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COLORADO SUPREME COURT
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

CERTIORARI TO THE COURT OF APPEALS
Case No. 2019CA0340
Opinion by Fox, J.
Dailey, J., concurring in judgment
Schutz, J., dissenting

GILPIN COUNTY DISTRICT COURT
Honorable Dennis J. Hall
Case No. 2017CR193

Petitioner:

REGINALD KEITH CLARK

v.

Respondent:

THE PEOPLE OF THE STATE OF COLORADO

▲ **COURT USE ONLY** ▲

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Case No. 22SC313

BRIEF OF AMICI CURIAE COLORADO-MONTANA-WYOMING AREA CONFERENCE THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2) & (3), C.A.R. 32, and C.A.R. 29.

This brief complies with the word limits set forth in C.A.R. 29(d) (an amicus brief may be no more than one-half the length authorized for a party's principal brief). It contains 4,464 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 29.

/s/ Anna I. Kurtz

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The Colorado-Montana-Wyoming Area Conference of the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) of Colorado respectfully submit this brief of *amici curiae* pursuant to C.A.R. 29.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The NAACP is the oldest civil rights organization in the country. Its mission is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The NAACP has a longstanding history of advocating against discrimination in jury selection and advocating for the equal protection of all people under the law. Furthermore, the Colorado-Montana-Wyoming Area Conference of the NAACP and its units have advocated for the equal treatment of Coloradans in the judicial system for decades. The NAACP has frequently spoken out against the harms of racial bias in all stages of the criminal legal system in Colorado.[1] The erroneous denial of a causal challenge directly hinders the NAACP's mission and its efforts to increase racial fairness in

[1] Most recently, Portia Prescott, President of the Colorado-Montana-Wyoming Area Conference of the NAACP, raised concerns about potential exclusion of Black jurors. *See* Michael Karlik, *In Search of Fairness: Tug-of-war between Jury Inclusiveness and Juror Impartiality Reaches Supreme Court* (Feb. 2023), https://www.coloradopolitics.com/courts/in-search-of-fairness-tug-of-war-between-jury-inclusiveness-and-juror-impartiality-reaches-supreme/article_7287e5be-ad65-11ed-bbf8-b7c340743137.html.

the Colorado criminal legal system.

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions for all Americans. The ACLU of Colorado, with over 45,000 members, is a state affiliate of the ACLU and was founded in 1952. Because the ACLU of Colorado is dedicated to the constitutional rights and civil liberties of all Coloradans, the organization has a unique interest in guaranteeing that judicial acceptance of racial bias does not corrode the legitimacy of the judicial process or fundamental fairness of criminal trials in our state.

SUMMARY OF ARGUMENT

Racial bias in the jury box is "antithetical to the functioning of the jury system." *Peña-Rodriguez v. Colo.*, 580 U.S. 206, 229 (2017). Our country's history and jurisprudence teach that the mandate to purge racial discrimination from the administration of justice is "the most compelling in the judicial system." *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

In this case, the court of appeals recognized that the trial court abused its discretion in permitting a prospective juror with acknowledged racial bias to remain on the jury panel. The appellate court, however, deemed that error to be harmless because of its view that this Court's opinions in *People v. Novotny*, 2014 CO 18, 320

P.3d 1194, and *Vigil v. People*, 2019 CO 105, 455 P.3d 332, foreclosed the conclusion that the trial judge's error was one of constitutional dimension. This Court should make clear that neither *Novotny* nor *Vigil* requires reviewing courts to have blinders to *all* judicial error in reviewing a challenge for cause, no matter how harmful and no matter the constitutional protection implicated, so long as the involved prospective juror is eventually removed from the jury.

A judge's erroneous denial of a defendant's for-cause challenge to a juror who expressed racial bias causes constitutional harm that cannot be cured with a peremptory challenge. Indeed, excusing for cause jurors with acknowledged racial bias is as crucial to the fair administration of justice as prohibiting the exclusion of jurors on the basis of race (*e.g.*, *Batson*, *Powers*) or removing overt racial bias from the deliberation room (*e.g.*, *Peña-Rodriguez*). Upholding the decision below would give judicial imprimatur to jurors expressing racial bias and lead to a systemic loss of confidence in the jury system.

This case presents a crossroads where this Court must ensure that its doctrinal framework is an aid, not a hinderance, to "ferreting out racial discrimination" from the administration of justice. *People v. Madrid*, 2023 CO 12, ¶ 71. The trial court's tolerance of racial animus in the jury box amounted to structural error—violating

Mr. Clark's rights, undermining the integrity of the court, and harming the entire community. This Court should reverse his conviction.

ARGUMENT

I. Judicial approval of racial animus in the jury pool is incompatible with the constitutional guarantees of equal protection and a fair trial.

A. Purging criminal jury trials of racial prejudice is a foundational commitment of the U.S. and Colorado Constitutions.

The reconstruction of our constitutional framework following the Civil War was aimed at rooting out one "primary evil": discrimination on account of race. *Rose v. Mitchell*, 443 U.S. 545, 554 (1979). While "odious in all respects," racial discrimination has long been recognized to be "especially pernicious in the administration of justice." *Id.* at 555; *Peña-Rodriguez v. People*, 2015 CO 31, ¶ 29, 350 P.3d 287, 294 (Marquez, J., dissenting) ("Racial discrimination in our jury trial system 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.'" (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

As such, the Reconstruction Congress understood that for Black Americans to fully access citizenship, the guarantee of equal protection of the laws must be protected in the jury system. The Supreme Court has enforced the resulting constitutional guarantees against racial discrimination in the jury system since 1879.

See, *e.g.*, *Strauder v. West Virginia,* 100 U.S. 303 (1879); *Neal v. Delaware*, 103 U.S. 370 (1881); *Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hernandez v. Texas*, 347 U.S. 475, (1954); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Peña-Rodriguez*, 580 U.S. at 229. The case before this Court can only be properly understood against this historical backdrop.

Congress used jury trials to confront white supremacists who turned to terrorism to resist Reconstruction. Following the Civil War, terrorist groups such as the Ku Klux Klan committed large-scale torture, lynchings, and intimidation of Black Americans. In response to rising rates of racial violence, Congress passed the Reconstruction Amendments and several laws that aimed to remove racism from criminal trials so that the justice system could become a meaningful tool against the Ku Klux Klan and similar white supremacist organizations. Recognizing the futility of a system of justice that would permit avowed racists in the jury box, the architects of Reconstruction used these laws to incorporate Black citizens as witnesses and jurors at the same time as they excluded racist white jurors. These efforts expressed that the purpose of the Reconstruction Amendments in the criminal courtroom was to protect resolutely the rights and dignity of Black defendants, victims, and the broader community.

The rise of the Ku Klux Klan and other terrorist groups opposed to Reconstruction challenged Congress. By killing, torturing, and lynching Black Southerners, these organizations hoped to prevent emancipation from meaning real democracy in the South. Congress became frustrated with the impunity these terrorists felt in state and federal courts. In Texas, for instance, there were over 500 murders of Black victims by white men in 1865 and 1866; not a single jury convicted even one of the white defendants.[2]

In 1871, Congress acted. It held hearings to address this extreme failure of the criminal legal system. Before Congress, Klansmen openly acknowledged their willingness to nullify charges in defense of their fellow Klansmen.[3] Congress responded by passing the Ku Klux Klan Act of 1871 to remove these Klansmen jurors. Those who perjured themselves during *voir dire* or conspired to violate the civil rights of Black people would be ineligible to serve on juries. (This provision was amended and codified at 42 U.S.C. § 1985.)

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[2] James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L. J. 895, 916 (2004) (hereafter "Forman, *Juries and Race*").
[3] David W. Blight, *Race and Reunion: The Civil War in American Memory*, 113–22 (2001); Forman, *Juries and Race* at 921–22.

This exclusion of conspiratorial, racist jurors worked almost immediately.[4] When a mob of more than forty Klansmen went on a savage rampage on March 6, 1871, and attacked James Rainey, a leading Black Republican and officer in the all-Black militia in South Carolina, members of both grand and petit juries that heard the criminal cases were predominantly Black and relatively free of Klan influence.[5] No Klansman was tried by an all-white jury; in fact, two-thirds of all petit jurors were Black. This led to guilty pleas and guilty verdicts that together made up over 100 convictions. The next year, federal prosecutors obtained over 500 jury convictions of Klansmen and other white supremacists—compared to only 42 the year before the Ku Klux Klan Act.[6] Along with these convictions and hundreds of indictments across the South, the Ku Klux Klan Act enabled Black Americans to exercise their rights as citizens—to vote and to serve on juries—and quelled much of the white supremacist terrorism.[7]

[4] Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877 at 457–59 (2014 ed.)
[5] Forman, *Juries and Race* at 924–25.
[6] *Id.* at 926.
[7] Foner, *Reconstruction* at 458–59.

While the Fifteenth Amendment was understood as having granted the right to serve on juries to Black Americans,[8] Congress was unsure about whether to enact a law to enforce that right. As they debated proposals that would protect Black jurors, the same members of Congress who had drafted and passed the Reconstruction Amendments and their fellow representatives focused on the rights of Black defendants, the right to sit on a jury, the protection of Black victims, and the importance to the community of more just case outcomes. Congress passed the Civil Rights Act of 1875, which created remedies for race-based discrimination in jury selection.

The Ku Klux Klan Act combined with Black jury service worked to change the tide of justice against white terrorism in the South. With so many potential racist white jurors excluded from the venire, Black jurors and jurors free from overtly racist commitments could help realize justice in the South.[9]

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[8] *See, e.g.*, Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 235 (1995); *Neal v. Del.*, 103 U.S. 370, 389 (1880) ("[T]he statute prescribing the qualification of jurors by reference to the qualifications for voters should be construed . . . as modified or affected by the Fifteenth Amendment."); *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J, dissenting); Amar, *The Constitution* at 395–401; Travis Crum, *The Unabridged Fifteenth Amendment*, 133 Yale L. J. (forthcoming 2023).

[9] Forman, *Juries and Race* at 926–27.

In 1879, the U.S. Supreme Court decided *Strauder v. West Virginia*. This founding case in the Supreme Court's race and jury line, written in response to a state law prohibiting Black jurors, emphasizes key role of jury service in enforcing the promise of equal citizenship, regardless of race: "The true spirit and meaning of the [Reconstruction] amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish." *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

There is an unbroken thread between this history and the case at hand. It is incumbent upon this Court to recognize that racial bias in the composition of a jury—whether because of who is included or who is excluded—is anathema to the constitutional guarantees of equal protection and a fair trial.

B. A court's endorsement of an openly biased prospective juror's participation in the jury violates the constitution and amounts to structural error requiring reversal.

Racial bias in the jury box is "antithetical to the functioning of the jury system." *Peña-Rodriguez*, 580 U.S. at 229. It "must be confronted . . . to implement the lessons of history." *Id.* The U.S. Supreme Court has clearly stated that the "mandate that race discrimination be eliminated from all official acts and proceedings of the State is the *most compelling in the judicial system*." *Powers*, 499 U.S. at 415 (emphasis added). Racial bias in the judicial process is "a familiar and

recurring evil that, if left unaddressed, [risks] systemic injury to the administration of justice." *Peña-Rodriguez*, 580 U.S. at 224. As a result, "[a] constitutional rule that racial bias in the justice system must be addressed . . . is necessary to prevent a systemic loss of confidence in jury verdicts." *Id.* at 225.

Like its predecessors *Batson* and *Peña-Rodriguez*, this case presents a crossroads where this Court must ensure that its doctrinal framework is an aid, not a hinderance, to "ferreting out racial discrimination" from the administration of justice. *Madrid*, ¶ 71. Ruling in the state's favor would do the opposite. It would render Colorado's judicial system one that excuses trial courts' acceptance of avowed racial bias in the jury pool. Peremptory challenges are no remedy for the harm that such a ruling would do to the integrity of criminal trials in Colorado.

1. The court-approved continued participation of a prospective juror with admitted racial bias violates the U.S. and Colorado Constitutions.

The trial court's failure to strike Juror K for cause violated the U.S. and Colorado Constitutions. In *Batson v. Kentucky*, the U.S. Supreme Court held that the exclusion of jurors based on race violates a defendant's right to equal protection. 476 U.S. at 86. A year after *Batson*, this Court concluded that the exclusion of potential jurors based on presumed group characteristics amounts to an independent violation of the right to an impartial jury guaranteed by article II, section 16 of the Colorado Constitution. *Fields v. People*, 732 P.2d 1145, 1155 (Colo. 1987). The

constitutional offense recognized in *Batson* and *Fields* was judicial enforcement of a discriminatory peremptory challenge. Such judicial error is an "overt wrong, often apparent to the entire jury panel," that "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial." *Powers*, 499 U.S. at 412. The depth of the harm is partially attributable to its occurrence during the *voir dire* phase of the trial, which "represents the jurors' first introduction to the substantive factual and legal issues in a case," and has a lasting influence that "may persist through the whole course of the trial proceedings." *Id.* Moreover, because "the purpose of the jury system is to impress upon the criminal defendant and *the community as a whole* that a verdict . . . is in accordance with the law by persons who are fair," "[t]he verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset." *Id.*

The constitutional violation here is in some ways clearer than in *Batson* or *Fields*. In a typical *Batson* challenge, the venire does not hear the prosecution or defense make any explicitly racially-biased statements. In fact, to the contrary, the offending counsel will offer race-neutral reasons for excluding the jurors (which can be challenged as pretext)—typically in a side-bar with the court alone. Therefore, what is "apparent to the entire jury panel," 499 U.S. at 412, is only which juror(s)

each party struck. Once *voir dire* is completed in a *Batson* case, the jury is left with the *impression* of potential racial bias.

That is far less conspicuous than the open racial bias in this case. Here, both the State and defendant agree that Prospective Juror K's statements showed his racial bias. *People v. Clark*, 512 P.3d 1074, 1076 (Colo. App. 2023). The racial bias was expressed in open court, explicit and incurable, and "apparent to the entire jury panel." 499 U.S. at 412. Yet by minimizing the racially charged statements as acceptable "political views," the trial court judge treated such racist ideas as acceptable in a court of law. If the *impression* of judicial tolerance of racial bias impermissibly allows racial discrimination to infect the jury, such explicit judicial tolerance of *admitted* racial bias is even worse.

Indeed, failing to remedy the constitutional violation here would invite precisely the kind of threat to the fundamental integrity of the jury trial right recognized in *Peña-Rodriguez*. In that case, dissenting justices of this Court understood, and the U.S. Supreme Court ultimately held, that racial bias of one or more jurors expressed during deliberations can taint a jury and undermine the institutional legitimacy of criminal trials. *Peña-Rodriguez v. Colo.*, ¶¶ 38-39, 350 P.3d at 296–97 (Márquez, J., dissenting). If open admissions of bias in jury deliberations threaten a defendant's constitutional right to be tried by an impartial

jury, how can it be constitutionally permissible for a court to tolerate a prospective juror who makes such statements at the outset of jury selection?

As a practical matter, while *Peña-Rodriguez* established necessary racial bias protections in deliberations, its success "depends in part on jurors knowing that they can, and should[,] report instances of bias during deliberations."[10] When jurors believe that statements of incurable racial bias are not disqualifying, those sharing such biases are emboldened to act on them and those who might otherwise report similar comments are silenced. Without the support and understanding of jurors, the protections outlined in *Peña-Rodriguez* cannot be enforced.[11] Simply put, protecting the right to a fair trial requires that trial courts provide a consistent framework demonstrating that racial bias is not acceptable in the jury pool.

Given the lessons of *Batson* and *Peña-Rodriguez*, judicial error that *permits* a juror to remain in the jury pool after a challenge is incompatible with the constitutional guarantees of equal protection and an impartial jury. *See e.g.*, *State v. Witherspoon*, 919 P.2d 99, 100 (Wash. Ct. App. 1996) (reversing the conviction of

[10] Natalie A. Spiess, *Peña-Rodriguez v. Colorado*: *A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 Denv. L. Rev. 809, 837 (2018).
[11] Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 Calif. L. Rev. 2121, 2147-8 (2021).

a Black defendant when a trial court failed to grant a challenge for cause against juror who admitted they were "a little bit prejudiced" against Black people).

2. Failure to excuse for cause an avowedly racist juror immeasurably and incurably undermines the fundamental fairness of a trial.

Structural errors are those "affecting the framework within which the trial proceeds—errors that infect the entire trial process and necessarily render a trial fundamentally unfair." *Novotny*, ¶ 21, 320 P.3d at 1201; *see also Weaver v. Mass.*, 137 S. Ct. 1899, 1907 (2017) ("The purpose of the structural error doctrine is to ensure insistence on certain basic constitutional guarantees that should define the framework of any criminal trial."). Structural error can also be implicated where the right at issue is designed to protect some interest beyond preventing an erroneous conviction, and where the effects of the error are simply too hard to measure. *Weaver*, 137 S.Ct. at 1908. For all these reasons, the trial court's approval of Juror K's racial bias in the jury pool amounts to structural error.

The presence of racial bias *anywhere* in the judicial process poses a great risk to the sanctity and credibility of the judiciary and the legal system. Racial bias "implicates unique historical, constitutional, and institutional concerns," and efforts to address it are necessary to ensure that "our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Peña-Rodriguez*, 580 U.S. at 224. A fair jury selection

process in particular is foundational to the criminal justice system, because it "is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." *Powers*, 499 U.S. at 411 (citing *Rose v. Mitchell,* 443 U.S. 545 (1979)).

On the other hand, permitting racial prejudice in the venire damages "both the fact and the perception of justice." *People v. Ojeda*, 2022 CO 7 ¶ 20 (citing *Peña-Rodriguez,* 580 U.S. at 223). A fundamental purpose of the jury system is to assure the defendant and the community that any verdict was fairly determined. *Id.* at 413. That is why the U.S. Supreme Court has repeatedly acknowledged that the harm from discriminatory jury selection "extends beyond that inflicted on the defendant . . . to touch the entire community" and "undermines public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87; *see also Powers*, 499 U.S. at 402 ("In the many times we have confronted the issue . . . we have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."). And given the elevated role of judges in the administration of justice, their actions have outsized power to influence these community perceptions for better or for worse. *See* C.J.C. 1.2 (outlining judicial duty to "promot[e] public confidence in the independence, integrity, and impartiality" of Colorado's courts).

Where, as here, a court refuses to remove a juror who has admitted in open court to incurable racial bias, it erodes the community's faith in the impartiality of the criminal legal system. This harm is particularly likely in Gilpin County, where Mr. Clark was arrested and where, as Juror K noted, the community is not diverse: only 1 percent of residents identify as Black.[12] Despite comprising such a small percentage of the community, these Black residents account for 7 percent of cases filed in the First Judicial District.[13] A seven-fold overrepresentation in the criminal legal system legitimizes concerns about the impartiality of the system and exacerbates the need for the local court swiftly to redress instances of racial bias and discrimination.

For all these reasons, the trial court's erroneous denial of the defendant's challenge for cause to prospective Juror K amounted to structural error requiring reversal. This Court should hold that a trial is necessarily unfair when the court gives its imprimatur to a potential jury box that explicitly reflects and reproduces the racial hierarchies our constitutional guarantees were designed to root out.

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[12] First Judicial District Attorney, Defendant Characteristics, *available at* https://data.dacolorado.org/1st/defendant_characteristics.
[13] *Id*.

II. The *Novotny-Vigil* framework does not control review of constitutional defects in the jury selection process.

The court below recognized that the trial court abused its discretion in permitting a prospective juror with acknowledged racial bias to remain on the jury panel. The court, however, deemed that error to be harmless because of its view that this Court's opinions in *Novotny* and *Vigil* foreclosed the conclusion that the trial judge's error was one of constitutional dimension. *Amici* urge this Court to clarify that neither *Novotny* nor *Vigil* should be construed to preclude meaningful review of all judicial error—no matter the stakes—in deciding a challenge for cause.

In *Novotny* and *Vigil*, this Court renounced the view that a defendant who expends a peremptory challenge to cure an erroneous ruling on a challenge for cause suffers a deprivation of federal due process so profound that any subsequent conviction requires reversal. *Novotny*, ¶ 2, 320 P.3d at 1196 ("[A]llowing a defendant fewer peremptory challenges than authorized, or than available to and exercised by the prosecution, does not, *in and of itself*, amount to structural error." (emphasis added)); *Vigil*, ¶ 15, 455 P.3d at 336 (disavowing prior understanding that a criminal defendant has a right to shape the jury through the use of peremptory challenges and holding that "the use of a peremptory challenge to cure an erroneous ruling on a defendant's challenge for cause is necessarily harmless").

The division here dangerously stretched the meaning of these cases, however, as having recast a defendant's resort to a peremptory challenge from constitutional harm into constitutional cure-all. Neither *Novotny* nor *Vigil* can be read so broadly.

First, the division wrongly construed *Novotny* and *Vigil* to require automatic affirmance for any erroneous cause challenges, no matter the constitutional values at play. It is of course true that removal of a biased prospective juror via peremptory challenge prevents that juror from serving on the jury. But as this case highlights, the biased individual's participation on the jury is hardly the only threat to the integrity of a criminal trial that can ever arise when a judge erroneously denies a challenge for cause. Here, the wrong occurred when the court gave its imprimatur to the continued participation of a prospective juror with acknowledged racial bias. While the defendant was able to prevent that individual from ultimately serving on his jury, he could not cure the broader injury already done.

Second, *Novotny* and *Vigil* were driven by the U.S. Supreme Court's conclusions that peremptory challenges were not a matter of *federal* constitutional concern. Endorsing the division's overly broad reading of those cases would prevent Colorado courts from meaningfully considering whether the erroneous denial of a peremptory challenge could raise different issues under the Colorado Constitution. *See Novotny*, ¶ 40, 320 P.3d at 1205 (Hood, J., dissenting) (noting the majority's

failure to grapple with whether a different rule could follow from the importance of peremptory challenges under Colorado law, as other states have concluded). There is reason to think such analysis could be fruitful: this Court's jurisprudence on the requirements of due process, equal protection, and an impartial jury has not proceeded in lockstep with the federal courts. *See, e.g., People v. Abu-Nantambu-El,* 2019 CO 106, ¶ 35, 454 P.3d 1044, 1051 ("Colorado has been more protective of a defendant's right to a jury free of implied bias than the federal courts or other jurisdictions."); *Fields,* 732 P.2d at 1155 (construing *Batson* challenge as implicating right to impartial jury); *People ex rel. Juhan v. Dist. Ct.*, 439 P.2d 741, 745 (Colo. 1968) ("What 'due process of law' means in the territorial limits of the sovereign State of Colorado, under the provisions of our own constitution," is not confined by "what it . . . may or may not mean in any other [jurisdiction]."). The division's interpretation of this Court's precedents would unnecessarily cut such critical inquiry short.

This case presents an important opportunity to clarify that neither *Novotny* nor *Vigil* purports to require reviewing courts to have blinders to *all* judicial error in reviewing a challenge for cause, no matter how harmful and no matter the constitutional protection implicated, so long as the involved prospective juror is eventually removed from the jury. Because the defendant will, as a practical matter,

always try to contain such harms through a peremptory challenge, a contrary ruling would only insulate grave errors like the one here from meaningful review. *Amici* urge the Court to make plain that its precedents cannot be read to so weaken our core constitutional commitments to equal protection and a fair trial.

CONCLUSION

Based on these reasons and authorities, the Colorado-Montana-Wyoming Area Conference of the NAACP and the ACLU of Colorado respectfully ask this Court to reverse Mr. Clark's convictions and remand this case for a new trial.

Dated: April 25, 2023

Respectfully submitted,

/s/ Anna I. Kurtz

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**Motion for Pro Hac Vice entry of appearance pending*

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2023, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE COLORADO-MONTANA WYOMING AREA CONFERENCE THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF PETITIONER** was electronically filed and served via Colorado Courts E-Filing on the following counsel of record:

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