APL-2015-00099
Queens County Indictment No. 2014/11
Appellate Division, Second Department Docket No. 2012-07683

Court of Appeals

STATE OF NEW YORK

THE PEOPLE,

Respondent,

—against—

JOSEPH BRIDGEFORTH,

Appellant.

BRIEF FOR *AMICI CURIAE* FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, ANTI-DEFAMATION LEAGUE, ASIAN AMERICANS ADVANCING JUSTICE, ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, HISPANIC NATIONAL BAR ASSOCIATION, LATINOJUSTICE PRLDEF, INC., METROPOLITAN BLACK BAR ASSOCIATION, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, NATIONAL BAR ASSOCIATION, NATIONAL NATIVE AMERICAN BAR ASSOCIATION, SOCIETY OF AMERICAN LAW TEACHERS, INC., SOUTH ASIAN BAR ASSOCIATION OF NEW YORK, SOUTH ASIAN BAR ASSOCIATION OF NORTH AMERICA, AND LAW PROFESSORS IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 1

INTEREST OF *AMICI CURIAE* 2

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. *Batson* and Its Progeny Seek to Prevent Prosecutors from Striking Potential Jurors Based on Invidious Stereotypes 15

II. Color Discrimination Presents Precisely the Harms that *Batson* and its Progeny Aim to Prevent 18

A. Darker-Skinned Individuals Have Continuously Been Stereotyped as Less Qualified Than Lighter-Skinned Individuals Solely Based on Skin Color 19

B. Darker-Skinned Individuals Are Regularly Deprived of Benefits, Rights, Privileges, and Opportunities Afforded to Lighter-Skinned Individuals 22

1. Employment 23

2. Education 26

3. Politics 28

4. Dating, Marriage, and Adoption 31

5. Pop Culture 32

III. The People's Administrability Concerns Lack Merit 34

A. Courts Are Well-Equipped to Identify Discrimination on the Basis of Skin Color 35

1. 1866 Civil Rights Act 36

2. 1964 Civil Rights Act 37

3. Section 1982 and the Fair Housing Act 39

B. Color Is No Less Administrable a Category Than Race Under *Batson*...40

C. Any Administrability Concern Has Minimal Impact Given That the Prosecutor Can Simply Provide a Race-Neutral Explanation for the Strike.....42

CONCLUSION.....44

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Cases

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405 U.S. 625 (1972).....7

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2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).....38

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288 F.3d 124 (4th Cir. 2002).....39

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396 U.S. 320 (1970).....7

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807 F.2d 1214 (5th Cir. 1987).....41

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514 U.S. 765 (1995) 17

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340 F.3d 178 (3d Cir. 2003) 41, 42

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of the Court of Appeals, 22 N.Y.C.R.R. § 500.l(f), *Amici Curiae* make the following disclosure:

The Fred T. Korematsu Center for Law and Equality, the Anti-Defamation League, Asian Americans Advancing Justice, the Asian American Bar Association of New York, the Asian American Legal Defense and Education Fund, the Hispanic National Bar Association, LatinoJustice PRLDEF, Inc., the Metropolitan Black Bar Association, the NAACP Legal Defense & Educational Fund, Inc., the National Asian Pacific American Bar Association, the National Bar Association, the Society of American Law Teachers, Inc., and the South Asian Bar Association of North America are not-for-profit organizations with no parents, subsidiaries, or affiliates. The National Native American Bar Association has an affiliate 501(c)(3) not-for-profit charitable arm, the National Native American Bar Association Foundation, but has no other parents, subsidiaries, or affiliates. The National Asian Pacific American Woman's Forum is fiscally sponsored by the Tides Center. The South Asian Bar Association of New York has an affiliate 501(c)(3) not-for-profit charitable arm, the South Asian Bar Association of New York Fund, Inc., but has no other parents, subsidiaries, or affiliates.

INTEREST OF *AMICI CURIAE*

Amici curiae—bar associations, advocacy organizations, and professors of law specializing in American legal history, constitutional law, criminal law and procedure, civil rights, capital punishment, and race, gender and discrimination—submit this brief in support of Defendant Joseph Bridgeforth's appeal from the Second Department, which held that Defendant failed to establish a *prima facie* violation under *Batson v. Kentucky* when he asserted that the prosecutor struck a prospective juror based on her dark skin color. 119 A.D.3d 600, 601. Drawing from their collective experiences, *amici* recognize that color discrimination inflicts lasting harms both on our justice system and on society as a whole. Accordingly, *amici* have a strong interest in ensuring that courts eradicate color discrimination from the prosecutor's use of peremptory strikes, and, where an inference of such discrimination exists, that courts require the prosecutor to provide a neutral explanation for the strike.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all.

It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring that effective remedies exist to address implicit and explicit bias in the courtroom. The Korematsu Center also works to understand and remedy the race and color-based inequality that plagues our criminal justice system, including during jury selection. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The Anti-Defamation League ("ADL") was founded in 1913 to combat anti-Semitism and all forms of bigotry, to defend democratic ideals, and to secure justice and fair treatment to all. ADL is vitally interested in protecting the civil rights of all persons and ensuring that each individual receives equal treatment under the law regardless of race, color, ethnicity, religion, sex, sexual orientation, or gender identity. Consistent with its mission, ADL is committed to working to eliminate bias in the criminal justice system.

Asian Americans Advancing Justice ("Advancing Justice") is a national affiliation of five independent nonprofit, nonpartisan organizations: Asian Americans Advancing Justice | AAJC, Asian Americans Advancing Justice | Asian Law Caucus, Asian Americans Advancing Justice | Chicago, Asian Americans Advancing Justice | Los Angeles, and Asian Americans Advancing Justice | Atlanta. Through litigation, direct legal services, policy advocacy, community outreach and education, and organizing, Advancing Justice seeks to promote a fair and equitable

society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. Members of Advancing Justice strongly believe that our legal institutions including our jury system cannot operate legitimately unless we are vigilant in ensuring that they are free from all forms of discrimination and reflect the racial and ethnic diversity in our larger society.

The Asian American Bar Association of New York ("AABANY") was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian-American attorneys, judges, law professors, legal professionals, legal assistants, paralegals, and law students. The mission of AABANY is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

The Asian American Legal Defense and Education Fund ("AALDEF"), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. Discrimination based on "color" in a *Batson* challenge is no different from the parallel challenges based on race and national origin; all of these categories are

unlawful under the equal protection clause. Asian Americans have suffered and continue to suffer because of discrimination based on color.

The membership of *amicus curiae* the Hispanic National Bar Association ("HNBA") comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly petitions Congress and the Executive on behalf of all members of the communities it represents.

LatinoJustice PRLDEF, Inc. ("LatinoJustice") is a national not-for-profit civil rights organization that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting, and voting rights. During its 44-year history, LatinoJustice has litigated numerous cases in both state and federal courts challenging multiple forms of racial discrimination including discriminatory policing and law enforcement practices. LatinoJustice supports greater transparency and fairness in our justice system, and

judicial recognition that skin color-based racial discrimination is a constitutionally cognizable group for *Batson* purposes.

The purpose of the Metropolitan Black Bar Association ("MBBA") is to provide a forum to advance diversity and inclusion in the legal community and address legal issues affecting the citywide community. Specifically, MBBA advances the progress and enhancement of lawyers, with a focus on Black lawyers and lawyers of color, and building the pipeline of talent for future lawyers; develops jurisprudence and promotes the ethical practice of law; partners with legal societies, governmental agencies, lawyers of other nations, and the public in general to advance its purpose; commits its time, talent, and resources to the community; and will do any and all things necessary and proper for the accomplishment of these purposes, to the same extent, and in the same manner as permitted by law. Undergirding MBBA's mission and activities is a fundamental commitment to equality. The current state of the law does not promote equality of treatment.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. LDF has long been

concerned about the influence of race on the administration of the criminal justice system in particular and with laws, policies, and practices that have a disproportionate negative impact on communities of color, especially African Americans. For example, LDF served as counsel of record in cases challenging racial bias in the criminal justice system, including the racial make-up of juries, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in cases involving the use of race in peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*).

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific-American attorneys, judges, law professors, and law students, representing the interests of nearly seventy-five state and local Asian Pacific-American bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988,

NAPABA has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. In furtherance of its mission, NAPABA promotes a diverse and inclusive legal system free of discrimination.

The National Asian Pacific American Women's Forum ("NAPAWF") is the only national, multi-issue Asian and Pacific Islander (AAPI) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for AAPI women and girls. Jury participation is a privilege and responsibility extended to all citizens of the United States. Any exclusion of AAPI individuals from juries sends the message to the AAPI women and girls NAPAWF serves that they are not included nor represented in our system of justice, and would have an adverse impact on the inclusion of AAPI women in civic engagement.

The National Bar Association ("NBA") is the largest and oldest association of predominantly African-American attorneys and judges in the United States. The NBA was founded in 1925 when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association, did not admit African-American attorneys. Throughout its history, the NBA consistently has advocated on behalf of African Americans and other minority populations regarding issues affecting the legal profession. The

NBA represents approximately 66,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

The National Native American Bar Association ("NNABA") is the oldest and largest association of predominantly Native American attorneys in the United States. Founded in 1973 when the first group of Native American attorneys was entering the legal profession, NNABA represents the interests of approximately 2,700 Native American attorneys. NNABA's core mission since its inception has been to promote the development of Native American attorneys who share the communal responsibility of advancing justice for Native Americans.

The Society of American Law Teachers, Inc. ("SALT"), founded in 1973, is the largest independent membership organization of legal academics in the United States. SALT's membership includes law professors, deans, librarians, and administrators from law schools across the country. Virtually all active SALT members hold full-time positions in legal education.

The South Asian Bar Association of New York ("SABANY") is an organization dedicated to the needs, concerns and interests of lawyers of South Asian heritage and the South Asian community in the greater New York City area.

The South Asian Bar Association of North America ("SABA North America") is a voluntary bar organization that serves as an umbrella organization to 26 chapters in the United States and Canada representing over 6,000 lawyers,

judges, and law students. SABA North America is a recognized forum for the professional growth and advancement for South Asian lawyers in North America and seeks to safeguard the civil rights and liberties of the South Asian community across the continent.

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Excluding an individual from jury service based on the color of her skin violates the Equal Protection Clause of the Federal and New York Constitutions. As set forth in *Batson v. Kentucky*, a prosecutor who has exercised a peremptory strike potentially motivated by racial discrimination must provide, at a minimum, a race-neutral explanation for the strike. 476 U.S. 79, 97 (1986).

Here, the prosecutor failed to provide such an explanation when Defendant challenged the prosecutor's peremptory strike of a dark-skinned Indian woman from the jury.[1] Notwithstanding this failure, the People argue that the strike was appropriate because skin color, unlike race, is not a protected characteristic under the federal and state Equal Protection Clauses, and because permitting *Batson*

[1] The material facts underlying Defendant's *Batson* challenge, including the color of the stricken juror's skin and the prosecutor's failure to provide any explanation for striking this juror, are not in dispute here. *See generally* A313-319.

challenges based on skin color would be too difficult to administer. People's Br. 8-10. Neither point is correct. Indeed, there is no question that *Batson* protects against discrimination on the basis of both race and skin color. Moreover, given the relatively low burden *Batson* places on a prosecutor, and the importance of preventing the "stigma or dishonor" that accompanies a prosecutor's use of the "raw fact of skin color" to "determine the objectivity or qualifications of a juror," *Powers v. Ohio*, 499 U.S. 400, 410 (1991), Defendant was entitled to raise a *Batson* challenge on the basis of skin color discrimination here.

This brief proceeds in three parts. First, the brief reiterates *Batson's* purpose in protecting against discriminatory peremptory strikes arising out of stereotypes based on characteristics like race, gender, religion, or skin color. Importantly, once a defendant has made a *prima facie* showing supporting an inference of discrimination, the burden falls on the prosecutor to provide a neutral explanation for the strike.

Second, the brief identifies substantial empirical research outlining the historical and continued effects of color discrimination in society. The People's first argument—at its core, that Defendant overstates the reality of color-based discrimination—is undercut by numerous academic studies documenting both the stereotypes attached to darker skin and the resulting discrimination that darker-

skinned individuals face in all facets of society. These harms are precisely those that *Batson* seeks to guard against with respect to jury selection.

Finally, the brief addresses the People's administrability concerns. The People's brief fails to acknowledge decades of precedent showing that courts have been capable of analyzing color discrimination in the context of, *inter alia*, employment, housing, and federal financial assistance. The People also overlook the fact that race-based discrimination, which is undisputedly a *Batson*-protected group, is itself difficult to define and carries similar administrability problems. Indeed, the People's entire administrability argument appears to mirror a similar argument raised by the dissent in *Batson* itself, which the *Batson* Court flatly rejected. *See Batson*, 476 U.S. at 129-30 & n.10. In any event, any administrability concern can simply be addressed by a neutral explanation for the strike. That the prosecutor failed to do so here does not mean, as the People would have it, that the Court should tolerate color discrimination in jury selection altogether.

ARGUMENT

I. *Batson* and Its Progeny Seek to Prevent Prosecutors from Striking Potential Jurors Based on Invidious Stereotypes

a. *Batson* held that a peremptory challenge "based on either the race of the juror or the racial stereotypes held by the" prosecutor violates the Equal Protection Clause of the Fourteenth Amendment. *Georgia v. McCollum*, 505 U.S. 42, 59

(1992); *see also Batson*, 476 U.S. at 89.[2] In so holding, the Supreme Court reaffirmed the long-recognized principle that "[a] person's race simply 'is unrelated to his fitness as a juror.'" *Batson*, 476 U.S. at 87 (quoting *Thiel v. Southern Pacific Co*., 328 U.S. 217, 223-24 (1946)). Rather, a juror's competence to serve "ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Id.*

The Supreme Court has also recognized that excluding prospective jurors based on such stereotypes both demeans the individual juror's dignity and decreases public faith in the justice system as a whole. It has squarely rejected the suggestion that "no particular stigma or dishonor results if a prosecutor uses *the raw fact of skin color* to determine the objectivity or qualifications of a juror." *Powers*, 499 U.S. at 410 (emphasis added). To the contrary, "[s]triking individual jurors on the assumption that they hold particular views simply because of" their race or sex "is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

[2] *See also* N.Y. Const., Art. I, § 11 ("No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his or her civil rights[.]").

b. *Batson*'s familiar three-step inquiry provides a framework to root out peremptory strikes based on such protected characteristics.[3] Under *Batson*, "once the opponent of a peremptory challenge has made out a prima facie case of *** discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two)." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). If no explanation is tendered, the strike is impermissible. *People v. Allen*, 86 N.Y.2d 101, 109 (1995). "If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful *** discrimination." *Purkett*, 514 U.S. at 767.

Making out a prima facie case "is not intended to be onerous[.]" *People v. Hecker*, 15 N.Y.3d 625, 651 (2010). A party objecting to a strike need only "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred," rather than proving it more likely than not that a strike was made with discriminatory intent. *Johnson v. California*, 545 U.S. 162, 170 (2005). Moreover, once a challenge has been raised, the burden imposed on the prosecution by moving from Step 1 (prima facie case) to Step 2 (explanation) is

[3] In light of the inescapable tension between peremptory challenges and a commitment to eradicating discrimination in jury selection, several members of the judiciary have called for peremptory challenges to be abandoned, or at least reconsidered. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (collecting citations). *Batson* did not go that far, whether or not it should have.

minimal. When asked to explain a strike, "the reason offered by the prosecutor *** need not rise to the level of a challenge for cause ***." *Hernandez v. New York*, 500 U.S. 352, 362–63 (1991). But that is all the more reason why a non-discriminatory explanation must be provided.

II. Color Discrimination Presents Precisely the Harms that *Batson* and its Progeny Aim to Prevent

Courts have extended *Batson*'s protections to discrimination based on sex, ethnicity, and religion. *See J.E.B.*, 511 U.S. 127 (sex); *Hernandez*, 500 U.S. 352 (ethnicity); *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (religion). They have found similar protections rooted in state law. *E.g.*, *People v. Kern*, 75 N.Y.2d 638, 650 (1990). And they have stressed, as did *Batson*, that even a single discriminatory strike is intolerable. *E.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016); *People v. Childress*, 81 N.Y.2d 263, 267 (1993) ("[T]he exclusion of even one member of a group for racial reasons is abhorrent to a fair system of justice.").

In each of these cases, as in *Batson*, a court held that an individual that was part of a group "capable of being singled out for differential treatment" was entitled, at a minimum, to a non-discriminatory explanation for a peremptory strike under the Equal Protection Clause. *Batson*, 476 U.S. at 94 (*citing Castaneda v. Partida*, 430 U.S. 482, 494 (1977)). The simple question presented by this case is whether a challenge on the basis of skin color is entitled to the same explanation under *Batson* Step 1. As seen below, given the pervasive discrimination on the

basis of skin color that continues to affect every facet of society, the answer must be "yes."

A. Darker-Skinned Individuals Have Continuously Been Stereotyped as Less Qualified Than Lighter-Skinned Individuals Solely Based on Skin Color

Ample research shows that American society makes "assumptions about a person's race, socioeconomic class, intelligence, and physical attractiveness" based solely on that person's skin color.[4] These assumptions fall along a well-established hierarchy: lighter skin is associated with positive traits, and darker skin is tied to negative ones. As a result, lighter-skinned individuals are "treated by others as though they are more competent than" darker-skinned individuals "though there is no information conveyed by the status itself indicating competency."[5] This, of course, is exactly what *Batson* was intended to prevent in the jury selection process.

For decades, researchers have found that lighter-colored skin—across races—is associated with "good" characteristics like "attractiveness,"[6]

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[4] Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 Duke L.J. 1487, 1499-1500 (2000).

[5] Michael Hughes & Bradley Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 Soc. Forces 1105, 1116 (Univ. of N.C. Press June 1990).

[6] Jennifer Hochschild & Vesla Weaver, *The Skin Color Paradox and the American Racial Order*, 86 Soc. Forces 1, 1 (Univ. of N.C. Press Dec. 2007); Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26

"intelligence,"[7] "prosperity,"[8] "refinement,"[9] "civility,"[10] "virtue,"[11] "personal charm,"[12] "social mobility,"[13] and "emotional stability."[14] Darker-colored skin, by contrast, calls to mind "bad" characteristics: "toughness,"[15] "meanness,"[16] "indigence,"[17] "criminality,"[18] and "failings in moral character, intellectual capacity and achievement drive."[19] One psychological study found, for example, that "[d]ark skin evokes fears of criminality or sharper memories of a purportedly criminal face."[20] And a real-world example of this unconscious association took

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Berkeley J. Empl. & Labor L. 435, 446-459 (2005); Margaret Hunter, *The Persistent Problem of Colorism: Skin Tone, Status, and Inequality*, Sociology Compass 237, 243 (2007).

[7] Jones, *supra* note 4, at 1527; Nance, *supra* note 6, at 446-459; Lance Hannon, *White Colorism*, 2 Soc. Currents 13, 17 (2015).

[8] Jones*, supra* note 4, at 1527.

[9] *Id.*

[10] Hunter, *supra* note 6, at 243.

[11] *Id.*

[12] Nance, *supra* note 6, at 446-459.

[13] *Id.*

[14] *Id.* at 446 n.59 (citing Keith Maddox & Stephanie Gray, *Cognitive Representations of Black Americans: Reexploring the Role of Skin Tone*, 28 Personality & Soc. Psychol. Bull. 250, 255 (2002)).

[15] *Id.* at 1527.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Walter Allen, Edward Telles & Margaret Hunter, *Skin Color, Income and Education: A Comparison of African Americans and Mexican Americans*, 12 Nat'l. J. Soc. 130, 132 (2000).

[20] Hochschild & Weaver, *supra* note 6, at 5 (internal citations omitted). In one study, researchers found that Black defendants with darker skin and other, more "stereotypically Black" physical traits were more than twice as likely to be sentenced to death as lighter-skinned or less stereotypically Black defendants. Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, 385 (2006).

place in 2015, when police officers in Madison, Alabama severely beat and injured a fifty-seven-year-old Indian immigrant after a suspicious caller reported him to be a "skinny Black guy."[21] This incident obviously raises other intertwined issues of policing and racial profiling, but aptly illustrates the lumping of dark-colored individuals into a single class of "suspect" individuals based simply on their skin color.

Studies have identified similar color-based stereotypes—lighter skin "better", darker skin "worse"—in Black,[22] Latino,[23] and Asian[24] communities. Indeed, even as late as 1990, scholars were still testing—and debunking—the theory that "the relationship between light skin and high socioeconomic status" is because "those with light skin have more white ancestry *and therefore more native ability*."[25]

Researchers have also traced this persistent view—that a "fair complexion" confers "a decided advantage" in society—across the course of American history.[26]

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[21] Peter Holley, Abby Phillip & Abby Ohlheiser, *Alabama Police Officer Arrested after Indian Grandfather Left Partially Paralyzed*, Wash. Post (Feb. 12, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/02/11/alabama-cops-leave-a-grandfather-partially-paralyzed-after-frisk-goes-awry/.

[22] Jones, *supra* note 4, at 1551; Nance, *supra* note 6, at 446-459.

[23] Hannon, *supra* note 7, at 17.

[24] Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 Wash. U. Global Stud. L. Rev. 665, 671-674 (2015).

[25] Hughes & Hertel, *supra* note 5, at 1115 (emphasis added).

[26] Nance, *supra* note 6, at 441.

In the post-Civil War era, for example, lighter-skinned Blacks created "separate communities in which skin color served as the key to access."[27] These included "color-conscious congregation[s]," where membership was determined by whether an individual's skin color was lighter than a brown paper bag.[28] These also included social clubs like the "Blue Vein Society of Nashville," where entry was determined on whether the "applicant's skin color was light enough for the veins in the wrist to be visible."[29] Similar skin-color litmus tests have been historically used to determine the rights and privileges of individuals of other races and ethnicities as well. To take one case, in *United States v. Dolla*, a South Asian immigrant was granted citizenship, a privilege then-reserved for only "White" immigrants, primarily on the ground that the "skin of his arm" was "sufficiently transparent for the blue color of the veins to show very clearly." 177 F. 101, 102 (5th Cir. 1910).

B. Darker-Skinned Individuals Are Regularly Deprived of Benefits, Rights, Privileges, and Opportunities Afforded to Lighter-Skinned Individuals

Overt skin-color litmus tests, of course, are barred by the state and federal Equal Protection Clauses. Nevertheless, negative attitudes and stereotypes against darker-skinned individuals continue to manifest themselves as tangible harms

[27] Jones, *supra* note 4, at 1515.

[28] *Id.* at 1516.

[29] *Id.* at 1515.

across all aspects of society. One survey of African Americans found that "darker-skinned African Americans are twice as likely to report that they have been victims of discrimination than those with lighter-skinned complexions."[30] Likewise, "darker, more Indian-looking Mexican Americans also reported a significantly greater amount of discrimination" than "lighter, more European-looking Mexican Americans."[31] Scholars have further observed that "[d]arker-skinned Asian groups are widely considered to be at the bottom of the Asian American social hierarchy."[32] Below, *amici* outline just a few examples of the societal harms imposed upon dark-skinned individuals by virtue of their skin color.[33]

1. Employment

The United States government has itself acknowledged that darker-skinned individuals are generally denied access to more prestigious and better-paying jobs

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[30] Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 Denv. U.L. Rev. 131, 133-134 (1997).

[31] *Id.* at 134.

[32] Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 Wash. U. Global Stud. L. Rev. 637, 644 (2015).

[33] *Batson* does *not* require proof that a struck venireperson belongs to a "group" with a "common thread of attitudes, ideas or experiences." *Contra* People Br. 33. Indeed, it makes no sense to hold that *Batson*—a doctrine aimed at *eliminating* the role of invidious stereotypes in jury selection—only applies if an objector can *stereotype* a "cognizable group" as having "common" attitudes, ideas or experiences. *Cf. Shaw v. Reno*, 509 U.S. 630, 647 (1993) (rejecting perception "that members of the same racial group *** think alike" as an "impermissible racial stereotype[]"). But to the extent that the People's argument is premised on a belief that *some* threshold shared experience of discrimination is required, this section should be answer enough.

based on their skin color. In 1995, the Federal Glass Ceiling Commission ("FGCC") conducted a study of "opportunities for, and artificial barriers to, the advancement of minority men and all women into management and decisionmaking positions" in American businesses.[34] Among other things, the study concluded that "our society has developed an extremely sophisticated, and often denied, acceptability index based on gradations in skin color."[35]

The FGCC's findings have been borne out by numerous empirical studies. Lighter-skinned Blacks, for example, are paid more, hold more desirable jobs, and generally have a "higher socioeconomic status" than darker-skinned Blacks.[36] Even after controlling for socioeconomic backgrounds at birth, studies find that individuals with lighter skin have "greater education, occupational prestige, personal income, and family income than those with darker skin."[37] As a result, lighter-skinned Blacks were "more likely to be employed as professional and technical workers" than darker-skinned Blacks, who "were more likely to be employed as laborers."[38] Indeed, one study, in trying to quantify the additional value society awards to lighter-colored skin, found that dark-skinned Blacks earned

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[34] Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital*, 3 (1995).

[35] *Id.* at 29 (emphasis added).

[36] Nance, *supra* note 6, at 443.

[37] Hughes & Hertel, *supra* note 5, at 1109 (emphasis added).

[38] Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. Rev. 1705, 1719 (2000).

"seventy cents for every dollar earned by a light-skinned black."[39] Another study concluded that, although Blacks as a whole earned lower mean hourly wages than Whites, light-skinned Blacks earned 8.6% less; dark-skinned Blacks, by contrast, earned *26.4% less*.[40]

Similar studies show that darker-skinned Latinos—generally those with mixed African or Native American ancestry—have "lower socioeconomic status," "lower earnings," and "less schooling" than "their lighter skinned, European-looking counterparts."[41] A 2003 study, for example, found that "[w]hite Latinos *** had lower unemployment rates and lower poverty rates than black Latinos."[42] Other studies have found that darker-skinned Hispanics and Latinos receive "significantly lower earnings"[43] and "significantly lower occupational prestige scores"[44] than their lighter-skinned counterparts.

Studies of Asian Americans reach similar conclusions. In Hawai'i, "light-skinned East Asian groups" are "overrepresented in white-collar industries," while "[d]ark-skinned Asian Americans, including Pacific Islanders, are overrepresented

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[39] Nance, *supra* note 6, at 443.

[40] Arthur H. Goldsmith, Darrick Hamilton & William Darity Jr., *From Dark to Light*, 42 J. Hum. Res. 701, 717 (2007).

[41] Christina Gomez, *The Continual Significance of Skin Color: An Exploratory Study of Latinos in the Northeast*, 22 Hisp. J. Behav. Sci. 94, 95 (2000).

[42] *Id.*

[43] *Id.*; *see also* Hunter, *supra* note 6, at 243 (2007).

[44] Rodolfo Espino & Michael M. Franz, *Latino Phenotypic Discrimination Revisited: The Impact of Skin Color on Occupational Status*, 83 Soc. Sci. Q. 612, 612 (2002).

in low-wage blue-collar industries."[45] More generally, researchers have found that society associates "lighter-skinned" Asian Americans—*e.g.*, those with Chinese, Japanese, or Korean ancestry—with "socioeconomically privileged groups," and "darker-skinned" Asian Americans—e.g., those with Hmong, Cambodian or Laotian ancestry—with "socioeconomically disadvantaged groups."[46]

2. Education

Darker-skinned individuals are also deprived of educational opportunities based on their skin color, such as where they go to school, how long they go to school, and how they are treated once at school. Multiple studies have demonstrated this "learning and earnings penalty" imposed on those with darker skin.[47]

Researchers have determined, for example, that the "education gap between light-skinned blacks and dark-skinned blacks" is "nearly identical" to the "education gap between whites and blacks."[48] "Darker skinned children," in addition, "are much more likely to be disciplined" than their lighter-skinned

[45] Chanbonpin, *supra* note 32, at 645.

[46] *Id.* at 655.

[47] Allen, Telles & Hunter, *supra* note 19, at 168. Discrimination on the basis of skin color further affects "housing access, ownership, and segregation," all factors that contribute towards the quality of education received. *See, e.g.*, Hunter, *supra* note 6, at 242.

[48] *Id*. at 243.

classmates.[49] In one study, darker-skinned Black female students were found to be "about three times more likely to be suspended at school than their light-skinned counterparts."[50]

Similarly, "Latinos with dark skin are significantly less likely to graduate from high school and go to college than those with light skin."[51] Researchers found in one analysis that "lighter-skinned Mexican Americans complete more years of schooling than darker-skinned Mexican Americans even when their family backgrounds are similar."[52] In another, light-skinned Mexican Americans were found to have had about 1.5 more years of schooling than darker-skinned Chicanos.[53]

In a third line of studies, researchers have found that "lighter complexion among Asian American young adults of both sexes is associated with higher educational attainment."[54] Asian-American men with white skin "are approximately 2.4 times likely to hold a Bachelor's degree than those with light

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[49] Kimberly Jade Norwood, *"If You Is White, You's Alright…." Stories About Colorism in America*, 14 Wash. U. Global Stud. L. Rev. 585, 593 (2015).

[50] Hannon, *supra* note 7, at 15.

[51] Igor Ryabov & Franklin W. Goza, *Phenotyping and Adolescence-to-Adulthood Transitions Among Latinos*, 6 Race Soc. Probs. 342, 353 (2014).

[52] Hunter, *supra* note 6, at 243.

[53] Gomez, *supra* note 41, at 96.

[54] Igor Ryabov, *Colorism and Educational Outcomes of Asian Americans: Evidence from the National Longitudinal Study of Adolescent Health*, 19 Soc. Psychol. Educ. 303, 321 (June 2016).

brown skin."[55] And despite the prevalence of the "model minority myth" of Asian Americans as universally well-educated high achievers, high school graduation rates of darker-skinned Southeast Asians "approximate those of Hispanics, the lowest among the US major minority groups."[56]

3. Politics

In the political arena, lighter-skinned individuals also enjoy advantages over darker-skinned individuals as well. For example, in an analysis of all African-American officials elected to the House of Representatives, Senate or a governor's office since 1865, one study found that "light-skinned blacks have always been considerably overrepresented and dark-skinned blacks dramatically underrepresented as elected officials."[57] Similarly, in an experimental study to assess the effect of skin color on voting preferences, a hypothetical darker-skinned Black candidate "was evaluated much more harshly than his lighter-skinned peer" by prospective voters.[58] Even when all other objective qualifications had been kept equal, after the hypothetical vote was tallied, the researcher found that the lighter-

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[55] *Id.* at 316.

[56] *Id.* at 307.

[57] Hochschild & Weaver, *supra* note 6, at 8; Nor is this data skewed by historical preferences. Another study noted that "since the 1960s, most Blacks elected or appointed to prominent governmental positions have had light skin." Jones, *supra* note 4, at 1520.

[58] Nayda Terkildson, *When White Voters Evaluate Black Candidates: The Processing Implications of Candidate Skin Color, Prejudice, and Self-Monitoring*, 37 Am. J. Pol. Sci. 1032, 1048 (1993).

skinned candidate had "prevailed over his darker opponent by an astonishing *18 percentage points*."[59]

Real-world examples of this preference for lighter skin can easily be found. During the 2008 Presidential election, for example, Senator Harry Reid was reported to have privately stated his belief that the United States was ready to embrace a black presidential candidate like then-Senator Barack Obama—"a light-skinned" African American "with no Negro dialect, unless he wanted to have one."[60] The benefits conferred by lighter skin color, too, were at the center of a controversy involving then-Governor of Louisiana Bobby Jindal, who is Indian-American, when he displayed a commissioned portrait of himself with a lightened skin tone in the Louisiana State Capitol, as well as a controversy involving South Carolina Governor Nikki Haley, another Indian-American, concerning her self-identification as "White" on her 2001 voter registration.[61]

Darker-skinned individuals, by contrast, continue to face outright discrimination in politics, including by being attacked with the same epithets

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[59] Hochschild & Weaver, *supra* note 6, at 10 (emphasis added).

[60] Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. Rev. L. & Soc. Change 657, 657 (2010) (internal citation omitted).

[61] Vinay Harpalani, *To Be White, Black, or Brown? South Asian Americans and the Race-Color Distinction*, 14 Wash. U. Global Stud. L. Rev. 609, 623-24 (2015).

historically used against Blacks.[62] For example, in 1965, Indian Prime Minister Lal Bahadur Shastri and Pakistani President Mohammed Ayub Khan were scheduled to visit the United States. However, after both leaders expressed opposition to the Vietnam War, President Lyndon Johnson cancelled their visits, remarking: "[a]fter all, what would Jim Eastland [the conservative Senator from Mississippi] say if I brought those two n****** over here."[63] To this day, Professor Bandana Purkayastha notes that this epithet continues to be directed at South Asian Americans.

Another, more-recent incident occurred in 2006, during the campaign of former Virginia Senator George Allen. S.R. Sidarth, a twenty-year old campaign volunteer for Allen's Democratic opponent, Jim Webb, was assigned to track and videotape Allen's rallies across the state of Virginia. At one rally, Allen referred to Sidarth, who is a relatively dark-skinned Indian-American, by stating: "Let's give a welcome to Macaca, here. Welcome to America and the real world of Virginia."[64] Sidarth was the only non-White person at the rally and caught the incident on videotape. Videotape of this incident spread quickly and widely on

[62] *See, e.g.*, Bandana Purkayasatha, *Negotiating Ethnicity: Second-Generation South Asian Americans Traverse A Transnational World*, 29 (Rutgers Univ. Press 2005) (discussing the experience of a South Asian medical student who was called the n-word as a child).

[63] Richard N. Goodwin, *President Lyndon Johnson: The War Within*, N.Y. Times (Aug. 21, 1988), http://www.nytimes.com/1988/08/21/magazine/president-lyndon-johnson-the-war-within.html?pagewanted=all (brackets in original, epithet removed).

[64] Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology*, Wash. Post (Aug. 15, 2006).

YouTube, and media soon reported that "macaca" referred to macaques—a species of monkey—and was considered an anti-Black racial epithet in French-speaking countries.[65]

4. Dating, Marriage, and Adoption

Color bias also affects the realm of personal choice. Research has demonstrated that preferences in dating, marriage, and adoption largely skew in favor of lighter-skinned over darker-skinned individuals across all races. These preferences cut across all communities; "[g]iven the opportunity, many people will . . . choose to marry a lighter-skinned woman rather than a darker-skinned woman."[66] In Asian-American communities in particular, "differences in skin color frequently determine social standing and marriageability."[67] For many in these communities, "[d]ark skin tone is *** associated with poverty and 'backwardness.'"[68] And when families seek to adopt children, "the data suggest there is a preference for light skin and biracial children over dark-skinned children."[69]

One of the more dramatic effects of these shared preferences for lighter-skinned romantic partners is the prevalent practice of "skin bleaching," *i.e.*, the use

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[65] *The Un-American Senator*, L.A. Times (Aug. 21, 2006).

[66] Hunter, *supra* note 6, at 238.

[67] Chanbonpin, *supra* note 32, at 642-643.

[68] Hunter, *supra* note 6, at 239.

[69] Norwood, *supra* note 49, at 595.

of chemical products to physically lighten one's own skin color. This practice has been traced to communities all over the world, from East Asia to India to the Middle East to Africa to Europe and to Canada.[70] And this practice is found here in the United States as well, as researchers have noted the popularity of "[a]dvertisements for skin bleach or fade crème" that continue to appear in numerous "national magazines aimed at black readers."[71]

5. Pop Culture

Finally, the practice of privileging lighter-skinned over darker-skinned individuals of a particular race is most visible in—and is likely reinforced by—popular culture. Across races, "[i]nstitutions ranging from advertising agencies to filmmakers to adoption agencies reinforce the dominant view that lighter is better."[72]

For example, "[b]lack women who play romantic leads in major Hollywood films tend to have lighter skin and longer hair."[73] To take a specific example of this type of color discrimination, earlier this year, controversy erupted over the

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[70] Banks, *supra* note 24, at 672; Banks, *supra* note 38, at 1737; Neha Mishra, *India and Colorism: The Finer Nuances,* 14 Wash. U. Global Stud. L. Rev. 725, 743 (2015); Trina Jones, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 U.C. Irv. L. Rev. 1105, 1117 (2013).

[71] Banks, *supra* note 38, at 1737. The existence of products designed to change skin color does not suggest that skin color is so mutable as to undermine the application of *Batson*. For example, *Batson* applies to claims of sex discrimination in jury selection, even though it is possible to change one's sex through reassignment surgery.

[72] Hochschild & Weaver, *supra* note 6, at 7.

[73] Jones, *supra* note 4, at 1514.

casting of a lighter-skinned African-American actor, Zoe Saldana, to play a darker-skinned African American, Nina Simone, with many critics focused on whether Ms. Saldana was cast because "she, unlike Simone, is light skinned and therefore a more palatable choice for the Hollywood film than a darker skinned actress."[74] Further controversy arose when it was announced that Ms. Saldana would "don[] make-up to appear darker for the film."[75] As The Atlantic's Ta-Nehisi Coates noted, "Why do this if color is irrelevant? It is not any critic nor interlocutor who is asserting that Zoe Saldana isn't 'black enough.' It is the film-makers who made that determination and then—in the most literal and crudest sense—decided to make Saldana blacker."[76]

Lighter-skinned Blacks are also more likely to be found on television "as news anchors, as cast members in television shows, as dancers and love interests in music videos and as models in commercials."[77] Indeed, "even today, it is rare to find a dark-skinned woman in a positive leading role or as a love interest."[78] In Latin-American *telenovelas*, too, "almost all of the actors look white, unless they

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[74] Tanzina Vega, *Stir Builds Over Actress to Portray Nina Simone*, N.Y. Times (Sept. 12, 2012), http://www.nytimes.com/2012/09/13/movies/should-zoe-saldana-play-nina-simone-some-say-no.html?_r=1.

[75] Ta-Nehisi Coates, *The Appropriation of Nina Simone*, The Atlantic (Mar. 17, 2016), http://www.theatlantic.com/notes/2016/03/the-appropriation-of-nina-simone/474186/.

[76] *Id.*

[77] Norwood, *supra* note 49, at 594.

[78] *Id.*

are the maids and are then light brown."[79] Similarly, "[l]ighter-skinned women . . . predominate among successful Black contestants in beauty pageants and in music videos. They are also more likely than darker Blacks to be selected to endorse mainstream commercial products."[80]

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In sum, darker-skinned individuals, both within and across races, continue to experience discrimination in all facets of society based solely on the "raw fact of skin color." *See Powers*, 499 U.S. at 410. Thus, in carrying out *Batson*'s promise to protect against invidious discrimination against groups "capable of being singled out for differential treatment," this Court should require, at a minimum, a non-discriminatory explanation from the prosecutor as to why he struck a dark-skinned individual from jury service.

III. The People's Administrability Concerns Lack Merit

The People further argue—remarkably—that Defendant's *Batson* challenge should be rejected because claims of color discrimination would be too difficult to be administered by a court. But, the People are wrong. Administrability concerns do not and cannot override the guarantees of equal protection in jury selection that *Batson* promised. Even if they could, these concerns are meritless for at least

[79] Hunter, *supra* note 6, at 240.

[80] Jones, *supra* note 4, at 1514.

three reasons. *First*, courts are perfectly well suited to analyze color-based discrimination claims, having done so under statutes recognizing such claims since the 1800s. *Second*, the administrability of color is no more difficult than the administrability of race, which is indisputably a *Batson* "cognizable group." And *third*, to the extent any legitimate concern about administrability actually exists, the impact is minimal; as discussed in Section I above, all a successful *prima facie* case of color discrimination does is require the prosecutor to provide some non-discriminatory rationale for the peremptory strike.

A. Courts Are Well-Equipped to Identify Discrimination on the Basis of Skin Color

Courts have reviewed and recognized claims of color discrimination based on statutory regimes from as far back as the 1800s, including, among others, the 1866 Civil Rights Act, the 1964 Civil Rights Act, and the Fair Housing Act.[81] As such, there is no reason to believe—and the People offer none—that a court is somehow ill-equipped to do the same under a *Batson* challenge. Indeed, a trial court's job in administering a claim of color discrimination in a *Batson* challenge is far easier than in the cases cited below, since in a *Batson* challenge, the court can

[81] Nance, *supra* note 6, at 462-63 (noting the increase in color-based discrimination charges received by EEOC as awareness grows that color is an independent ground for discrimination); Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA Asian Pac. Am. L.J. 1, 5 (2007) ("the dramatic increase in racial mixing in American society indicates that the issue of multiracial classification will become increasingly prominent over the next several decades").

immediately see for itself whether the prosecutor has preferred lighter-skinned individuals to darker-skinned ones, instead of relying on a plaintiff's allegations and the witnesses that are available for trial.

1. 1866 Civil Rights Act

Section 1981 of the 1866 Civil Rights Act was intended to prohibit "discrimination on account of race, *color*, or previous condition of servitude." *United States v. Cruikshank*, 92 U.S. 542, 555 (1875) (emphasis added). Courts, accordingly, have repeatedly held that Section 1981 encompasses claims of color discrimination. For example:

- In *Vigil v. City of Denver*, the court held that a Mexican-American could assert a Section 1981 claim of color discrimination against his employer, holding that "Mexican-Americans are subject to color-based discrimination, and are within the coverage of § 1981." No. 77-F-197, 1977 WL 41, at *2 (D. Colo. May 23, 1977).
- Likewise, in *Jordan v. Whelan Security of Illinois, Inc*., the court, holding that the Supreme Court's decision in *Saint Francis College v. Al–Khazraji*[82] "*compels* the conclusion that § 1981 encompasses

[82] In *Al-Khazraji*, the Supreme Court held that allegations that a white employer discriminated against an Iraqi-American employee constituted racial discrimination, though Arabs were classified as white, because § 1981 protected against discrimination based on "ancestry or ethnic characteristics." 481 U.S. 603, 613 (1987).

claims of color discrimination," recognized an African-American's Section 1981 claim of color discrimination against her employer. 30 F. Supp. 3d 746, 753 (N.D. Ill. 2014) (emphasis added).

2. 1964 Civil Rights Act

Title VII of the 1964 Civil Rights Act also forbids employers from discriminating on the basis of an individual's "race*, color*, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (emphasis added). The legislative history of the section confirms what the text makes clear: Congress intended to eradicate both race *and* color discrimination.[83] The Equal Employment Opportunity Commission's interpretation of the statute likewise states that "[e]ven though race and color overlap, *they are not synonymous*. *** Although Title VII does not define 'color,' the courts and the Commission read 'color' to have its commonly understood meaning – pigmentation, complexion, or skin shade or tone."[84] Here, too, courts have adjudicated numerous claims of color discrimination:

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[83] Jones, *supra* note 4, at 1533. Jones notes that, the legislative history of Title VII's enactment further supported the conclusion that the word "color" did not merely mean race, but the "shade of color" as well. *Id*. n.194. Similarly, the legislative history of the 1866 Civil Rights Act and the text of later civil rights laws treated race and color as two separate categories as well. *See McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 287 (1976) (quoting Senator Trumbull introducing the 1866 bill as "applying to 'every race and color'") (citing Cong. Globe, 39th Cong., 1st Sess., 211 (1866)); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. Rev. 431, 431-32 (1966) (referencing H.R. 3994, H.R. 7142, and the Civil Rights Acts of 1957 and 1960).

[84] *See* U.S. Equal Emp't Opportunity Comm'n, *Facts About Race/Color Discrimination* (2008), https://www.eeoc.gov/facts/fs-race.html.

- In *Walker v. IRS*, the court recognized a claim for color discrimination under Title VII between an African-American employee and African-American employer, holding that "'race' is to mean 'race,' and 'color' is to mean 'color.'" 713 F. Supp. 403, 406 (N.D. Ga. 1989).
- In *Felix v. Marquez*, the court recognized a claim for color discrimination under Title VII filed by a mixed-race Puerto Rican woman, and noted that, "considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most *practical* claim to present." No. 78-2314, 1980 WL 242, at *1 (D.D.C. Sept. 11, 1980) (emphasis added).
- In *Arrocha v. City University of New York*, the court held that a Mexican plaintiff's allegation "that light-skinned Hispanics were favored over dark-skinned Hispanics" in hiring asserted a *prima facie* claim of color discrimination under Title VII. No. CV021868, 2004 WL 594981, at *6 (E.D.N.Y. Feb. 9, 2004).
- And in numerous cases, courts have dismissed claims for color discrimination on the ground that, by solely asserting an administrative claim on the basis of race, and not on the basis of color, the plaintiff failed to exhaust his or her administrative remedies, because race and color comprise two distinct claims under Title VII. *See, e.g.*, *Bryant v.*

Bell Atl. Maryland, Inc., 288 F.3d 124, 133 n.5 (4th Cir. 2002); *Gill v. Bank of Am. Corp.*, 15-cv-319, 2015 WL 4349935, at *4 (M.D. Fla. July 14, 2015); *Hunter v. Texas Energy Servs. LP*, 14-cv-142, 2014 WL 5426454, at *3 (S.D. Tex. Oct. 23, 2014).

Other sections of the 1964 Civil Rights Act also recognize independent claims of color discrimination, and courts are responsible for administering these claims as well. *See, e.g.*, *Williams v. Wendler*, 530 F.3d 584, 587 (7th Cir. 2008) ("Title VI, like Title VII, forbids discrimination on the basis of 'color' as well as on the basis of 'race.'"); *Felix v. Marquez*, No. 78-2314, 1981 WL 275, at *11 (D.D.C. Mar. 26, 1981) ("Discrimination on account of color is *expressly forbidden* by the 1964 Civil Rights Act, not only in Title VII (employment), but also in Titles II (public accommodations), III (public facilities), IV (public education), VI (federally assisted programs), VIII (voting) and IX (community relations services)") (emphasis added).

3. Section 1982 and the Fair Housing Act

In *Rodriguez v. Gattuso*, the court awarded damages to a Latino couple consisting of a dark-skinned husband and a light-skinned wife on their color discrimination claim under 42 U.S.C. § 1982 and the Fair Housing Act. 795 F. Supp. 860 (N.D. Ill. 1992). There, a prospective landlord separately rejected the husband but permitted the wife to view an apartment. *Id.* at 865. In ruling for the

plaintiffs, the court held, "someone who is of the same race *** but who is treated differently because of his dark skin has been discriminated against because of *his color*." *Id*. (emphasis in original).

* * *

In light of all the other legal contexts in which courts already analyze color discrimination, the People's administrability concerns should be rejected on this ground alone.

B. Color Is No Less Administrable a Category Than Race Under *Batson*

The People's administrability concerns should further be rejected given that race—which the People do not dispute is a *Batson*-protected classification—presents just as many administrability challenges as does skin color. Neither the Fourteenth Amendment, nor *Batson*, nor any of the statutes referenced above provides an authoritative definition of "race" for guidance. In grappling with the "enduring confusion" of defining and administering racial categories, *see Vill. of Freeport v. Barrella*, 814 F.3d 594, 603 (2d Cir. 2016), courts over the years have tried out a broad range of proxies for race without settling on a single consensus definition,[85] including ethnicity,[86] ancestry,[87] national origin,[88] distinctive

[85] *Contra* People's Br. at 64. The challenges in administering race can be vividly seen in the classification of South Asians. In *United States v. Thind*, the Supreme Court, in denying citizenship to a South Asian man, held that the "brown Hindu" was Caucasian but not "White," even though just a few months earlier, the same Court, in denying citizenship of a Japanese man,

"physiognomy,"[89] cultural characteristics,[90] and common perception.[91] Indeed, the People's argument that race is administrable but color would be too hard to administer ironically echoes the argument raised by Chief Justice Burger's dissent in *Batson* itself, which raised the concern that making a record of jurors' races would prove difficult. *See Batson*, 476 U.S. at 129-30 & n.10.

Despite Chief Justice Burger's concerns, and the challenges raised above, courts continue to apply the three-step *Batson* framework to race-based challenges to prosecutors' peremptory strikes. *E.g.*, *Rico v. Leftridge-Byrd*, 340 F.3d 178, 183 (3d Cir. 2003) (Applying *Batson* in a race-based challenge even while asking, "[H]ow does one define the 'cognizable racial group' to which *Batson* itself referred? And how does one define 'race' when the understanding of 'race' itself

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had held that "Caucasian" and "White" were synonymous terms. 261 U.S. 204 (1923). Compare *Thind*, 261 U.S. at 209 *with Ozawa v. United States*, 260 U.S. 178, 198 (1922). Then, in the 1970s, the U.S. Census again abruptly designated South Asians as "White," precluding South Asians from receiving the protections of civil rights legislation passed during the 1960s. Susan Koshy, *Category Crisis: South Asian Americans and Questions of Race and Ethnicity*, 7 Diaspora: J. Transnatl. Stud. 285, 294 (1998); *see also* Harpalani, *supra* note 62, at 616-22 (detailing the changing racial classifications applied to South Asians through the late-nineteenth and twentieth centuries).

[86] *E.g.*, *Vill. of Freeport*, 814 F.3d at 607.

[87] *E.g.*, *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 757 (7th Cir. 2006).

[88] *Vill. of Freeport*, 814 F.3d at 606.

[89] *Al-Khazraji*, 481 U.S. at 613; *see also* U.S. Equal Emp't Opportunity Comm'n, *Questions and Answers About Race and Color Discrimination in Employment* (2006), https://www.eeoc.gov/policy/docs/qanda_race_color.html (identifying, among other characteristics, "skin color, hair texture or styles, or certain facial features").

[90] *Id.*

[91] *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1218 (5th Cir. 1987).

has changed over the centuries?"). There is no reason why color-based challenges cannot be similarly addressed as well.

C. Any Administrability Concern Has Minimal Impact Given That the Prosecutor Can Simply Provide a Race-Neutral Explanation for the Strike.

In short, the People's administrability concerns do not, and cannot, trump the constitutional imperative of eradicating invidious color-based discrimination in jury selection. But even assuming *arguendo* that some unique administrability concern exists with respect to a color-discrimination claim that interferes with an appellate court's ability to later review the record, any such concern should be minimized by *Batson*'s three-step inquiry. *See supra* Section I. Again, all that is needed, upon the making of a *prima facie* case, is a simple non-discriminatory explanation from the prosecutor. *Cf. Rico*, 340 F.3d at 183–84 ("Most trial courts, it appears, fairly quickly learned to avoid having to determine the extraordinarily difficult question of when and where to draw the line. Rather, most courts simply assumed without deciding that *Batson* [applies] and then went on to dispose of the *Batson* issue, most often by finding that the prosecutor had (or had not) offered a race-neutral explanation for a strike sufficient to rebut a defendant's prima facie case.").

Given this minimal burden on the People, the solution to any such administrative or record-building difficulty is not to tolerate peremptory strikes

based on race, sex, ethnicity, religion, or color. It is to review "a trial court's ruling on the issue of discriminatory intent" with deference, *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008), and abide by the principle that the burden of making a record falls to the appellant. Of course, if "meaningful appellate review" proves "impossible" in a particular case (People's Br. 68), the decision below will be affirmed, or the case remanded for further factual development. But where the claim of discrimination can be understood—because, for example, there is no dispute that certain venirepersons have darker skin than others—nothing more should be required, and appellate review should occur. *Cf. Miller-El*, 545 U.S. at 247 ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.").

Review is possible here. Below, defense counsel clearly explained that "[t]he district attorney has now preempted *all* the female black women," including "[t]he black or dark-colored" potential jurors. A313 (emphasis added). The prosecution's response was not, "which women?" or "I don't think these women were all dark-colored"; it was, "can't do black or skin color, Judge. But I have reasons for everybody." A313. Before this Court, the People concede that the prosecutor "never gave a reason" for striking the venireperson at issue in this appeal (People's Br. 2), and do not dispute that "if the prosecutor offers no

explanation [at Step 2], the defendant has succeeded in meeting the ultimate burden of establishing an equal protection violation." *Allen*, 86 N.Y.2d at 109.

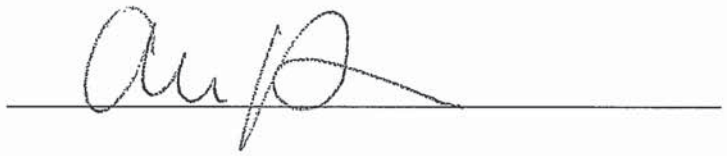
This case thus squarely presents the question whether a claim of discrimination based on skin color can ever shift the *Batson* inquiry from Step 1 (prima facie case) to Step 2. The Court is perfectly well-equipped to answer that legal question.

CONCLUSION

For the foregoing reasons, and in light of the prosecutor's failure to provide any reason for the peremptory strike of the juror in question, the Court should hold that the principles of Equal Protection under *Batson* were violated and order a new trial.

Dated: October 6, 2016
New York, New York

Respectfully Submitted,



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