No. 13-494

IN THE

Supreme Court of the United States

GEORGE BRETT WILLIAMS,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

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

BRIEF OF *AMICI CURIAE*, THE NATIONAL CONGRESS OF BLACK WOMEN AND THE BLACK WOMEN LAWYERS ASSOCIATION OF LOS ANGELES, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether as some courts have held, reviewing courts are required to accord "great deference" to unexplained *Batson* rulings where the trial court does not demonstrate on the record that it has evaluated "all of the circumstances that bear upon the issue of discrimination," or whether, in light of *Snyder* and as other courts have held, reviewing courts should not defer to the trial court's unexplained determination of a *Batson* objection?

2. Whether a reviewing court may defer to a trial court's *Batson* ruling where the trial court acknowledges that it is unable to independently evaluate the prosecutor's contested, demeanor-based explanation and denies a *Batson* motion by simply accepting the prosecutor's stated reason after observing that it comports with racial and gender stereotypes the judge believes to be true?

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INTERESTS OF *AMICI CURIAE*[1]

The National Congress of Black Women ("NCBW"), founded in 1984, is dedicated to the educational, political, economic, and cultural development of African-American women and their families. NCBW serves as a nonpartisan voice on issues pertaining to the involvement of Black women at all levels of government and aims to increase African-American women's participation in civic life.

The Black Women Lawyers Association of Los Angeles, Inc. ("BWL") was founded in 1975 to address the interests and concerns of African-American women in the legal profession. BWL engages in a range of charitable and educational programs to further these objectives and to serve the broader needs of the Los Angeles African-American community.

The constitutional right of African-American women to be considered, without discrimination, for jury service particularly concerns *amici*. *Amici* write from the perspective that "[e]qual opportunity to participate in the fair administration of justice is

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici* and its counsel has made a monetary contribution to the preparation and submission of this brief.

Pursuant to Rule 37.2(a), counsel of record for all parties received notice of the intention to file an *amicus curiae* brief at least ten days prior to the due date for the brief. The parties have consented to the filing of this brief and their letters of consent accompany this brief.

fundamental to our democratic system." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 145 (1994).

Confidence in the administration of justice is predicated upon the equal opportunity to participate in the jury system. It is undermined when the judiciary fails to safeguard against discriminatory jury selection through the meaningful application of the rule in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Amici* address the Court out of grave concern that practices such as those engaged in by the prosecutor and endorsed by the trial judge in this case insulate the "'action of a state . . . through its courts, or through its executive . . . officers'" in excluding persons from jury service because of their race and gender. *Norris v. Alabama*, 294 U.S. 587, 589 (1935) (citation omitted).

George Brett Williams's petition calls upon the Court to enforce *Batson* by ensuring that a reviewing court does not defer to a trial judge's ruling at the third step of the *Batson* inquiry unless the trial judge has considered all relevant circumstances and explained his or her credibility determination. The question presented is vital to African-American women who, on account of their race and gender, were historically excluded from jury service and who continue to be the targets of discriminatory jury selection practices.

SUMMARY OF ARGUMENT

Amici adopt the facts as recounted in the petition for writ of *certiorari*.

In 1991, six qualified African-American women entered the courthouse in Compton, California for jury service in George Brett Williams's capital trial. The prosecutor struck the first five African-American women. Pet. App. 166a, 171a, 180a. He offered nearly identical reasons for each strike—reasons that had little or nothing to do with the women's answers to questions, but instead with their "demeanor" and the prosecutor's "general impression" "in spite of what they said." Pet. App. 168a, 177a.

Defense counsel asked the trial court if it was mere "coincidence" that the prosecutor had struck the first five Black women in the jury box. Pet. App. 187a. "No," the court replied, making explicit what had remained unsaid throughout the proceeding, the same unspoken stereotype that stubbornly lingers in courtrooms across the country:

> I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I have found it to be true.

Pet. App. 187a. The comment offends this Court's equal protection principle that race and gender are "unconstitutional prox[ies] for juror competence and impartiality." *J.E.B.*, 511 U.S. at 129. The assertion also parrots entrenched assumptions about African-American women as prospective jurors. Exclusions based on race and gender continue to perpetuate stereotypes. *See Miller-El v. Dretke*, 545 U.S. 231,

270 (2005) (Breyer, J., concurring) (commenting that "the use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before").

"Competence to serve as a juror ultimately depends on . . . individual qualifications and ability impartially to consider evidence presented at a trial." *Batson*, 476 U.S. at 87 (citing *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223-24 (1946)). The use of a juror's membership in a racial or gender group as a proxy for competence or impartiality "'open[s] the door to . . . discriminations which are abhorrent to the democratic ideals of trial by jury.'" *J.E.B.*, 511 U.S. at 145 n.19 (quoting *Thiel*, 328 U.S. at 220).

As this Court observed in *Batson*, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." 476 U.S. at 87. The African-American community of Compton has long struggled for equality and inclusion. This struggle intensified shortly before Mr. Williams's capital trial. Pet. App. 114a (Liu, J., dissenting) (explaining that racial tensions erupted anew after a videotape showed police brutally beating a Black motorist). Compton's fitful, and at times profound, progress has been too frequently interrupted by a legacy of discrimination and exclusion.

The courts maintain a fundamental role in remedying that history. As Justice O'Connor observed:

> The jury system is not only central to our trial process, but it is the primary link between the courts and the community . . . . The impressions jurors receive during their jury service can have a significant impact on public perceptions about the justice system.

Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, 36 Ct. Rev. 10, 12 (Fall 1999), *available at* http://aja.ncsc.dni.us/htdocs/publications-courtreview.htm.

Inadequate judicial enforcement of the prohibition on discriminatory jury selection validates skepticism about the fairness of our legal system. O'Connor, *supra*, at 11 (observing that "[t]he perception that African-Americans are not afforded equality before the law is pervasive, and requires us to take action at every level of our legal system, especially at the local level"). In this case, the trial court was not merely lax in restraining a prosecutor's unlawful strikes. It embraced the same stereotype that has been applied to African-American women for decades. This Court should grant *certiorari* to make clear that deference by an appellate court to a trial court's unexplained *Batson* ruling is unwarranted, especially when racial or gender stereotypes infect the ruling.

ARGUMENT

I. THE RACE AND GENDER STEREOTYPES EMPLOYED IN THIS CASE HISTORICALLY HAVE BEEN USED TO EXCLUDE AFRICAN AMERICANS AND WOMEN FROM FULL PARTICIPATION IN CIVIC LIFE

A. Racial Stereotypes Historically Invoked to Exclude African Americans from Jury Service Are Still Used Today.

The stereotype that African Americans will be partial to a defendant of the same race has long been used to exclude them as jurors. *See Batson*, 476 U.S. at 103-04 (Marshall, J., concurring) (providing examples of prosecutors' routine and undisguised use of peremptory challenges to strip juries of African Americans). Before *Batson*, prosecutors employed peremptory strikes to remove African Americans from trials in which the accused was Black as "'a matter of common sense'" and a regular "'practice.'" Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 New Eng. L. Rev. 192, 202, 205 (1978) (citations omitted) (quoting judicial opinions describing prosecutors' jury selection practices); *see also id*. at 214 n.126 (quoting *State v. Jack*, 285 So.2d 204, 210 (La. 1973)) (Barham, J., dissenting) (explaining how strikes "'were exercised systematically and discriminatively for the purpose of excluding all blacks from the jury'"); *Reed v. Quarterman*, 555 F.3d 364, 382 (5th Cir. 2009) (describing a manual used by the Dallas County

District Attorney's Office, instructing prosecutors to avoid selecting "'any member of a minority group'" because "'[m]inority races almost always empathize with the Defendant'").

Although *Batson* created a new legal test, allowing a defendant to rely "solely on the facts . . . in his case" to demonstrate purposeful discrimination, 476 U.S. at 95, prosecutors continue to base peremptory strikes on racial stereotypes. *See, e.g., People v. Randall,* 671 N.E.2d 60, 65 (Ill. App. Ct. 1996) (surmising that "new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations'"); Equal Justice Initiative, Illegal Racial Discrimination in Jury Service: A Continuing Legacy 14-30 (2010) (describing the prevalence of "racially biased use of peremptory strikes" post-*Batson*, and cataloguing examples of reasons that "explicitly incorporate race" or "correlate strongly with racial stereotypes").

B. Gender Stereotypes Historically Invoked to Exclude Women from Jury Service Are Still Used Today.

As this Court discussed at length in *J.E.B.*, "gender, like race, is an unconstitutional proxy for juror competence and impartiality." 511 U.S. at 129. In extending *Batson*'s protection to women, the Court disavowed stereotypes historically used to exclude women from civic engagement, including jury service. *Id.* at 131-36.

For generations, women's exclusion from civic life was based on gender stereotypes that cast them as either too sensitive or singularly focused on their roles as wife and mother. *See, e.g.*, *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding women's exemption from jury service because women occupy a unique position "as the center of home and family life"); *Bailey v. State*, 219 S.W.2d 424, 428 (Ark. 1949) (observing that criminal trials "often involve . . . elements that would prove humiliating, embarrassing and degrading to a lady").

These stereotypes were widely used by prosecutors when *J.E.B.* was decided. *See* Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1172 (1993) (describing "trial manuals and jury selection tracts" predicting how women jurors would behave); Brown, *supra*, at 224 n.181 (quoting the Dallas County District Attorney's manual instructing that "'women's intuition can help you if you can't win your case with the facts,'" but that "'[y]oung women too often sympathize with the Defendant'"). These stereotypes continue to animate jury selection practices. *See Miller-El*, 545 U.S. at 271 (Breyer, J., concurring) (describing a trial consulting firm's jury selection technology for civil and criminal cases that specifies "'exact demographics,'" including race and gender, to enable lawyers to identify "'the type of jurors you should select and the type you should strike'").

C. Because of Their Dual Identities as African Americans and Women, Black Women Are Particularly Vulnerable to Discriminatory Peremptory Challenges.

Extending *Batson*'s protection to women, the Court acknowledged the relationship between race and gender discrimination in the use of peremptory challenges:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

J.E.B., 511 U.S. at 145; s*ee also id.* at 145 n.18 (observing that "[t]he temptation to use gender as a pretext for racial discrimination may explain why the majority of the lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove minority women" and that "[a]ll four of the gender-based peremptory cases to reach

the Federal Courts of Appeals . . . involved the striking of minority women").[2]

The most commonly held stereotype about African-American women in the context of jury selection is that they will not convict a Black male defendant because they will emotionally respond to him as a son or husband. For example, in *Jones v. Ryan*, 987 F.2d 960, 973 (3d Cir. 1993), the prosecutor challenged one juror because she had a son approximately the same age as the defendant. He struck the other because, according to the prosecutor, she was "'the same approximate age and race of the defendant'" and he was concerned she might be attracted to the defendant. *Id.*; *see also* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 42 (2001) (noting that in a training videotape, Jack McMahon instructed fellow Philadelphia prosecutors to avoid selecting older Black women when the defendant is a young Black man because of their "'maternal instinct'"); Babcock, *supra*, at 1147 (commenting that when prosecutors peremptorily strike African-American women, it is based on the assumption that they will "not convict young men who might be their sons or brothers").

In the context of capital trials, this stereotype translates into the assumption that African-American women will not impose the death penalty

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[2] *See, e.g.*, *United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993) (foreshadowing *J.E.B.*'s recognition that gender may be used as a proxy for race).

against an African-American male defendant. This notion is a hybrid of stereotypes historically used to exclude African Americans and women from jury service. First, it presumes that, as African Americans, Black women will be partial to defendants who share their race. Second, it presumes that, as wives and mothers, Black women will not be able to rationally consider a case involving a defendant who could be their husband or son. In this sense, the same antiquated stereotypes that were used to exclude women and African Americans from "voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life" are at play when prosecutors and judges assume that African-American women will not impose the death penalty. *J.E.B.*, 511 U.S. at 142 n.14.

As in other contexts, African-American women are often subjected to a double dose of discrimination in jury selection. *See People v. Motton*, 704 P.2d 176, 181 (Cal. 1985) (in bank) (noting that during jury selection, "black women face discrimination on two major counts—both race and gender—and their lives are uniquely marked by this combination"); Jean Montoya, *"What's So Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender*, 3 Mich. J. Gender & L. 369, 400 (1996) (observing that African-American women experience "intersectional or race *and* gender discrimination," which "is necessarily race discrimination and gender discrimination"); Babcock, *supra*, at 1163 (arguing that "in the case of minority women, allowing gender strikes subjects them to the most virulent double

discrimination: that based on a synergistic combination of race and sex").[3]

D. Striking African-American Women Based on "Gross Generalizations" Regarding Group Views on Capital Punishment Offends the Equal Protection Clause.

To a prosecutor, Black women may be seen as undesirable jurors based on the assumption that they are unlikely to impose the death penalty.[4] Polling data shows that women and African Americans oppose capital punishment somewhat more frequently than men and Whites, respectively.[5] There is, however, social science research demonstrating that jurors do not decide verdicts

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[3] *See Commonwealth v. Basemore*, 744 A.2d 717, 730 (Pa. 2000) (describing the same training videotape referenced above, in which prosecutor McMahon instructs that "'young black women'" are also "'very bad'" because "'they got two minorities, they're women and they're [ ] blacks, so they're downtrodden in two areas. And they somehow want to take it out on somebody, and you don't want it to be you'").

[4] *See, e.g.,* Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 Am. Psychol. 527, 530 (2008) (observing that "[i]n practice, attorneys' chief objective . . . is to select jurors whom they believe will be sympathetic to their side of the case").

[5] *See* Gallup poll conducted December 19-22, 2012 (published January 9, 2013), http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx; Gallup poll conducted June 4-24, 2007 (published July 30, 2007), http://www.gallup.com/poll/28243/Racial-Disagreement-Over-Death-Penalty-Has-Varied-Historically.aspx.

based on their racial or gender identity.[6] As one African-American female potential juror in the District of Columbia explained:

> Some defense lawyers may feel that the predominantly middle aged, predominantly black jury most often chosen in the District is more sympathetic to the black defendant. But they are espousing . . . another bit of folklore. In fact, quite the opposite is true. Enough crime is enough, such juries feel. We are the victims.

Montoya, *supra*, at 382.

As a matter of constitutional law, stereotypes may not be the basis of governmental action. The exclusion of African-American women based on any "gross generalizations" about their character, capabilities, or views violates the Equal Protection Clause, "even when some statistical support can be conjured up for the generalization." *J.E.B.*, 511 U.S. at 139 & n.11. Because juror competence is an individual matter, a prosecutor may not use a juror's membership in a particular racial or gender group as a proxy for "juror competence and impartiality." *J.E.B.*, 511 U.S. at 129.

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[6] *See* Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts*, 64 Judicature 22, 27 (1980) (finding that Black women are more inclined to convict defendants of color before deliberation than Whites); *see also* Sommers & Norton, *supra* n.4, at 531 (stating that though "juror [racial] stereotypes tend to be global," juror behavior is "more context dependent").

II. THE CIRCUMSTANCES OF MR. WILLIAMS'S TRIAL ARE RELEVANT TO THE PROSECUTOR'S DISCRIMINATORY STRIKES AND THE TRIAL COURT'S RULINGS

A. Race, Place, and Time Were All Relevant Circumstances in the Exclusion of the Five African-American Women.

Mr. Williams, a Black man, was tried in Compton for the murder of two men. Pet. App. 114a (Liu, J., dissenting). Mr. Williams's wife, who is also Black, was the key defense witness. Pet. App. 111a. (Liu, J., dissenting). At the time of Mr. Williams's trial, African Americans comprised fifty-five percent of Compton's voting-age population, and more than half were women. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 CP-1-6, 1990 Census of Population: General Population Characteristics California 132 (1992).

Compton's location as the site of Mr. Williams's trial has constitutional significance. At the turn of the twentieth century, Compton epitomized the White "All-American" suburban dream. Josh Sides, *Straight into Compton: American Dreams, Urban Nightmares, and the Metamorphosis of a Black Suburb*, 56 Am. Q. 583, 585 (2004). With the commencement of World War II and the passage of Executive Order 8802 (which made it illegal for government contractors to discriminate in hiring), "hundreds of thousands" of African Americans migrated to Los Angeles to work in the newly opened defense industry jobs. Paul Robinson, *Race, Space,*

and the Evolution of Black Los Angeles, in Black Los Angeles 40 (Darnell Hunt et al. eds., 2010). White residents of Compton successfully kept them out, touting the slogan "'Keep the Negroes North of 130th Street.'" Sides, *supra*, at 585. In 1948, Compton had a population of 45,000; fewer than 50 Compton residents were African American. *Id*. As the Black population swelled, Black Angelenos were forced into established "black zones" throughout South Central Los Angeles. Robinson, *supra*, at 39. In response, Black leaders spearheaded the desegregation of exclusively white residential areas like Compton in the 1950s and 1960s. *Id*. at 43.

This Court's decisions in *Shelley v. Kramer* and *Barrows v. Jackson* facilitated the metamorphosis of Compton. *Shelley*, 334 U.S. 1, 21-22 (1948) (holding that the Equal Protection Clause prohibits state court enforcement of restrictive real estate covenants based on race); *Barrows*, 346 U.S. 249, 259-60 (1953) (extending *Shelley* to prohibit judicial enforcement of restrictive covenants against property owners who break them). Decisions putting an end to racially restrictive housing covenants allowed upwardly mobile African-American families to finally integrate Compton. *See* Sides, *supra*, at 586.

In 1950, African Americans made up four percent of Compton's population; by 1960, this figure had jumped to forty percent. Sides, *supra*, at 588. By the time Douglas Dollarhide became Compton's first Black city councilman in 1963 and the first Black mayor in 1969, Compton had become the "vanguard of black empowerment" in the United States. *Id*. at 590.

Over the next several decades, the White population of Compton decreased, and coupled with Southern California's sharp decline in "steady, unionized, blue-collar . . . employment, the pillars of black prosperity in Compton" were largely undermined. Sides, *supra*, at 591. In 1965, mounting racial tensions in Los Angeles erupted in the Watts riots, which caused a "wholesale white flight" from Compton. *Id*. As White residents left, they also abandoned their retail businesses, prompting a loss of jobs and public services. *Id*. In the 1980s, Compton became an epicenter of street gang violence and the crack cocaine epidemic. *Id*. at 593. Notwithstanding the social and economic challenges in the decades preceding Mr. Williams's trial, Compton sustained a working-class community whose citizens participated in all aspects of civic life. Sides, *supra*, at 601.

In 1973, Compton became the first metropolitan city in the United States to elect a Black woman mayor. Compton's current mayor, Aja Brown, is also an African-American woman. *See* Jean Douglas Murphy, *Doris Davis Running Hard and Fast,* L.A. Times, Sept. 23, 1973, at J1; Angel Jennings, *Aja Brown Elected Compton's Mayor,* L.A. Times, June 06, 2013, at AA.1.[7] African-American women were crucial in combating the gang violence and drug scourge of the 1970s, 1980s, and early 1990s. For example, they mobilized groups of outraged residents to clean up the streets of Compton in the face of

[7] Presently, African-American women hold a majority of civic leadership positions in the city. *See* Elected Officials: City of Compton, http://www.comptoncity.org/index.php/Table/Elected-Officials (last visited Nov. 8, 2013).

intimidation by gang members. Terry Spencer, *Compton Block Clubs Find Strength in Numbers as They Wage Battle Against Neighborhood Gangs, Drug Dealers,* L.A. Times, Feb. 14, 1988, at 1.

The image of Compton as a "ghetto of poverty, crime, gang violence, unemployment and blight" was exacerbated by the release of the album *Straight Outta Compton* by the rap group NWA. Sides, *supra*, at 596. To counter this image, African-American women protested until they were successful in stopping NWA from filming videos in Compton and restraining their air play on local radio stations. *See* Rebekah Gardner, *Black Women Ask Retailer Not To Sell "Gangsta Rap,"* L.A. Times, Jan. 06, 1994, at 17; Emily Adams, *City Orders Rap Video Straight Out of Compton,* L.A. Times, Oct. 13, 1993, at 1; *Restraint That's Good for the Community[:] Local FM Station Will Not Air Rap Music That Offends,* L.A. Times, Nov. 02, 1993, at 6.

B. The Trial Judge's Voir Dire Question Highlighted the Racialized Environment in Which Mr. Williams's Trial Occurred.

"The racial overtones of this trial in which a black man was charged with capital murder, were apparent to all those present in the courtroom." Pet. App. 146a (Liu, J., dissenting). During voir dire, the trial judge asked prospective jurors: "Is there anyone here who feels because of the Rodney King case that it has affected you to a point where you would not be able to listen impartially to the testimony of a police officer?" Pet. App. 163a. *Amici* understand that this inquiry was likely intended to ascertain whether

jurors' impartiality toward law enforcement might be compromised by a recent, highly publicized event. Less than six months before Mr. Williams's trial, the country watched the nationally televised beating of Rodney King, an unarmed Black man, by the Los Angeles Police Department (LAPD). *See* Pet. App. 114a (Liu, J., dissenting); The Staff of the Los Angeles Times, *Understanding the Riots* 33 (Shelby Coffey et al. eds., 1996).

To many in the African-American community, the beating and the officers' conduct in its aftermath validated long-standing criticism of the LAPD. *See* Jerry G. Watts, *Reflections on the King Verdict*, *in Reading Rodney King, Reading Urban Uprising* 241 (Robert Gooding-Williams ed., 1993). African-American residents spoke out. Art Washington, a Black middle class resident, said in a televised interview: "'Well, at least they *see* we're not lying to them . . . they see that this stuff actually happens. Now the world sees.'" The Staff of the Los Angeles Times, *supra*, at 35. Washington's nephew, a UCLA student, saw the beating as educational, commenting: "'[Y]our parents can tell you all the stories in the world about what some police do to black people, but until you see it you don't understand.'" *Id*. In a *Los Angeles Times* op-ed, another resident called the officers "hoodlums," saying the real tragedy is that people "don't see criminal acts perpetrated by the police as criminal. This moral misjudgment corrupts our society and endangers our lives." John P. Brady, *Outcry Over Police Brutality*, L.A. Times, Mar. 24, 1991, at 4.

Thus, at the time of Mr. Williams's trial, community distrust of the police was at an all-time high. The Staff of the Los Angeles Times, *supra*, at 35. A poll taken the week after the beating revealed that ninety-two percent of Angelenos believed the police had used excessive force against Mr. King, and two-thirds believed that police brutality was common. *Id*. Even if the trial court's voir dire question about the Rodney King beating was warranted, it immediately framed Mr. Williams's trial in racial terms that were later magnified by the prosecutor's strikes of five Black women, his polling of prospective jurors as to whether the strikes offended anyone, the trial court's comments about Black women, and its *Batson* rulings.

III. THE TRIAL COURT'S RULINGS EXEMPLIFY WHY REVIEWING COURTS MUST NOT DEFER TO UNEXPLAINED *BATSON* RULINGS

A. Trial Judges May Be as Prone to Racial and Gender Bias as Other Participants in the Justice System.

During jury selection in Mr. Williams's trial, the prosecutor offered the same reason for each strike of the five Black women: notwithstanding their answers, it was his "impression" that each would not impose the death penalty. Pet. App. 168a, 177a, 184a. After defense counsel objected to the strike of the fifth African-American woman, Ruth Jordan, the prosecutor admitted at sidebar that race was on his mind: he expressed concern "about offending the blacks on the jury for them thinking" he was

repeatedly striking African Americans. Pet. App. 181a.

The trial court's response to the strike of Ms. Jordan reveals that the judge impermissibly endorsed the prosecutor's stereotyping. When the prosecutor stated that he was having difficulty expressing for the record his reason for challenging Ms. Jordan, the trial judge responded, "I understand." Pet. App. 185a. When defense counsel then asked if it was "coincidence" that the prosecutor had removed five out of six African-American female prospective jurors, the judge responded:

> No . . . . And I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I have found it to be true.

Pet. App. 187a.[8] The court denied the *Batson* motion, stating, "And at this point I will accept [the prosecutor's] explanation." Pet. App. 189a. Once again, the prosecutor and the trial court privileged their own beliefs about African-American women over what these five African-American women said about their beliefs.

After the court's *Batson* ruling, the prosecutor addressed the remaining prospective jurors in open court, stating, "It is not a mystery at all, you know.

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[8] When defense counsel asked whether the judge had overruled the *Batson* objection based on her stated opinion, she denied that she had done so. Pet. App. 187a-188a.

Everybody here, everybody recognizes when we go up to the bench after I kick a female black, for example, a number of times we're up there talking about the fact that I'm doing that." Pet. App. 190a.[9] "Does it cause anybody any concern?" the prosecutor inquired. Pet. App. 190a-191a. The prosecutor then accepted the sixth and final African-American woman, who served on the jury. Pet. App. 181a, 193a. After the jury was sworn, the prosecutor explicitly acknowledged that he took race into account in his strikes, stating for the record that he had used his last preemptory challenges to strike "white jurors" because he wanted "greater . . . racial diversification on this jury." Pet. App. 194a. Throughout jury selection, race and gender were "a substantial or motivating factor" in his peremptory challenges. *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

Dissenting in Mr. Williams's case, Justice Werdegar characterized the trial court's "observation" about Black women's views on the death penalty as one of "the egregious circumstances of the present case," which "amply establish" that the *Batson* rulings are not entitled to deference. Pet. App. 110a-111a (Werdegar, J., dissenting). The trial court's remarks exemplify what empirical research demonstrates: judges may be just as prone as attorneys and jurors to flawed decision-making based on their own biases. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev.

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[9] "[I]t is clear that the prosecutor was quite cognizant of the race of the jurors he struck, and he was also aware that the principal defense witness was going to be a black woman." Pet. App. 146a (Liu, J., dissenting).

1124, 1146 (2012) (concluding that "the extant empirical evidence" shows that "there is no inherent reason to think that judges are immune" from bias); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solution*s, 4 Harv. L. & Pol'y Rev. 149, 150 (2010) (chronicling one judge's upsetting discovery that he harbored implicit biases); Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1197 (2009) (finding that "[j]udges hold implicit racial biases" that "can influence their judgment").

Moreover, trial judges may overestimate their impartiality, compounding the impact of judicial bias. For example, ninety-seven percent of judges recently surveyed believe they are in the top half relative to their colleagues in "avoid[ing] racial prejudice in decisionmaking" relative to other judges. *See* Rachlinski, *supra*, at 1225. These findings suggest that "judges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes." *Id*. at 1225-26.

Given that trial judges harbor biases and overestimate their impartiality, it is troubling—though perhaps not surprising—that they accept the overwhelming majority of attorneys' race-neutral justifications. *See* K. J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 461 (1996) (finding that prosecutors' race-neutral explanations for peremptory strikes were accepted

eighty percent of the time); M. J. Raphael & E. J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. Mich. J. L.Reform 229, 235 (1993) (concluding that "only a small percentage of the neutral explanations for peremptory strikes were rejected").

Concurring in *Batson*, Justice Marshall cautioned that because "[a]ny prosecutor can assert facially neutral reasons for striking a juror," there is a danger that courts will accept these post hoc rationalizations and "the protection erected by the Court today may be illusory." 476 U.S. at 106 (Marshall, J., concurring). More than thirty years on, "lawyers have simply learned to mask discriminatory peremptories" by furnishing race- and gender-neutral reasons, and there are raging inconsistencies between trial judges' scrutiny at step three. Nancy S. Marder, *Justice Stevens, The Peremptory Challenge, and the Jury*, 74 Fordham L. Rev. 1683, 1707-08 nn.170-71 (2006) (describing cases in which virtually identical facially neutral reasons were found satisfactory at step three by some judges and pretextual by others); Sommers & Norton, *supra* n.4, at 534 (surveying studies showing the boundless range of race-neutral reasons).

B. Precluding Deference to Unexplained *Batson* Rulings Will Reduce Discriminatory Jury Selection Practices and Improve Public Confidence in the Administration of Justice.

Recently in *Snyder*, this Court reaffirmed the "pivotal role" trial courts play in enforcing *Batson*'s

equal protection promise. 552 U.S. at 477. *Snyder* held, however, that trial courts do not discharge this responsibility when they fail to make "a specific finding on the record concerning [the juror's] demeanor." *Id*. at 479. In such circumstances, a reviewing court's paramount enforcement responsibility precludes deference. *See id*. (declining to "presume that the trial judge credited the prosecutors' [demeanor-based] assertion").

An explained credibility determination at step three not only lends substance and legitimacy to the trial court's ruling; it builds into the process a check against racial and gender bias that trial attorneys and judges alike often harbor. Because stereotypes "can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness," Kang, *supra*, at 1129, precluding deference to unexplained step-three rulings can help ferret out and reduce bias in at least two respects.

First, "effortful, deliberative processing" and "active, conscious control" counters biased decision-making. Kang, *supra*, at 1199; Rachlinski, *supra,* at 1225. Second, accountability matters. "[B]iases translate most readily into discriminatory behavior . . . when people have wide discretion in making quick decisions with little accountability." Kang, *supra*, at 1142 (citing Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795 (2012)). By contrast, when judges are "motivated to avoid the appearance of bias" and "risk a charge of bias," they can engage their abilities to

confront it. Rachlinski, *supra*, at 1225. In these ways, precluding deference when the trial court does not explain its step-three ruling incentivizes trial judges to address discrimination in the courtroom and thus preserves the constitutional right that *Batson* aims to protect.

CONCLUSION

Peremptory challenges are often based on gut instincts. The prosecutor's removal of five African-American women from Mr. Williams's jury and the trial court's unexplained rulings upholding their exclusion is a reminder that such instincts are often rooted in racial and gender stereotypes. *See generally Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)) (observing that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'"). This Court should preclude deference to unexplained step-three rulings in order to fortify the judicial checks that are central to *Batson*'s enforcement mechanism and thereby maintain the Court's "unceasing efforts" to eliminate racial and gender discrimination in jury selection. *Id.* at 85.

For the reasons set forth herein, *amici* respectfully request that the Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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