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STATE OF COLORADO**

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**ON CERTIORARI TO THE COURT OF
APPEALS**

Case No. 19CA1355

ARAPAHOE COUNTY DISTRICT COURT

Honorable Patricia D. Herron
Case No. 17CR118

▲ COURT USE ONLY ▲

Petitioner:

THE PEOPLE OF THE STATE OF
COLORADO

v.

Respondent:

STERLING DWAYNE AUSTIN

Case No. 23SC75

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ASSOCIATION, ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF
COLORADO, SOUTH ASIAN BAR ASSOCIATION OF COLORADO,
AND SAM CARY BAR ASSOCIATION IN SUPPORT OF RESPONDENT**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

The amicus brief complies with the applicable 4,750-word limit set by C.A.R. 29(d) because it contains 4,584 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

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

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Supreme Court of Arizona, Order Amending Rules 18.4 and 18.5 of the
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[https://fingfx.thomsonreuters.com/gfx/legaldocs/egvbkkwkrpq/R-210020 %20Final%20Rules%20Order.pdf](https://fingfx.thomsonreuters.com/gfx/legaldocs/egvbkkwkrpq/R-210020%20Final%20Rules%20Order.pdf)21
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rities_2021.html](https://www.prisonpolicy.org/graphs/disparities2021/CO_racial_disparities_2021.html)15

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STATEMENTS OF IDENTITY AND INTEREST

The **ACLU of Colorado**. 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 and supporters, is a state affiliate of the ACLU. 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 equal protection of the law in criminal legal proceedings.

The **Roderick and Solange MacArthur Justice Center** 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. MacArthur Justice Center attorneys have played a key role in civil rights battles in areas including police misconduct, the rights of the indigent in the criminal legal system, compensation for the wrongfully convicted, and the treatment of incarcerated people. MacArthur Justice Center has served as merits counsel, amicus counsel, or amicus curiae in numerous cases around the country challenging racial disparities in the criminal legal system.

The **Fred T. Korematsu Center for Law and Equality** is based at Seattle University School of Law and advances justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 120,000 Japanese Americans. The Korematsu Center, inspired by his example, works to advance his legacy by promoting racial and social justice. It played a key role in reforms relating to the exercise of peremptory challenges in Washington.¹ It has engaged in amicus advocacy with regard to jury venires and peremptory strikes in Louisiana, New York, and North Carolina; its advocacy in New York led to a historic decision when its high court recognized that color discrimination was cognizable as a *Batson* violation.²

The **Colorado Hispanic Bar Association** serves Colorado and promotes justice by advancing the interests of Hispanics and Latinos in the legal profession and seeking equal protection for the Hispanic/Latino community before the law.

The **Asian Pacific American Bar Association of Colorado** represents the interests of the Asian Pacific American community, speaks on behalf of, and advocates for that community's interest, and provides a vehicle for unified

¹ *E.g.*, Wash. G.R. 37; *City of Seattle v. Erickson*, 188 Wash. 2d 721 (2017); *State v. Jefferson*, 192 Wash. 2d 225 (2018).

² *People v. Bridgeforth*, 69 N.E.3d 611 (N.Y. 2016).

expression of opinions and positions by the organization's members upon current social and legal matters or events of concern to its members.

The **South Asian Bar Association of Colorado** serves to promote equity by advancing South Asian interests—alongside the interests of other minority voices—through substantive programming, community outreach, diverse allyship, and advocacy. It has a vested interest in ensuring that all Coloradans, diverse or otherwise, are treated equally under the law.

The **Sam Cary Bar Association** serves to promote the administration of justice; to promote the well-being of the Black community; to secure proper legislation; and to promote professionalism, fellowship, and harmony within the Black legal profession in Colorado and beyond.

Collectively, these organizations are committed to ending racial prejudice in Colorado's judicial system.

SUMMARY

Amici urge this Court to affirm the Court of Appeals' decision because participation in anti-racist activism is frequently caused by a Black juror's lived experience with and perception of police and is therefore so intricately related to race that it should not be accepted as a race neutral basis to peremptorily strike that juror. This Court has the authority under the Colorado constitution to go beyond federal protections and address the shortcomings of the *Batson* framework, and thus should affirm the Court of Appeals' decision.³

³ Other than the Summary and Conclusion sections, as well as the deletion of a discussion of the *per se* approach, which is not at issue in this appeal, this Brief is identical to the amicus brief filed in *People of the State of Colorado v. Raeaje Resshaud Johnson*, Case No. 22SC852.

ARGUMENT

A. The constitutional right to an impartial jury includes the right to a jury of one's peers selected in a process free from discrimination.

The “right to a jury drawn from a representative or fair cross-section of the community” is inherent in the right to an impartial jury enshrined in both the United States and Colorado Constitutions. *See Fields v. People*, 732 P.2d 1145, 1151 (Colo. 1987) (citations omitted); *see also* U.S. Const. Amend XIV; Colo. Const. Art. II § 16. The “impartial jury” mandate demands “the jury be a body truly representative of the community, and not the organ of any special group or class.” *Glasser v. United States*, 315 U.S. 60, 86 (1942). When a jury consists of only particular segments of the population, both “[c]ommunity participation in the administration of the criminal law” and the jury’s purpose “to guard against the exercise of arbitrary power” are defeated. *See Fields* 732 P.2d at 1151 (citations omitted). Other than voting, jury service “is the most substantial opportunity that most citizens have to participate in the democratic process.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).

Applying these Equal Protection Principles in *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court recognized that “the State may not draw up its jury lists pursuant to neutral procedures and then resort to discrimination at other stages in the selection process.” *Id.* at 89 (internal quotation marks and citations

omitted). *Batson* sought “to put an end to governmental discrimination on account of race” in the jury selection process. *Id.* at 85.

The Court set forth the *Batson* framework to remedy purposeful discrimination in jury selection: (1) if the defense shows “a prima facie case of discrimination”; (2) the state must provide “race-neutral reasons” for its peremptory strikes; and (3) finally, the trial judge must determine whether those stated reasons “were the actual reasons” or instead “a pretext for discrimination.” *Flowers*, 139 S. Ct. at 2241 (citations omitted). The Court declined to “formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges,” explaining that in “light of the variety of jury selection practices followed in our state and federal trial courts,” the Court would “make no attempt to instruct these courts how best to implement our holding today.” *Batson*, 476 U.S. at 99–100 & n.24.

In this case, the time and opportunity has come for this Court to recognize *Batson*’s limitations and to further discern what protections are necessary under the federal and Colorado Constitutions.

B. Systematic exclusion, intentional or otherwise, of Black jurors and other jurors of color harms accused people and undermines public confidence in the judicial system.

Nationwide, studies repeatedly show the disproportionate removal of Black jurors and jurors of color from the jury pool. *See, e.g.*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 15–18 (2010).

Implicit bias, thinly veiled pretext, or reliance on harmful stereotypes play a significant role in peremptory strikes disproportionately excluding jurors of color. *See* BERKELEY LAW DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS 14–23 (2020) (analyzing the use of peremptory strikes against Black and Latinx jurors in California criminal justice system); ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION, *supra*, at 15–18 (analyzing “race-neutral” means to strike jurors that disproportionately exclude Black jurors and rely on harmful racial stereotyping).

Frequently, these “race neutral” bases for exclusion rely on past or present contact with the criminal justice system or negative views on policing. WHITEWASHING THE JURY BOX, *supra*, at 21. When Black jurors and other jurors of color are struck from juries, the integrity of the criminal legal system suffers. Racial

discrimination in jury selection diminishes the legitimacy of the legal system in the eyes of the public, and, in actuality, diminishes the effectiveness of juries as fact-finders. Unfortunately, the default *Batson* framework has not curbed the enduring problem of race discrimination in jury selection because it both makes it “very difficult” for accused persons to prove purposeful discrimination and “fails to address peremptory strikes due to implicit or unconscious bias.” *State v. Jefferson*, 192 Wash. 2d 225, 242–243 (2018).

1. Black jurors and other jurors of color are disproportionately vulnerable to exclusion from Colorado criminal juries because of prior criminal legal system involvement.

Though Colorado has removed the bar to jury service for felons whose voting rights have not been restored, *People v. Ellis*, 148 P.3d 205, 209 (Colo. App. 2006), a previous criminal conviction is still a permissible basis for attorneys to request for cause or peremptory dismissal. See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 599–602 (2013); Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 75 (2020) (“even if individuals with criminal convictions make it into a jury pool, prosecuting attorneys often remove them...due to their contact with the criminal legal system”). Because of race disproportionality in the incarceration of Coloradans, people of color are disproportionately vulnerable

to being struck for cause or peremptorily. Black people, only 4 percent of the state’s adult population, make up 18 percent of the prison population, an incarceration rate seven times higher than the rate for white Coloradans. Forest Wilson, *New report highlights racial disparity in Colorado’s booming prison population*, COLO. INDEP. (Sept. 14, 2018), <https://www.coloradoindependent.com/2018/09/14/aclu-prison-reform-racial-disparity/> (citing ACLU SMART JUSTICE, BLUEPRINT FOR SMART JUSTICE: COLORADO 4 (2018), <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-CO.pdf>). Other racial minorities fare similarly. *Id.*

2. The disproportionate exclusion of Black jurors and other jurors of color harms the legitimacy of the criminal legal system and undermines public confidence in our justice system.

The disproportionate removal of persons of color from jury service undermines and damages the administration of justice; indeed, “permitting racial prejudice in jury systems damages both the fact and the perception of justice.” *E.g.*, *People v. Ojeda*, 2022 CO 7, ¶ 20.

The Washington Supreme Court recognized “that there is constitutional value in having diverse juries,” because a jury “is a ground level exercise of democratic values.” *State v. Saintcalle*, 178 Wash.2d 34, 50 (2013).

Whether the result of purposeful discrimination or implicit biases, the discriminatory effect of removing jurors of color has the same constitutional

significance. Other state courts have reached similar conclusions. *E.g.*, *State v. Andujar*, 254 A.3d 606, 630 (N.J. 2021) (recognizing that implicit bias in the jury selection process harms the entire community, and “undermine[s] public confidence in the fairness of our system of justice.”); *Jefferson*, 192 Wash. 2d at 249; *cf.* *State v. Aziakanou*, 498 P.3d 391, 407 (Utah 2021) (“And even where a Batson violation has not occurred, the disproportionate removal of racial minorities from juries . . . erodes confidence in the justice system and weakens the very notion of a fair trial by an impartial jury.”).

3. The disproportionate exclusion of Black jurors and other jurors of color harms the truth-finding function of juries and negatively impacts outcomes.

Studies show that “diversity helps jurors perform better during a complex, group deliberation setting.” Liana Peter-Hagene, *Jurors’ Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & HUM. BEHAV. 232, 243 (2019). That is because diverse juries are more likely to consider comprehensive information during deliberations, to discuss missing evidence, and to discuss controversial issues such as racial profiling. See Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical findings, Implications and Directions for Future Research*, 2 SOC. ISSUES & POL. R. 65 (2008).

The Supreme Court of Washington explained “studies suggest that compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.” *Saintcalle*, 178 Wash.2d at 50. Specifically, “diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused,” and that by every measure, “heterogeneous groups outperformed homogeneous groups.” *Id.* Thus, the “absence of racial diversity on juries leads to outcomes that are less reliable, inflicts injury on people of color who are excluded, and undermines the integrity of the entire criminal legal system.” Peter-Hagene, *supra*, at 247 n.3.

In short, as Justice Marshall predicted in a pre-*Batson* case,

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503–504 (1972). The “systematic removal of minority jurors” creates “a badge of inferiority, cheapening the value of the jury verdict.” *Saintcalle*, 178 Wash.2d at 50.

Moreover, the failure to ensure diversity in juries undermines the legitimacy of the result, and studies reveal crucial disparities in trial outcomes when controlling

for the inclusion or exclusion of Black people and other people of color. *See, e.g.,* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017 (2012).

This same effect occurs in the sentencing process, especially in capital cases. In a national study of capital jurors' decision-making in 340 trials across 14 states, in cases involving a Black accused person and white victim, all-white juries imposed the death penalty in 71.9% of cases, while juries with one or more Black males imposed death only 37.5% of the time. *See, William J. Bowers et al., Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PENN. J. CONST. L. 171, 193–94, 243 (2001).

Social science indicates that prosecutors *do* frequently strike Black jurors for perceptions of the criminal legal system inseparable from their racial experience. One study, for example, found that prosecutors cited a juror's expressed distrust of law enforcement or belief in the existence of racial discrimination in the criminal legal system for 25.6% of Black jurors struck, with other frequent citations including prior personal or family contact with law enforcement or the criminal legal system. WHITEWASHING THE JURY BOX, *supra*, at 21.

In short, Black and other jurors of color are disproportionately more likely to be struck from juries for purportedly neutral reasons that are inextricably tied to race,

such as experience with the criminal legal system, or due to implicit or unconscious racial biases. Such disproportionate exclusion affects trial outcomes and threatens the legitimacy of, and public confidence in, the legal system.

C. Jurors are permitted to lean on their experience and background; mislabeling their lived experience of racial injustice as a race-neutral ground for striking them is legally and factually unsound.

Several studies show that minorities' lived experiences and interactions with police significantly affect the person's perception of the police and the criminal justice system and often leads to an increased motivation to engage in racial justice activism, and thus, should not be considered a race-neutral basis to strike a juror.

1. Discrimination against people of color by police is pervasive.

Research into the connection between race, bias, and policing nearly universally recognizes that within the American criminal legal system, law enforcement consistently engages in discriminatory behaviors against minorities. *See* James J. Fyfe, *Race and Extreme Police-Citizen Violence*, RACE, CRIME AND CRIMINAL JUSTICE 89–108 (R.L. McNeely & Carl E. Pope eds., 1981); Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1985).

In 2019, for example, Colorado law enforcement made or issued over 209,000 arrests or summonses. *See* COLO. DEP'T OF PUB. SAFETY, DIV. OF CRIM. J.,

SUMMARY: REPORT ON THE C.L.E.A.R ACT 22 (Oct. 2020), <https://cdpsdocs.state.co.us/ors/docs/reports/2020-SB15-185-Rpt.pdf> (2019 represents last available data). Black people accounted for 12% of that number but only represented 4% of the state population. *Id.* Hispanics were also overrepresented in criminal legal involvement, accounting for at least 29% of arrests/summons, but only 20% of the population. *Id.* Overrepresentation of Hispanic/Latinx people is likely underreported in these statistics due to insufficient data collection: “Hispanics are most often coded as White” and the arrest data was so “plagued with random misclassification of race and ethnicity,” that the report used a statistical model to predict Hispanic ethnicity, rather than rely on the raw data. *Id.* at 58.

Killings by police also disproportionately impacted people of color. Between 2013 and 2023, Black Coloradans and Native American Coloradans were more than three times as likely to be killed by police as white Coloradans. Mapping Police Violence, State Comparison Tool, <https://mappingpoliceviolence.us/states>. When people are killed or injured by police, entire communities are impacted. A disproportionate number of people of color will be related to or in community with someone impacted by police violence. The impact of police killings is particularly acute in Colorado, which has the sixth highest rate of police killings in the country. *Id.*

People of color are also overrepresented in Colorado prisons and jails, disproportionately impacting Colorado's families and communities of color. In 2021, Black people made up 4% of Colorado's population, but 17% of Colorado's prison population, and 16% of its jail population. PRISON POLICY INITIATIVE, *COMPARING COLORADO'S RESIDENT AND INCARCERATED POPULATIONS* (2021), https://www.prisonpolicy.org/graphs/disparities2021/CO_racial_disparities_2021.html (using data provided by the Bureau of Justice and the United States Census Bureau). Native American people made up 0.5% of Colorado's population, but 3% of its prison population, and 2% of its jail population. *Id.*

In addition, researchers find that up to 88% of Black adolescents and adults report experiencing individual racism in their lifetime. Elan C. Hope et al., *Anti-racism activism among Black adolescents and emerging adults: Understanding the roles of racism and anticipatory racism-related stress*, 93 *CHILD DEV.* 717, 718 (2022).

It follows that a person's "race and personal experience with police [are] two of the strongest predictors of attitudes toward police[.]" Daniel K. Pryce & Randy Gainey, *Race Differences in Public Satisfaction with and Trust in the Local Police in the Context of the George Floyd Protests: An Analysis of Residents' Experiences and Attitudes*, 35 *CRIM. JUST. STUD.* 74, 79 (2022). An individual's lived experience

with and perception of the police is therefore inextricably linked to race and should not be accepted as a race-neutral basis to strike a juror.

2. Racial justice activism is deeply connected to the lived experience of minorities.

Nor should a Black juror's participation in anti-racist activism be accepted as a race-neutral ground for a peremptory strike. Experiences of racism can catalyze engagement in anti-racist activism. For instance, scholars have found that, for Black adolescents and emerging adults, more frequent and more stressful experiences with racism correlate with greater engagement in anti-racist action. Nkemka Anyiwo et al., *Racial and Political Resistance: An Examination of the Sociopolitical Action of Racially Marginalized Youth*, 35 CURRENT OP. IN PSYCH. 86, 88 (2020); Hope et al., *supra*, at 717. Researchers theorize that sociocultural factors such as racially discriminatory experiences, racial identity, and racial socialization shape activism of racially marginalized youth into their adulthood. Nkemka Anyiwo et al., *Sociocultural Influences on the Sociopolitical Development of African American Youth*, 12 CHILD DEV. PERSPECT. 165, 165–67 (2018). It has also been widely noted that experiencing racism or witnessing societal racism (e.g., deportation, police killings of unarmed Black people) provide the impetus for action. Anyiwo et al., *Racial and Political Resistance, supra*, at 87.

Black Lives Matter, for example, is a sociopolitical movement seeking to promote anti-racism, and highlight the racism, discrimination, and racial inequality experienced by Black individuals. Support for the movement is intersectional, as supporters of the movement vary considerably by race. A PEW Research Center survey shows that 81% of Black adults reported they support the movement, compared with only 63% of Asian adults, 61% of Hispanic adults and 42% of White adults.⁴ Support for Black Lives Matter, in other words, is intricately linked to race. Participation and support of this movement is statistically significant among populations with lived discriminatory experiences that have formed a substantial part of their racial and social identity. Thus, striking a Black juror for supporting such activism is not race-neutral because such support is often a proxy for race.

D. This Court, as part of its developing *Batson* jurisprudence, should adopt more robust constitutional protections.

Batson was intended to address the persistent failure of courts to protect the rights of accused people and prospective jurors against discrimination in jury selection. 476 U.S. at 86 (situating *Batson* as part of the court’s “unceasing efforts

⁴ PEW RESEARCH CENTER, SUPPORT FOR THE BLACK LIVES MATTER MOVEMENT HAS DROPPED CONSIDERABLY FROM ITS PEAK IN 2020, <https://www.pewresearch.org/social-trends/2023/06/14/support-for-the-black-lives-matter-movement-has-dropped-considerably-from-its-peak-in-2020/> (June 14, 2023).

to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn”). As even *Batson* acknowledged, however, it was not intended to be the final word, nor, given its limitations, could it fully accomplish the goal of eradicating racial discrimination in selecting jurors. 476 U.S. at 99–100; *see also* Leonard Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501 (1999). Recognizing the “variety of jury selection practices” followed in state courts, the opinion explicitly declined to dictate to the states “how best to implement [its] holding.” *Batson* at 99 n.24. The court of appeals below properly took up the mantle, explicitly left to the states, of defining the contours of *Batson*’s Step 2. This Court has the responsibility to do the same.

In the United States, there is “not one Constitution but 51, meaning American constitutionalism concerns far more than what began in Philadelphia.” *Thompson v. Dallas City Attorney’s Office*, 913 F.3d 464 (5th Cir. 2019). The nature of our federalist system dictates that state courts should interpret their own constitutions, rather than treat them as “mere mirrors of federal protections.” *Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982). This Court has taken up the mantle on several occasions, endorsing rights under the Colorado Constitution that exceed parallel rights under the United

States condition. *See People v. McKnight*, 2019 CO 36, ¶¶ 38–43 (departing from Fourth Amendment jurisprudence to determine a dog sniff was a search under article II, section 7 of the Colorado Constitution); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) (Colorado Constitution’s protections against search and seizure and legitimate expectation of privacy in telephone numbers dialed on home telephone).

While this Court has borrowed from the federal analysis at times, particularly where the text of Colorado’s provision is identical or substantively similar to the federal provision, “even parallel text does not mandate parallel interpretation.” *McKnight*, 2019 ¶ 37. “When interpreting our own constitution, we do not stand on the federal floor; we are in our own house.” *Rocky Mount. Gun Owners v. Polis*, 2020 CO 66, ¶ 36. There are reasons that the Colorado Constitution, forged in the Rocky Mountains and the ethic of the West, nearly 100 years later, might not be interpreted identical to the U.S. Constitution born of the colonies.

Indeed, this Court has been rightly reluctant to revert automatically to federal interpretations of substantive rights in the context of criminal trials in particular, because state courts deal with the vast majority of criminal prosecutions and have exceptional experience and expertise. *See McKnight*, 2019 CO ¶ 39 (reasoning that criminal law was traditionally considered a state matter and assumption that state Constitutional provisions in the criminal area mirrored federal ones was

unwarranted). While the principles underlying *Batson* also apply in the civil context, the right to an impartial jury has historical and jurisprudential roots in criminal law—especially in Colorado. Indeed, shortly after *Batson* was decided, this Court held that exclusion of jurors based on presumed group characteristics is an independent violation of the right to an impartial jury guaranteed by article II, section 16 of the Colorado Constitution. *Fields*, 732 P.2d at 1155. That section reads, “in criminal prosecutions the accused shall have the right to [...] a speedy public trial by an impartial jury.” Colo. Const. Art. II, § 16 (emphasis added). Particularly because the question presented here is an issue of criminal law, this Court has a “responsibility to engage in an independent analysis of our own state constitutional provision in resolving” it. *Rocky Mountain Gun Owners*, 2020 CO 66, ¶ 34.

This Court has acknowledged that state-specific conditions may require a more expansive reading of provisions of the Colorado Constitution than its federal counterpart. *McKnight*, 2019 CO ¶ 40. In addition, race discrimination in the exercise of peremptory strikes is inextricable from state statute. Peremptory strikes themselves are a creature of statute, created by C.R.S. § 16-10-104. Although peremptory strikes are bound by constitutional limitations, like those imposed by *Batson*, they are not themselves created by federal rights. Arizona recently eliminated peremptory strikes altogether. Supreme Court of Arizona, Order

Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure (Aug. 30, 2021), [https://fingfx.thomsonreuters.com/gfx/legaldocs/egvbkkwkrpq/](https://fingfx.thomsonreuters.com/gfx/legaldocs/egvbkkwkrpq/%20Final%20Rules%20Order.pdf) R-210020 %20Final%20Rules%20Order.pdf. Peremptory strikes—whether parties receive them, how many there are, under what conditions they may be used—are a “distinctive state-specific factor” indicating that interpreting the state constitution in a manner more protective than the federal courts’ interpretation of the federal constitution “may be the most logical option.” *McKnight*, 2019 CO ¶ 40; *see also People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 35 (indicating that “Colorado[’s statutory scheme] has been more protective of a defendant’s right to a jury free of implied bias [in challenges for cause] than the federal courts or other jurisdictions.”)

To combat the shortcomings of *Batson*’s application in the real world over the last 35 years, Amici encourage this Court to affirm the decision of the Court of Appeals by exercising its authority under the Colorado constitution and “flexibility in formulating appropriate procedures to comply with *Batson*” in a manner that prophylactically offers more robust protections for Colorado litigants. *Johnson v. California*, 545 U.S. 162, 168 (2005). To reflect the state-specific circumstances in Colorado and to address the decades of failed protections offered by the conventional *Batson* framework, the Court should do just that.

CONCLUSION

A Black juror's lived experience with and perception of police are frequently a catalyst for participation in anti-racist activism and are inextricably linked to race, and thus, cannot serve as race-neutral bases to peremptorily strike that juror. Amici urge this Court to adopt broader protections against racially discriminatory jury selection under the Colorado Constitution than those provided by the federal Constitution by affirming the Court of Appeals' decision.

Dated November 6, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2023 a true and correct copy of the foregoing Amicus Brief of ACLU of Colorado, Roderick & Solange MacArthur Justice Center, Fred T. Korematsu Center for Law and Equality, Colorado Hispanic Bar Association, Asian Pacific American Bar Association of Colorado, South Asian Bar Association of Colorado, and Sam Cary Bar Association, in support of Respondent, was served upon all counsel having entered an appearance herein via Colorado Courts E-Filing electronic filing and service.

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