CAPITAL CASE
No. 18-7094

IN THE

Supreme Court of the United States

FLOYD DANIEL SMITH,

Petitioner,

—v.—

STATE OF CALIFORNIA,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF SOUTHERN CALIFORNIA, AND THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, IN SUPPORT OF PETITIONER

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The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 2 million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU of Southern California is an affiliate of the ACLU. Both organizations share longstanding interests in protecting the rights of capital defendants and the criminally accused, including the right to a jury trial free of discrimination.

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include the death penalty, police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

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[1] Counsel of record for both parties received timely notice of amici's intent to file this brief and consented. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than amici and their counsel.

SUMMARY OF ARGUMENT

At his 1997 capital trial, Floyd Smith, a young black man, stood accused of killing a white teen. The San Bernardino prosecutors used peremptory challenges to strike all four of the eligible black venire members, resulting in a jury with no black jurors. Pet. App. 9a. In response to a motion pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), the court asked the prosecution to provide a race-neutral explanation to rebut Smith's prima facie case of discrimination. The prosecution cited the jurors' views of the O.J. Simpson trial as a purportedly race-neutral basis for striking all four black jurors. *See* Pet. App. 10a-30a. The prosecution did not cite views about the Simpson trial as justification for striking any white jurors. The trial took place in the late 1990s, against a backdrop of ubiquitous publicity about how white and black Americans viewed the O.J. Simpson verdict differently.

Despite the extraordinary and widely recognized overlap between race and views of the O.J. Simpson verdict, the trial court accepted the prosecution's reliance on such views as a valid race-neutral reason for all four strikes. For each strike, the court accepted the justification on its face, and conducted no inquiry to assess whether this rationale was being used as a proxy for race. Pet. App. 10a-30a. On appeal, the California Supreme Court did the same, *id.* at 26a-27a, as it has done in several other capital cases. Pet. App. 17a; 19a; 21a; *see also People v. Mills*, 48 Cal 4th 58, 177-90 (Cal. 2010); *People v. Vines*, 251 P.3d 943, 959 (Cal. 2011); *People v. Montes,* 58 Cal. 4th 809, 851-56 (Cal. 2014).

That makes Smith's case at least the fourth capital case in California, along with several criminal cases in Texas, where courts have accepted views on the O.J. Simpson verdict as a race-neutral explanation for striking black jurors, without any further inquiry. *Harris v. State*, 996 S.W.2d 232, 236 (Tex. Ct. App. 1999). State courts in Georgia and Colorado have taken different approaches, closely scrutinizing references to the Simpson trial to ensure that they are not a proxy for race. *Ridley v. State*, 235 Ga. App. 591, 595 (Ga. Ct. App. 1998); *Valdez v. People*, 966 P.2d 587, 594-96 (Colo. 1998).

More generally, lower courts are divided about how to address justifications proffered as facially race-neutral that are highly correlated with race, such as neighborhood of residence. Some courts, as here, simply accept such justifications as sufficient on their face, without even asking whether they are being used as proxies for race. Others inquire further to ensure that the justifications are in fact race-neutral, and not proxies for discrimination. In jurisdictions where such factors are accepted on their face, they have been incorporated in prosecutors' training materials, increasing the risk that such factors will be advanced to cover for racially-based strikes.

This Court should grant certiorari to resolve the confusion in the lower courts about how to apply *Batson* where, as here, an attorney seeks to rebut a prima facie case of racial discrimination by invoking factors that are purportedly race-neutral but highly correlated with race. As this Court itself demonstrated in *Hernandez v. New York,* 500 U.S. 352, 371 (1991) (plurality opinion), if *Batson*'s

promise is to be meaningful, courts must scrutinize such justifications to ensure that they are not proxies for the very discrimination that *Batson* forbids.

"Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015). The approach used by the courts below invites discrimination by unquestioningly accepting as race-neutral justifications that are highly correlated with race. The Court should grant review to make clear that where proffered justifications are highly correlated to race and may function as proxies for race, courts must ensure that they are in fact race-neutral before relying on them to rebut a prima facie case of racial discrimination in jury selection.

STATEMENT

Floyd Smith, a young black man charged with killing a white teenager, was tried twice in 1997, each time by a jury with no black jurors. Pet. 5-6. The first trial resulted in a hung jury, the second in conviction and a death sentence. In both trials, the prosecution used peremptory challenges to strike all the black jurors, and then relied on the black jurors' views of the Simpson verdict to rebut charges of race discrimination. The first trial came just eighteen months after the Simpson verdict, the second trial, two years after the verdict, and the same year as the verdict in Simpson's civil trial. At both trials, prospective jurors were asked in writing whether they "were [] upset with the criminal jury's verdict in the Simpson case?" *Id.* In the first trial, the prosecution struck two black prospective jurors and a

third black alternate juror, resulting in all-white jury. Pet. 5. In response to a *Batson* objection, the prosecution cited a prospective black juror's views about the O.J. Simpson case as a basis for the strike. *Id.* The trial judge concluded that the defendant had not established a prima facie case, and did not engage in any further probing of the O.J. Simpson response. *Id.*

This pattern continued at the second trial, where used peremptories to strike *all four* of the black prospective jurors questioned, again ensuring a trial with no black jurors. Pet. App. 7-8. When defense counsel objected to the stark racial pattern of strikes, the prosecution again cited the acceptance of the Simpson verdict as a purportedly race-neutral basis for striking three of the black prospective jurors, and also cited the fourth black juror's failure to follow the Simpson trial closely as a reason for striking her. Pet. App. 10 (juror S.D.'s feelings about the O.J. Simpson case were "undefined" and she seemed "sympathetic to Mr. Simpson"); Pet. App. 17 (juror R.S. had stated on the O.J. Simpson case "if they couldn't prove he murdered Nicole, then the verdict was fair"); Pet. App. 20 (juror H.D. stated that he "felt there was doubt" in the O.J. Simpson case); Pet. App. 26-27 (juror E.K. claimed not to have followed the O.J. Simpson case closely). The prosecution did not strike the five non-black jurors who indicated on their questionnaire that they were not upset by the Simpson verdict. Pet. 9. Nonetheless, the trial court accepted the prosecution's justifications as race-neutral without further discussion of whether views about the Simpson trial were a pre-textual rationale.

Smith's trial, and the prosecution's reliance on opinions about the O.J. Simpson trial, occurred in San Bernardino County, a county plagued by significant racial strife and discrimination. In the 1980s, San Bernardino saw cross burnings, large KKK rallies, and a racially motivated shooting of an African American utility worker.[2] During the prosecution of Kevin Cooper, an African-American male, for the 1983 murders of a white family in San Bernardino county, a crowd "displayed signs reading 'Hang the Nigger'" and "displayed a noose around a stuffed gorilla."[3]

On appeal, Smith continued to assert a *Batson* violation. The California Supreme Court affirmed. It too engaged in no inquiry to assess whether the proffered justifications were in fact race-neutral, but simply accepted them on their face:

> The record also lends some support to the prosecutor's stated concern about Reginia S.'s views regarding the evidence presented in the O.J. Simpson

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[2] *See generally* Josh Dulaney, *Blacks Reflect on Legacy of Fontana*, San Bernardino County Sun (Feb. 15, 2010), https://www.sbsun.com/2010/02/15/blacks-reflect-on-legacy-of-fontana; Jim Steinberg, *Fontana: Man Whose 1980 Shooting Turned Tide Against KKK Is Honored*, The Press-Enterprise (June 30, 2016), https://www.pe.com/2016/06/30/fontana-man-whose-1980-shooting-turned-tide-against-kkk-is-honored; David Olson, *Honoring King in Former KKK Hotbed*, The Press-Enterprise (Jan. 11, 2012), https://www.pe.com/2012/01/11/fontana-honoring-king-in-former-kkk-hotbed.

[3] Nicholas Kristof, *Was Kevin Cooper Framed for Murder*, N.Y. Times (May 17, 2018), https://www.nytimes.com/interactive/2018/05/17/opinion/sunday/kevin-cooper-california-death-row.html.

> case; asked on the questionnaire for her feelings about the case, she responded that "[i]f they couldn't prove he murdered Nicole, then the verdict was fair." . . . We have previously upheld challenges based on similar reasons (*See, e.g.*, *People v. Mills,* 48 Cal. 4th 158, 184 (Cal. 2010) (upholding as race-neutral the prosecutor's stated concern about a prospective juror's belief that the prosecution in the O.J. Simpson murder trial had not proven Simpson's guilt)).

Pet. App. at 17.

People v. Mills, the case cited by the California Supreme Court to justify its acceptance of the Simpson responses as race-neutral in Smith's case, was another capital case conducted on the heels of the O.J. Simpson verdict. In *Mills*, the prosecution struck all of the six black prospective jurors it had the opportunity to question. In response to a *Batson* challenge, the prosecutor cited a prospective black juror's acceptance of the Simpson verdict as a race-neutral explanation for striking her. 48 Cal. 4th at 184. The California Supreme Court simply accepted that the prosecutor's explanation constituted a race-neutral basis for its strike, without any attempt to determine whether it was in fact race-neutral or a proxy for race. *Id*.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT WHERE PARTIES PROFFER PURPORTEDLY RACE-NEUTRAL EXPLANATIONS THAT ARE HIGHLY CORRELATED WITH RACE IN RESPONSE TO *BATSON* CHALLENGES, COURTS MUST ENSURE THAT THE PROFFERED JUSTIFICATIONS ARE IN FACT RACE-NEUTRAL.

Batson v. Kentucky, 476 U.S. 79 (1986), established a clear procedure for assessing claims of race discrimination in the selection of a petit jury. Where either litigant identifies a sufficiently race-based pattern of strikes, it establishes a prima facie case of racial discrimination. *Id.* at 96-97. The striking party may then seek to rebut the prima facie case by advancing a race-neutral explanation for its peremptory strike(s). *Id.* at 97-98. The court then must determine in light of the totality of the circumstances whether the defendant has shown purposeful discrimination. *Id.* at 98.

This process will fail to counter racial discrimination in jury selection, however, if courts uncritically accept as "race-neutral" explanations that do not cite race explicitly on their face, but are so highly correlated with race that they can easily function as a proxy. Such factors, including residence, hair styles, or, as here, responses to the Simpson verdict, may under some circumstances be race-neutral. But they may also be proxies for illegal racial discrimination. Where proffered justifications

are highly correlated with race, therefore, courts cannot meaningfully assess whether the justifications are race-neutral without further inquiry to ensure that they are, in fact, and not just in form, race-neutral.

This Court has previously suggested, in dicta, that factors highly correlated with race require further inquiry where offered to rebut a prima facie showing of race discrimination under *Batson*. In *Hernandez*, 500 U.S. at 352, the Court upheld a prosecutor's explanation that he used peremptory challenges to strike two Hispanic jurors because they were bilingual, even though ability to speak Spanish is correlated with Hispanic ethnicity. However, the Court did so only where the prosecutor had further explained that his concern was that the jurors would rely not on the official English translation, but on their own understandings of Spanish-speaking witnesses, a race-neutral concern. The Court went on to state that:

> We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.... And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the

> individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us.

Hernandez, 500 U.S. at 371-72 (internal citations omitted).

To determine whether a prosecutor's use of the response to the Simpson verdict is in fact race-neutral and not a "surrogate for race," as the Court put it in *Hernandez*, reviewing courts must subject the response to further scrutiny in light of the entire record. The further examination may take various forms, including comparing the use of the rationale to justify striking jurors of different races, whether the factor is related to the case at hand, and whether the prosecutor's response rests on stereotypes or is individualized to the specific juror.

Here, the trial court accepted as race-neutral without any further inquiry—and the California Supreme Court upheld that determination without scrutiny—the prosecution's invocation of answers to a question about one of the most highly racially charged and polarized cases in American history: the criminal murder trial of O.J. Simpson. Indeed, as discussed further below, no trial in the last fifty years has more deeply divided black and white Americans.

II. AT THE TIME OF SMITH'S TRIAL, VIEWS OF THE O.J. SIMPSON VERDICT WERE HIGHLY CORRELATED WITH RACE.

There can be no doubt that opinions about the O.J. Simpson verdict were highly correlated with

race at the time of Smith's trial. The facts of the case—and the fact that the case was viewed differently by white and black Americans—are so notorious that they barely require recitation. Simpson, a black man, was charged with the murder of his white ex-wife, Nicole Brown Simpson and her white friend, Ron Goldman. Simpson was a nationally renowned NFL star who went on to become an actor and public celebrity. Robert J. Cottrol, *Through A Glass Diversely: The O.J. Simpson Trial as Racial Rorschach Test*, 67 U. Colo. L. Rev. 909 (1996).

Initial media reports stressed the racial composition of the jury. *See e.g.*, Andrea Ford & Jim Newton, *12 Simpson Jurors Are Sworn In: Trial: The Eight-Woman, Four-Man Panel is Predominantly Black*, L.A. Times, Nov. 4, 1994. A national Harris poll taken shortly after opening statements, revealed a sharp racial divide in the public's opinions of Simpson's guilt. Humphrey Taylor, *O.J. Simpson: Two-to-One Majority of Public, But Only Eight Percent of African-Americans, Think O.J. is Guilty* (Feb. 11, 1995), https://theharrispoll.com/wp-content/uploads/2017/12/Harris-Interactive-Poll-Research-Oj-Simpson-Two-To-One-Majority-Of-Public-But-Only-1995-02.pdf. Sixty-one percent of white respondents believed Simpson guilty of murder compared to only eight percent of black respondents. *Id.*; *see also*, Neal Garbler, *The Culture Wars*, L.A. Times, August 6, 1995 (citing ABC poll that showed that 21% of white Americans and 78% of black Americans believed Simpson innocent of murder). The media coverage contributed to racial polarization by its "extraordinarily divisive" reporting on the trial. Christo Lassiter, *The O.J. Simpson Verdict: A*

Lesson in Black and White, 1 Mich. J. Race & L. 69, 71 (1996). *Time* notoriously darkened Simpson's face on its cover after his arrest. Deidre Carmody, *Time Responds To Criticism Over Simpson Cover,* N.Y. Times, June 25, 1994.

Race became an explicit issue at trial with the testimony of Mark Fuhrman, a lead detective on the case and a critical prosecution witness. Simpson's defense team impeached Furhman's testimony with evidence of Fuhrman's extensive use of racial slurs, and of his history of racial prejudice, discriminatory statements and police misconduct. Lassiter, *supra,* at 71. Fuhrman pleaded the Fifth Amendment when asked whether he had planted any evidence in the case. Defense counsel Robert Shapiro famously referred to his co-counsel Johnny Cochran's defense strategy as "playing the race card" in a Barbara Walters television special after the verdict, a charge amplified by prosecutor Marcia Clark's accusation that a "majority black jury won't convict." *See* Joel Achenbach, *Lawyers' Sniping Destroys Illusion of Defense Team Unity*, Wash. Post, Oct. 5, 1995 (Shapiro's comment); Lassiter, *supra*, at 95 (Clark's comment). When the verdict of not guilty was announced on live television, the media broadcast starkly contrasting images of angry white Americans with celebrating black Americans as they watched the jury deliver its verdict on television screens across the nation. Cottrol, *supra*, at 915.

Polls after the trial continued to reflect a sharp divide between black and white Americans on Simpson's guilt. Joe Urschel, *A Nation More Divided*, USA TODAY, Oct. 9, 1996, at 5A (national USA TODAY poll showed "three quarters of white

Americans believe Simpson was guilty. Only one-quarter of blacks do."); Paul Hefner, *Trial Reveals L.A.'s Racial Chasm*, L.A. Daily News, Oct. 4, 1995 (CBS poll found 60% of white Americans disagreed with the verdict, compared with 90% of black Americans who agreed with the verdict); Cathleen Decker, *The Simpson Legacy,* L.A. Times, Oct. 11, 1995 (Los Angeles Times Poll found 69% of black respondents were confident that justice was served in the Simpson case compared to just 22% of white respondents); Harry Rosenfeld, *Can General Salve the Wounds?*, San Bernardino County Sun, Oct. 15, 1995, at A10 ("Whites overwhelmingly believed him guilty from the beginning; Blacks, by equivalent margins, thought he was framed by the cop."). In short, as one court has acknowledged, "the vast majority of African Americans believed the verdict was proper and an equally vast majority of whites believed Simpson was improperly acquitted." *Shelling v. State*, 52 S.W.3d 213, 217-18 (Tex. Ct. App. 2001) (en banc).

By October 1997, the time of Smith's trial, race was an established fault line for public opinion about the Simpson verdict. Simpson was found liable at a civil trial in federal court in February 1997 for the deaths of Nicole Brown Simpson and Ron Goldman. Polls taken after the 1997 civil verdict, and before Smith's trial, showed the same continued racial polarization in views about Simpson's guilt. *See* Sandy Banks, *Wearying Realities of Race Again Hit Home*, L.A. Times, Feb. 7, 1997 (Gallup poll taken after the civil verdict reported 71% of white Americans agreeing that murder charges were true compared to 28% of black Americans); Abigail Goldman & Mary Curtis, *Simpson Civil Case: For*

Many, It's as Simple as Black and White, L.A. Times, Feb. 5, 1997 (Los Angeles Times citywide poll found 71% of white Americans thought Simpson was guilty while an equal percentage of black Americans thought Simpson was innocent).

III. THE USE OF FACIALLY "RACE-NEUTRAL" REASONS THAT MAY BE PROXIES FOR RACE PRESENTS AN IMPORTANT AND RECURRING ISSUE FOR TRIAL COURTS.

Lower courts are divided as to how they consider purportedly race-neutral reasons for striking jurors. Some courts, as in this case, simply accept such reasons at face value without further analysis or inquiry. Other courts conduct a further examination to assess whether the justifications are actually race-neutral or are being used as proxies for racial discrimination. Because one cannot know whether a facially race-neutral but highly racially correlated justification is in fact race-neutral without further examination, the Court should grant review to make clear that *Batson* requires such an inquiry in circumstances like this.

A. O.J. Simpson References at Voir Dire Have Been a Recurring Issue in the Lower Courts, with Divided Results.

In four other death penalty cases, the California Supreme Court has similarly accepted at face value that the invocation of responses to the Simpson verdict were in fact race-neutral, and failed to engage in any effort to assess whether they were proxies for discrimination. It first accepted such

invocations as race-neutral in *People v. Mills*, 48 Cal. 4th at 184, discussed in the Statement above. It did the same in two more capital cases tried in 1996. *See People v. Vines*, 251 P.3d 943, 959-60 (Cal. 2011) ("[T]he prosecutor explained he challenged [a prospective juror] because [he] wrote that the O.J. Simpson trial 'restore[d]' his 'faith' in the justice system."); *People v. Montes*, 58 Cal. 4th 809, 851-56 (2014) (accepting prosecutor's explanation that he removed a prospective juror because the juror approved of O.J. Simpson's acquittal). A fifth case, *People v. Miles,* which like this case, involved a black defendant sentenced to death for the murder of a white victim, is currently pending in the California Supreme Court. Brief for Respondent at 20-28*, People v. Miles*, No. FSB09438 (Cal. Oct. 27, 2014), 2014 WL 10013601. The jurors in Miles's case were asked whether they were "upset" with the O.J. Simpson verdict. The prosecution struck three black jurors, and relied on their answers to the Simpson question as a race-neutral explanation for two of them. *Id.*

In states across the nation, attorneys have injected questions about the O.J. Simpson case into voir dire. Courts in Mississippi, Texas, and Georgia have all reviewed the practice, with conflicting results. *Compare Harris v. State*, 996 S.W.2d 232, 236 (Tex. Ct. App. 1999) (upholding prosecution's use of juror's acceptance of the Simpson verdict as race-neutral), *and Manning v. Epps*, 695 F. Supp. 2d 323, 350-52 (N.D. Miss. 2009) (concluding that the prosecution's objection to black prospective jurors who read *Ebony* and *Jet* magazines—magazines which in the prosecutor's mind "championed O.J. Simpson's innocence"—was "not inherently based on

race"), *rev'd on other grounds by Manning v. Epps*, 688 F.3d 177 (5th Cir. 2012), *with Ridley v. State*, 235 Ga. App. 591, 595 (Ga. Ct. App. 1998) ("[W]e are troubled by the explanation that [the prosecutor] also struck this juror because she regularly watched the O.J. Simpson trial.").

A Texas appellate court faced with a prosecutor's invocation of views on the Simpson case concluded that the explanation was race-neutral where further examination showed that the prosecutor had used the justification to strike *both* white and black jurors. *Shelling*, 52 S.W.3d at 220. Nonetheless, two judges dissented and would have found the justifications race-based. One dissenting judge concluded that the record as a whole showed the Simpson explanation to be a pretext. *Id*. at 227-29 (Price, J., dissenting). The second dissenting judge urged the court not to "sanction skirting around *Batson* by condoning the peremptory strike of a member of a particular minority based solely on one answer to one question about which a vast majority of that minority have been demonstrated to agree." *Id*. at 220 (Mirabel, J., dissenting).

Other courts and judges have recognized the racially charged nature of the Simpson trial and have treated references to the case as improper attempts to inject race into the process. In a Colorado criminal trial, the prosecution invoked O. J. Simpson during its opening voir dire statement. *Valdez v. People*, 966 P.2d 587, 594-96 (Colo. 1998) (en banc). The Colorado Supreme Court cited the reference as supporting a finding of prima facie discrimination for a *Batson* challenge. The Court of Appeals of Texas in *Shelling*, discussed above, noted that by asking questions

about the fairness of the Simpson trial, the prosecution may have engaged in racial polarization, although it ultimately concluded that that issue had been waived. 52 S.W.3d at 217. And a dissenting judge on the Louisiana Supreme Court would have reversed for a *Batson* violation in part because of the prosecutor's attempt to "inflame" the all-white jury by referring to how O.J. Simpson "got away with it" during closing argument. *State v. Snyder,* 750 So. 2d 832, 866-67 (La. 1999) (Johnson, J, dissenting), *rev'd sub nom. Snyder v. Louisiana*, 552 U.S. 472 (2008) (holding trial court committed clear error in overruling *Batson* objection with respect to one black juror, without discussing prosecutor's remarks about Simpson).

Thus, courts are divided, as to references to the highly racially charged Simpson trial with some uncritically accepting such references as race-neutral on their face, others finding them evidence of racial bias, and still others accepting them only after thorough scrutiny of the entire record. The California approach, which blindly accepts as race-neutral justifications that are highly correlated to race, is inconsistent with this Court's direction in *Batson* to eliminate racial discrimination in jury selection, and warrants this Court's review.

B. Lower Courts Are Also Divided about the Treatment of Other Ostensibly Race-Neutral Justifications That Are Highly Correlated With Race.

The issue presented here is but one example of a broader phenomenon: the citation of facially race-neutral factors to rebut a *Batson* challenge where

those factors are highly correlated with race. In contrast to the way the California Supreme Court acted here, courts in other jurisdictions have frequently—although not universally—recognized that explanations that may be proxies for race cannot be accepted as race-neutral absent further inquiry. For example, courts have rejected references to a prospective juror's neighborhood of residence as a race-neutral basis for exclusion when the neighborhood is closely associated with a racial group and is unrelated to the facts of the case. Others have treated such objections as race-neutral, but only after undertaking further inquiry to ensure that they are not being used as proxies for race. And still others have simply accepted such justifications on their face because they are not expressly based on race.

The issue arose almost immediately after this Court's decision in *Batson*. In *Ex parte Lynn*, 543 So. 2d 709 (Ala. 1988), the Alabama Supreme Court upheld the denial of a *Batson* claim in which the prosecution cited the venire-members' residence in a largely black community, but only because further inquiry disclosed the prosecution's concern that they might have known the defendant's family. This Court denied certiorari. Justice Marshall dissented, maintaining that stereotyped views based on neighborhood residence are an impermissible proxy for race. *Lynn v. Alabama*, 493 U.S. 945 (1989) (Marshall, J., dissenting from denial of certiorari). He called for careful scrutiny when a facially nonracial criterion is highly correlated with race, and particularly when the objection is speculative. *Id.* at 945-46.

Some courts have embraced Justice Marshall's approach, and have carefully scrutinized racially-correlated factors cited as ostensibly race-neutral reasons for strikes. *See Commonwealth v. Horne*, 635 A.2d 1033, 1034 (Pa. 1994) (per curiam) (citing *Lynn*, 493 U.S. at 947-48, and affirming *Batson* violation because speculation that a black juror's residence in "high crime neighborhood" would cause him to be "desensitized to violence" was not a race-neutral reason); *Congdon v. State*, 424 S.E.2d 630, 631 (Ga. 1993) (prosecution's explanation that he struck black venire-members in a small town for living in a neighborhood that was predominantly black was not race-neutral).

In *United States v. Bishop*, the Ninth Circuit held that a black juror's residence in Compton was not a race-neutral justification for striking him. 959 F.2d 820, 826 (9th Cir. 1992). The prosecutor had explained that he thought a juror from Compton might be more likely to sympathize with the defendant and more skeptical of police. *Id.* at 822. The court noted that while there may be a legitimate, case-related reason for asking about and relying upon neighborhood of residence, in this instance it appeared nothing more than subterfuge for racial bias and stereotypes about Compton residents. *Id.*

The California Court of Appeals took a similar view of a prosecutor's reliance on a prospective juror's residence in largely black Inglewood as a race-neutral basis. *People v. Turner*, 90 Cal. App. 4th 413, 418 (Cal. Ct. App. 2001). In that case, the prosecution suggested that a juror from Inglewood might be less likely to consider drugs a problem. *Id.* The court rejected the prosecution's explanation,

finding it a proxy for race based on the prosecution's stereotypes, rather than an objection to a characteristic specific to the individual juror. *Id.* at 420. A district court in the District of Columbia similarly concluded that residence in the largely white Northwest section of the District was not a race-neutral basis for striking white jurors when residence had no connection to the case. *United States v. Wynn*, 20 F. Supp. 2d. 7, 15 (D.D.C. 1997).

The Washington Supreme Court recently convened a working group to propose new rules to reduce discrimination in jury selection. *See* Jury Selection WorkGroup, Final Report (Feb. 16, 2018), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf. After substantial study, the Court adopted a rule presumptively holding invalid as a *Batson* justification a prospective juror's residence in a "high-crime" neighborhood, precisely because of the risk that it could easily be a cover for racial discrimination. Wash. Sup. Ct. Gen. R. 37.

Together, the cases instruct that when a factor that is highly correlated to race, such as a racially identified neighborhood, is offered as a purportedly race-neutral justification for a pattern of racial strikes, it should receive extra scrutiny. The further examination may take various forms, including comparing the use of the rationale to justify striking jurors of different races, whether the factor is related to the case at hand, and whether the prosecutor has advanced a race-neutral explanation for why he or she relied on the factor. *See Hernandez*, 500 U.S. at 371 (recognizing that certain factors closely correlated with race, and unconnected to the facts of

the case, may "be treated as a surrogate for race under an equal protection analysis"); *Batson*, 476 U.S. at 98 (explaining that a prosecutor's rationale must be "related to the particular case to be tried"). To resolve this case, the Court need only hold that *some* further inquiry was necessary.

Here, too, however, the courts are divided, with some courts accepting residence in a segregated neighborhood as race-neutral in at least some circumstances. *See e.g.*, *People v. Johnson*, 218 Ill. App. 3d 967, 980-85 (Ill. App. Ct. 1991) (upholding as race-neutral prosecutor's explanation that he struck a juror for living and teaching in the "inner city"); *United States v. Johnson*, No. 96-4002, 1995 WL 369503, at *2 (4th Cir. July 3, 1997) (prosecution's explanation that a black female juror lived in a "neighborhood known for drug trafficking activities" was sufficiently race-neutral in a drug trafficking case); *United States v. Uwaezhoke*, 995 F.2d 388, 393-94 (3d Cir. 1993) (upholding strike against black female juror whose neighborhood meant she was more likely to be exposed to drug trafficking in a drug case). This Court should grant certiorari to make clear that when justifications are highly correlated with race, courts must not blindly accept them as race-neutral without further examination.

IV. IN THE ABSENCE OF A RULING FROM THE COURT, PROSECUTORS WILL CONTINUE TO STRIKE JURORS ON THE BASIS OF RACE BY USING JUSTIFICATIONS CLOSELY CORRELATED WITH RACE, AND THE PROBLEM IS ESPECIALLY ACUTE IN CALIFORNIA.

Absent this Court's intervention, the damage done by case law that tolerates discrimination will be exacerbated through prosecution trainings. And while this is a national problem, it is particularly acute in California because of the state supreme court's demonstrably poor record of *Batson* enforcement.

A. Prosecutors' Training Manuals Exacerbate the Risks Posed by the Pretextual Use of Ostensibly Race-Neutral Justifications to Obscure Race-Based Strikes.

When courts allow the prosecution to rely on justifications that are highly correlated with race to defend an apparently race-based strike, the justification will foreseeably become part of prosecutors' training curricula. And where prosecutors are taught to invoke racially correlated factors to defeat *Batson* challenges, the integrity of the system will suffer. *Cf. Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.").

For example, a 2004 Texas prosecution manual on jury selection provided summaries of cases as templates of "valid reasons for strikes." Texas District & County Attorney Associations' 2004 Prosecutor Trial Skills Course 11 (2004), https://www.themarshallproject.org/documents/2461886-batson-basics. Citing *Harris v. State*, 996 S.W.2d at 236, one of the decisions discussed above, it listed views in favor of the O.J. Simpson verdict as a valid race-neutral reason for striking a black juror. *Id.* at 21. It also listed separately negative feelings about the government as a result of the Simpson case, along with other reasons highly correlated to race, such as watching gospel TV programs. *Id.* at 16, 21. The manual was distributed as part of the statewide training of prosecutors in district and county offices. *See also* Gilad Edelman, *Why Is It So Easy For Prosecutors to Strike Black Jurors,* The New Yorker, June 5, 2015 (describing a 1987 Philadelphia training video instructing prosecutors to question black prospective jurors at length and to write down explanations to give when challenged); Tonya Maxwell, *Black Juror's Dismissal, Death Penalty Revisited in Double Homicide*, Citizen Times, Nov. 3, 2016 (describing a North Carolina training where prosecutors were given a short-hand list of ten justifications for removing black jurors, like appearance and dress).

B. California Courts Have a Record of Failing To Enforce *Batson*.

The California Supreme Court's uncritical acceptance at face value of justifications based on views of the Simpson verdict is of particular concern because of its weak record of *Batson* enforcement. In

2005, this Court reversed California's outlier practice of requiring an overly strenuous showing to make out a prima facie case under step one of the *Batson* analysis. *Johnson v. California*, 545 U.S. 162 (2005) (rejecting California's additional requirement that the movant show a violation was "more likely than not" to have occurred when establishing that the totality of facts give rise to an inference of discrimination).

Even after *Johnson*, California continued its pattern of denying *Batson* claims. *See People v. Gutierrez*, 395 P.3d 186, 203 (Cal. 2017) (Liu, J., concurring) (noting that *Gutierrez* was the first time in sixteen years and second time in more than twenty-five years that the California Supreme Court reversed for a *Batson* violation); *People v. Harris,* 306 P.3d 1195, 1242 (Cal. 2013) (Liu, J., concurring) (noting the California Supreme Court had found a *Batson* violation only once in more than 100 cases over the last twenty years). The extraordinarily low number of reversals for *Batson* violations marks California as an outlier *Cf.* Equal Justice Initiative, Illegal Discrimination In Jury Selection: A Continuing Legacy, 19-20 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf (noting that in a study of eight Southern States over twenty-six years, only Tennessee's appellate courts had never granted *Batson* relief, while Alabama courts issued eighty *Batson*-based reversals, Florida thirty-three, Louisiana twelve, Arkansas and Mississippi ten each, and Georgia eight).

The Court should grant certiorari to prevent California courts from upholding the use of

prospective jurors' opinions about the Simpson trial or other potential racial proxies as race-neutral explanations without further inquiry.

CONCLUSION

The Court should grant certiorari to decide whether *Batson* permitted the courts below to accept blindly as race-neutral the proffered justification based on black jurors' views of the O.J. Simpson verdict.

Respectfully Submitted,

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Dated: January 18, 2019

CERTIFICATE OF COMPLIANCE

Case No. 18-7094

Caption: *Smith v. California*

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,858 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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Executed on January 18, 2019.

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I, Howard Daniels, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, executed on January 18, 2019, pursuant to Supreme Court Rule 29.5(c). All parties required to be served, have been served.

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Sworn to me this
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Docket No.: 18-7094