of justice." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 223 (2017). "[I]f left unaddressed," this discrimination "risk[s] systemic injury" to the justice system, *id.* at 224, by "condon[ing] violations of the United States Constitution within the very institution entrusted with its enforcement," and by "invit[ing] cynicism" about "the jury's

neutrality and its obligation to adhere to the law," *Powers*, 499 U.S. at 412.

Thus, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," *Batson v. Kentucky*, 476 U.S. 79, 87 (1986), by "poison[ing] public confidence in the evenhanded administration of justice," *Davis v. Ayala*, 576 U.S. 257, 285 (2015). The harm "is to society as a whole …. '[T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).

The result is that discriminatory jury selection violates the fundamental principle that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Indeed, "public perception of judicial integrity is 'a state interest of the highest order.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015). And "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the 'deck has been stacked' in favor of one side." *J.E.B.*, 511 U.S. at 140.

Before Petitioners' cases, the Supreme Court of North Carolina had also recognized these principles. It observed that, for citizens to "respect and support" "the judicial system of a democratic society," that system "must operate evenhandedly" and "be *perceived* to operate evenhandedly." *State v. Cofield*, 357 S.E.2d 622, 625 (N.C. 1987). Indeed, "the appearance of a fair trial before an impartial jury is as important as the fact of" the trial itself. *Id.* And excluding protected groups from juries, the Supreme Court of North

Carolina had recognized, "entangles the courts in a web of prejudice and stigmatization" by "put[ting] the courts' imprimatur on attitudes that historically have prevented" those groups "from enjoying equal protection of the law." *Id.* at 625-26.

2. Engaging in discrimination in jury selection erodes public trust in the legal system and thus, in turn, has negative effects on the administration of justice and public safety. When community members view the police as "legitimate social authorities," they are more likely to report crimes in their neighborhoods, cooperate in criminal investigations, aid the judiciary in resolving criminal cases, and follow the law themselves. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio State J. Criminal L. 231, 262-63 (2008); *accord* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 Psychology, Public Policy, & L. 78, 80 (2014). In contrast, when community members don't trust law enforcement or the criminal justice system, they are less inclined to participate in the system. That means they are less likely, for example, to report crimes and cooperate in criminal investigations.

The community's reluctance to participate in the criminal justice system, in turn, hampers the ability of the courts, police, and prosecutors to fulfill their obligations to protect the public. 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), https://tinyurl.com/298bve6z [hereinafter *In Pursuit of Peace*].

D. The risk of harm from striking potential jurors based on gender or race in North Carolina is significant.

The risk that discriminatory jury selection undermines public confidence in the justice system is significant in North Carolina, a state with a long history of discrimination in jury selection but little redress. Indeed, studies show that juror selection in North Carolina is heavily motivated by race, but the justice system systematically fails to vindicate *Batson* violations.

One study shows that North Carolina prosecutors strike eligible Black jurors more than *twice* as often as non-Black eligible jurors in capital cases. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1964 (2016). Another study of North Carolina trials revealed that prosecutors used 60% of their strikes against Black prospective jurors, even though Black individuals made up only 32% of the jury pool. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1539 (2012).

Despite that pervasive discriminatory practice, North Carolina's appellate courts did not find a *single Batson* violation for over 30 years. *See* Pollitt & Warren, *supra*, at 1961. Trying to explain this tension, the study concluded that North Carolina courts have systematically failed to give due weight to the pattern of

strikes against prospective minority jurors; give too much weight to unarticulated possible reasons for strikes; and impose too onerous a burden under the first step of *Batson*. *Id.* at 1965. *Batson*'s first step requires the defendant to make a prima facie showing that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the jury pool members of the defendant's race because of their race. *See* 476 U.S. at 96. But the Supreme Court of North Carolina has held that defendants in multiple cases did not make a prima facie showing even when the prosecutors struck *all* of the potential jurors from minority backgrounds. Pollitt & Warren, *supra*, at 1966. Indeed, "the Supreme Court of North Carolina frequently asserts that a strike rate of 57.2% is 'some evidence that there was no discriminatory intent.'" *Id.* at 1967 (quoting *State v. Smith*, 400 S.E.2d 712, 725 (N.C. 1991)).

The pattern continues. Although the North Carolina Supreme Court finally found a *Batson* violation in 2022, *see State v. Clegg*, 867 S.E.2d 885, 890 (N.C. 2022), since then it has continued to find no *Batson* violation in case after case, *see, e.g.*, *State v. Hobbs*, 884 S.E.2d 639, 641 (N.C. 2023); *State v. Richardson*, 891 S.E.2d 132, 200, 206 (N.C. 2023); *State v. Tucker*, 895 S.E.2d 532, 553 (N.C. 2023).

North Carolina has actively sought to evade *Batson*, too. Indeed, in the 1990s, the North Carolina Conference of District Attorneys intentionally trained its prosecutors on how to strike potential jurors of color without being caught for violating *Batson*. Batson *Justifications: Articulating Juror Negatives*, https://tinyurl.com/4wtv7zu9 (last visited September 24, 2025); *see* Pollitt & Warren, *supra*, at 1979-80. The

training document suggested that prosecutors should "articulat[e]" the prospective juror's "negative" quality another way. *Batson Justifications*. For example, the prosecutor might say that a Black juror's "hair style" indicates "resistance to authority," or that their "attire" showed "rebelliousness." *Id.* FJP finds trainings like these, designed specifically to teach prosecutors how to violate the spirit of *Batson*, to be abhorrent and repugnant to the Constitution prosecutors have sworn to uphold.

The appearance—if not the fact—of discrimination in jury selection infects capital cases in North Carolina, too. In 2010, for example, 30 of the individuals on North Carolina's death row had been convicted by a jury without a single Black member. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2110 n.356 (2010). And even after excluding all noneligible potential jurors and controlling for other variables, a study of capital cases concluded that the state struck 40% of Black jury pool members, contrasted with only 19% of pool members from all other races. Grosso & O'Brien, *supra*, at 1552.

Given this evidence, the judiciary and law enforcement are largely failing to garner community trust. For example, a national survey in 2015 concluded that only 54% of people—and only 35% of Black people—believe that state court proceedings are unbiased. North Carolina Commission on the Administration of Law & Justice, *Final Report: Recommendations for Strengthening the Unified Court System of North Carolina* 16 (2017), https://tinyurl.com/4h9awz9v. Given the track record of discriminatory jury selection in North Carolina, "both law enforcement and

communities" in the state "bear the consequences" of the erosion of trust in the criminal justice system. *In Pursuit of Peace*.

II. Prosecutors should encourage appellate and postconviction review of meritorious juror discrimination claims, not invoke novel procedural bars to prevent judicial review.

Prosecutors should welcome appellate or postconviction review of meritorious claims of juror-selection discrimination—like Petitioners' claims here—rather than standing in the way of their review. Prosecutors are uniquely situated to facilitate such review. They have a duty to do justice, not just to secure convictions. That means they must uphold the integrity of the proceedings and not fight to uphold unjust convictions.

The North Carolina Attorney General's office knows as much. For example, the state has previously acknowledged that a petitioner's "*Batson* argument [was] procedurally barred," but encouraged the court not to apply the bar because the "application of the bar under the circumstances presented … would result in a fundamental miscarriage of justice." State's Response to Petition for Writ of Certiorari 7, *State v. White*, No. P21-244, 2021 WL 4341939 (N.C. Ct. App. 2021).

Fulfilling those duties also means prosecutors must not discriminate based on gender or race when using peremptory strikes. Beyond trial, prosecutors must also turn over exculpatory new evidence to the defense and facilitate courts' ability to correct wrongful convictions. Doing so is critical in cases involving juror selection bias, because the resulting convictions in such cases are inherently less trustworthy: jury discrimination can and does influence case outcomes.

And facilitating review of meritorious claims is particularly important in capital and life-without-parole cases, where the outcome of appellate and postconviction proceedings influences whether the defendant lives or dies, or spends the rest of his life behind bars. Vigorously enforcing, and enabling review of, *J.E.B.* claims will not hamper law enforcement, as reforms of the jury-selection process make clear.

A. Prosecutors should encourage appellate and postconviction review, or even agree to a new trial, when the defendant has a meritorious *J.E.B.* claim.

Prosecutors should encourage appellate and postconviction review, or even agree to a new trial, once they discover that the convicting jury was the product of gender or race discrimination.

1. Prosecutors have a duty to pursue justice, not merely convictions, and that means upholding the integrity of the criminal trial process. A prosecutor is "a minister of justice and not simply … an advocate." Model Rules on Professional Conduct r. 3.8 cmt. 1 (American Bar Ass'n 1983), https://tinyurl.com/2452takv. "This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." *Id.* Indeed, prosecutors are tasked with representing "a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

Prosecutors must likewise be dedicated to ensuring the legitimacy and integrity of the trial process.

For example, using unlawful discriminatory peremptory challenges is not legitimate advocacy under Model Rules on Professional Conduct r. 8.4(g). American Bar Ass'n Committee on Ethics and Professional Responsibility, *Formal Op. 517*, at 3 (2025), https://tinyurl.com/kxcx9pxz. In fact, "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. It thus goes without saying that prosecutors must comply with *J.E.B.* and *Batson* by not using peremptory strikes to discriminate against potential jurors based on gender or race.

2. A prosecutor's obligation to do justice continues after conviction. "The public trust" placed in prosecutors "requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young v. United States*, 315 U.S. 257, 258 (1942). And more than a century ago, in *Cook v. United States*, 138 U.S. 157, 185 (1891), this Court recognized that "it was [the] duty" of the government's representatives in a criminal case to concede reversible error. The American Bar Association's Criminal Justice Standards for the Prosecutorial Function thus do not require prosecutors to "invoke every possible defense to a collateral attack" if "the interests of justice" would not be served by doing so. American Bar Ass'n, *Criminal Justice Standards for the Prosecutorial Function*, Standard 3-8.5 (4th ed. 2017), https://tinyurl.com/4xw5f582. And prosecutors build confidence when they honor those rules and that trust, as when the Oklahoma Attorney General recently joined death-row defendant Richard Glossip in asserting error in Glossip's case under *Napue v. Illinois*, 360 U.S. 264 (1959), "conceding both

that [a key witness's] testimony was false and that the prosecution knowingly failed to correct it." *Glossip v. Oklahoma*, 604 U.S. 226, 246 (2025).

Likewise, if a prosector "come[s] to realize that participants in a previous defendant's case are ethically flawed," the prosecutor must "decide whether justice requires them to take action that would help a defendant." Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 Vanderbilt L. Rev. 171, 178, 182 (2005). That's because prosecutors should seek to defend only convictions "legally obtained." National District Attorneys Association, *National Prosecution Standards* 9-1.3 (4th ed. Jan. 2023), https://tinyurl.com/4jc6mbn9. A contrary approach—authorizing prosecutors to act with the sole purpose of shielding convictions—would send the troubling message that the justice system's singular objective is to keep people in prison, rather than to do justice.

Indeed, various laws and policies encourage or require prosecutors to seek justice after conviction. For example, courts have held that a state's *Brady* obligations to turn over exculpatory evidence that the state knew about at trial continues during postconviction proceedings. *E.g.*, *In re Jenkins*, 525 P.3d 1057, 1067 (Cal. 2023); *Whitlock v. Brueggemann*, 682 F.3d 567, 588 (7th Cir. 2012); *Canion v. Cole*, 115 P.3d 1261, 1262 (Ariz. 2005) (en banc); *High v. Head*, 209 F.3d 1257, 1264 n.8 (11th Cir. 2000); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992).

In addition, more than 80 localities have created conviction integrity units (sometimes called conviction review units) meant to uncover and rectify wrongful or unjust convictions. Office of Justice Programs,

National Institute of Justice, *Wrongful Convictions: The Literature, the Issues, and the Unheard Voices* 29 (2023), https://www.ojp.gov/pdffiles1/nij/251446.pdf. Prosecutors in a conviction integrity unit review cases in which the defendant may have been wrongfully convicted and are tasked with taking any necessary action to correct the conviction. *Id.* Likewise, California, Illinois, Minnesota, Oregon, Washington, and Utah have enacted statutory procedures for prosecutors to ask a court to reconsider a sentence. Sara Cohbra & Becky Feldman, *The Second Look Movement: A Review of the Nation's Sentence Review Laws*, The Sentencing Project (updated August 27, 2025), https://tinyurl.com/ms5yxjjy.

3. Prosecutors cannot have faith in a conviction when jurors were struck based on gender or race, so prosecutors should support appellate and postconviction review of meritorious *J.E.B.* claims—like Petitioners' claims here—rather than invoke novel procedural bars to prevent them.

Discrimination in jury selection "places the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411. Indeed, "jury discrimination can and does influence jury decisions." Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 80 (1993); *see supra* pp. 5-6. Thus, prosecutors—and the communities they represent—cannot trust convictions following *J.E.B.* or *Batson* violations. Prosecutors thus should welcome appellate and postconviction review of potentially meritorious *J.E.B.* and *Batson* claims. That includes situations where, as here, a petition for postconviction relief is based on evidence that was not available to the defense at trial.

Prosecutors often receive new information related to prior crimes because of the "interlinked or recurring" nature of criminal investigations. Zacharias, *supra*, at 177. When new information "casts some degree of doubt on prior proceedings and the resulting conviction," prosecutors must act on that information by "consider[ing] whether it should be disclosed or otherwise pursued." *Id.* at 177-78.

Given the importance of these postconviction claims, prosecutors must take necessary actions to remedy injustices at trial. And relying on novel procedural bars to prevent judicial review of jury-selection-discrimination claims will only undermine the public's confidence in the judicial system.

B. Requiring courts to vigorously enforce *J.E.B.* claims will not hinder law enforcement, as efforts to reform the jury-selection process make clear.

Many states have taken steps to reform the jury-selection process by holding prosecutors to higher standards than *J.E.B.* and *Batson* do. These successful efforts make clear that requiring prosecutors to abide by *J.E.B.* and asking courts to vigorously enforce defendants' constitutional rights will not hinder law enforcement.

Recognizing the widespread harms that discrimination in the jury process causes, various jurisdictions have implemented reforms targeted at minimizing jury selection bias. Eliminating peremptory strikes altogether is the most radical reform. In 2022, Arizona became the first state to take that approach. Tyler Miller, *Arizona Eliminates Peremptory Challenges*, Ariz. State L.J. Online (Oct. 24, 2022), https://tinyurl.com/yanv6jb4. Early research from Maricopa

County, Arizona, indicates that the change was successful, and removing peremptory challenges did not "adversely impact[] the jury's ability to reach verdicts." Paul J. McMurdie et al., *Arizona's Elimination of Peremptory Challenges: A First Look*, 56 Ariz. State L.J. 1793, 1818 (2024).

In North Carolina, Durham County's District Attorney has advocated for eliminating peremptory challenges, stating that prosecutors "should take the lead and enact policies that prohibit their staff from using peremptory strikes." Satana Deberry et al., Opinion, *How Jury Selection Discriminates Against Black Citizens*, San Francisco Chronicle (July 24, 2020), https://tinyurl.com/3w52ajsj. She 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." *Id.*

Other jurisdictions have retained peremptory strikes, working within the *J.E.B.* and *Batson* framework to decrease bias in juror selection. In Washington state, several facially neutral justifications for peremptory strikes are presumptively invalid reasons to strike a prospective juror, and no peremptory strike is allowed if an objective observer could view race as a factor in the strike. Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*?: Rulemaking, Race, and Criminal Procedure Reform*, 124 Columbia L. Rev. 1, 25 (2024). Those facially neutral justifications include having a close relationship with people who have been arrested or convicted of a crime; living in a high-crime neighborhood; and being a nonnative English speaker. *Id.* Connecticut and New Jersey have implemented similar regimes. *Id.* at 28-29. California, too, abolished

Batson's first step (identifying that a potential juror of the defendant's racial group has been struck because of their race) and employs an "objectively reasonable" viewer standard at its second (which considers whether the state has given a neutral explanation for the strike). *Id.* at 26-27. California's and New Jersey's reforms apply to strikes motivated by gender as well as race. *Id.* at 27, 29.

These reforms show that requiring courts to vigorously enforce *J.E.B.* claims does not undermine law enforcement. Instead, they bolster the integrity of the trial process and thus the criminal justice system more broadly. Prosecutors should thus welcome the more modest—but nonetheless critical—step of allowing judicial review of meritorious *J.E.B.* claims (like Petitioners' here) rather than ask courts to apply procedural barriers to relief, like the state has done in Petitioners' cases.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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