

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v.

ANTIWUAN T. CAMPBELL

From Columbus County

File No. 15 CRS 50590

File No. COA18-998-2

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE OF THE RODERICK AND
SOLANGE MACARTHUR JUSTICE CENTER
AND THE AMERICAN CIVIL LIBERTIES
UNION IN SUPPORT OF DEFENDANT-
APPELLANT**

The Roderick and Solange MacArthur Justice Center and the American Civil Liberties Union, through their counsel and pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, respectfully request leave to file an amicus curiae brief in support of Defendant-Appellant Antiwuan T. Campbell. The proposed amicus brief is conditionally filed contemporaneously with this motion pursuant to Rule 28(i)(2).

In support of this motion, the applicants demonstrate to the Court the following:

THE NATURE OF THE APPLICANTS' INTEREST

The Roderick and Solange MacArthur Justice Center

(MacArthur) 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 attorneys have led civil rights battles in areas that include the death penalty, police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women. MacArthur has an interest in ensuring that criminal cases proceed in a manner consistent with the Constitution and that criminal defendants are tried before a jury that was selected in a process free from racial discrimination.

The **American Civil Liberties Union** (ACLU) is a national, non-profit, non-partisan civil liberties organization with approximately two million members dedicated to the principles of liberty and equality embodied in the Constitution. It has a longstanding commitment to ensuring the constitutionally required protections of a fair trial and jury and to combating racial discrimination.

REASONS WHY AN AMICUS CURIAE BRIEF IS DESIRABLE

As set forth above, MacArthur and ACLU have a wealth of experience and expertise regarding racial discrimination in the criminal justice system. This case raises critical constitutional issues regarding racial discrimination in the jury selection process. It also reflects a growing trend of prosecutors seeking to strike potential jurors—particularly Black potential jurors—based on their support for the Black Lives Matter movement and a tendency of courts to permit such strikes as race neutral. This practice reflects a misunderstanding of Black Lives Matter and a misapplication of *Batson v. Kentucky*, and it is fundamentally inconsistent with the constitutional imperative of having a jury untainted by racial discrimination.

ISSUE OF LAW TO BE ADDRESSED

The amicus brief will explain the history and nature of the Black Lives Matter movement and correct pervasive misapprehensions about the movement. In so doing, it will illustrate why support for Black Lives Matter is inextricably bound up in racial identity and why striking a potential juror for supporting Black Lives Matter is not race neutral under *Batson v. Kentucky*, 476 U.S. 79 (1986). It will also

explain the individual and societal harms that flow from permitting such strikes.

APPLICANTS' POSITION WITH RESPECT TO THE ISSUE

As demonstrated in the attached amicus brief, Black Lives Matter is a civil rights movement bound up in Black identity and lived experience. Support for Black Lives Matter is explicitly, statistically, and stereotypically associated with Black people. Because Black people are statistically more likely to support the movement and because their support is often bound up in their identity and lived experience, support for Black Lives Matter is inextricably intertwined with race. And because Black support of Black Lives Matter often comes from a personal place, questioning Black prospective jurors regarding their support for Black Lives Matter is tantamount to inquiring whether these jurors believe their own lives, and the lives of their families and loved ones, have inherent value—an inquiry never imposed on white prospective jurors. Accordingly, peremptory challenges predicated on support for Black Lives Matter are suspect under *Batson*. Striking a juror because she supports a movement asserting the worth of Black

lives, including potentially the worth of her own life—is not tolerated by the Constitution.

CONCLUSION

For the foregoing reasons, MacArthur and ACLU respectfully request that this Court grant them permission to file an amicus curiae brief in support of Defendant-Appellant.

June 18, 2021

Respectfully submitted,

/s/ Cassandra Stubbs

Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION
201 W. Main St. Suite 402, Durham,
NC 27701
(919) 688-4605
State Bar No. 37172
cstubbs@aclu.org

N.C.R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Elizabeth R. Cruikshank
(Pro Hac Vice pending)
Sarah H. Sloan
(Pro Hac Vice pending)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

ecruikshank@orrick.com

Daniel Rubens
(Pro Hac Vice pending)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
drubens@orrick.com

Easha Anand
(Pro Hac Vice pending)
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

*Attorneys for Amici Curiae of The Roderick and Solange Macarthur
Justice Center and The American Civil Liberties Union*

CERTIFICATE OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of the foregoing **MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANT-APPELLANT** on counsel in this action by causing the same to be emailed to the following addresses:

Peter A. Regulski
Joseph L. Hyde
Nicholas R. Sanders
Assistant Attorney General North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6549
pregulski@ncdoj.gov
jhyde@ncdoj.gov
nsanders@ncdoj.gov

Geeta N. Kapur
Attorney & Counselor at Law
Post office Box 51035
Durham, NC 27717
(919) 260-1977
gkapuratty@aol.com

June 18, 2021

AMERICAN CIVIL LIBERTIES UNION

/s/Cassandra Stubbs

Cassandra Stubbs
201 W. Main St. Suite 402, Durham, NC
27701
(919) 688-4605
State Bar No. 37172
cstubbs@aclu.org
Counsel for Amici Curiae

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INTRODUCTION

Access to jury service cannot be denied because of a prospective juror’s race. But the trial court below tolerated the exclusion of a Black juror because of her support for Black Lives Matter, a civil rights movement inextricably bound up in Black identity and lived experience. *Amici* agree with Appellant’s analysis of how the *Batson* framework applies in this case. We write to explain the racial contours of support for Black Lives Matter and the profound consequences—to individuals and the justice system as a whole—of excluding prospective jurors on

that basis. Put simply, striking a juror because she supports a movement asserting the worth of Black lives—the worth of her own life—is not tolerated by the Constitution.

Support for Black Lives Matter is explicitly, statistically, and stereotypically associated with Black people. Because Black people are statistically more likely to support the movement and because their support is often bound up in their identity and lived experience, support for Black Lives Matter is inextricably intertwined with race. And because Black support of Black Lives Matter often comes from a personal place, questioning Black prospective jurors regarding their support for Black Lives Matter is tantamount to inquiring whether these jurors believe their own lives, and the lives of their families and loved ones, have inherent value—an inquiry never imposed on white prospective jurors.

In asserting their right not to be killed while walking, jogging, or driving; while shopping at Walmart or worshipping in church; while existing in their own homes or lying face down in handcuffs, supporters of Black Lives Matter affirm their own humanity. When Black people today declare, “Black Lives Matter” in the face of race-based killings by

police and vigilantes, their voices echo Sojourner Truth asking, “Ain’t I A Woman” in the face of chattel slavery and Black protesters declaring, “I Am A Man” in the face of a racial caste system. And, just as clearly as the cries of their forebears, their declaration is inextricably linked to their sense of self and their Black identity. Striking jurors on that basis is thus antithetical to the protections of *Batson*.

FACTUAL BACKGROUND

In this case, defense counsel raised a *Batson* challenge after the prosecution exercised three out of four peremptory challenges to strike Black prospective jurors.¹ The trial court concluded that a prima facie case of purposeful discrimination had not been established, but it nevertheless ordered the prosecution to state a race-neutral basis for its peremptory challenges. Regarding Ms. Holden, one of the three stricken Black venire members, the prosecution explained, “[S]he was a participant, if not an organizer, for Black Lives Matter ... [and] implied unstated issues ... may arise due to either law enforcement, the State, or other concerns we may have.” The trial court then stated that even if

¹ The record contains a narrative summary of the voir dire proceedings, but not a verbatim transcript of them.

there had been a prima facie showing, the prosecution's justification for the peremptory strike was race-neutral.

Ms. Holden was not seated, and the defendant was convicted.

SUMMARY OF THE ARGUMENT

The trial court failed to appreciate the racial implications of support for Black Lives Matter.

In Part I, *amici* offer an accurate record regarding Black Lives Matter's goals, tactics, and supporters. Support for Black Lives Matter is inextricably bound up in race: Statistics show that Black people are more likely to support the movement, and statements from Black supporters of the movement demonstrate that they have deeply personal reasons for their support.

In light of those facts about Black Lives Matter, Part II argues that support for Black Lives Matter cannot be deemed race-neutral; accordingly, peremptory challenges justified based on support for Black Lives Matter are suspect under *Batson*.

Finally, *amici* respectfully suggest in Part III that this Court exhort prosecutors and judges to use proper caution when bringing questions about Black Lives Matter into voir dire.

Properly understood, support for Black Lives Matter cannot be separated from race—especially for Black supporters. Black Lives Matter is a movement and ideology that affirms the value of Black lives in the face of state-sanctioned violence and systemic racism. Because it is decentralized and its supporters espouse a variety of beliefs and policy preferences, it is impossible to read a statement of support for Black Lives Matter as anything other than an affirmation of the inherent worth of Black lives. At core, Black supporters of Black Lives Matter are asserting a belief in their own human dignity and the value of their lives.

ARGUMENT

I. Support For Black Lives Matter Is Inextricably Bound Up With Race.

Support for Black Lives Matter is not race-neutral. First, Black Lives Matter's goals are inherently race-based—the ideology is premised on the fundamental humanity of Black people. Though the movement encompasses a range of beliefs, recognition of that fundamental humanity is at the core of the movement. *Infra*, I.A. Second, support for Black Lives Matter differs starkly by race. Black

people are both far more likely than white people to support the movement and far more personally connected to it. *Infra*, I.B.

A. Black Lives Matter Is Predicated On The Worth Of Black Lives.

Black Lives Matter is an ideology based on the premise that Black lives have worth and must be protected and allowed to thrive. See Wesley Lowery, *They Can't Kill Us All: The Story of the Struggle for Black Lives* 87, 89 (2017) [hereinafter Lowery, *They Can't Kill Us All*]. By asserting the value of Black lives, Black Lives Matter “respond[s] to the systemic devaluation of Black life.” Barbara Ransby, *Making All Black Lives Matter: Reimagining Freedom in the 21st Century* 74-75 (2018) [hereinafter Ransby].

The phrase is the name of both an organization and a broader social justice movement. Lowery, *They Can't Kill Us All* at 89. The organization, created after activists from 18 different cities protested together in Ferguson and formally known as Black Lives Matter Global Network Foundation, is “adaptive and decentralized with a set of guiding principles.” Patrisse Khan-Cullors, *We Didn't Start a Movement. We Started a Network*, Medium (Feb. 22, 2016), <https://tinyurl.com/y3eorvzr> [hereinafter Khan-Cullors, *Network*]; see

also *Herstory*, Black Lives Matter, <https://tinyurl.com/y3c9zcqw> (last visited January 27, 2021) [hereinafter *Herstory*]. It “eschews hierarchy and centralized leadership.” Jelani Cobb, *The Matter of Black Lives*, *The New Yorker* (Mar. 7, 2016), <https://tinyurl.com/y388srmg>. The mission of the organization is “to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes.” *About*, Black Lives Matter, <https://tinyurl.com/y3razhag> (last visited May 19, 2021).

The broader social justice movement began in 2013, when the hashtag “#BlackLivesMatter” was initially used in response to the acquittal of George Zimmerman after he shot and killed Trayvon Martin. Khan-Cullors, *Network*. It came to national prominence a year later, when the killing of Michael Brown in Ferguson, Missouri sparked protests there and across the country. Lowery, *They Can’t Kill Us All* at 85. And “[a]s the list of names grew—each week, each day providing another—so did the urgency of the uprising that would become a movement.” *Id.* at 231. The phrase “became a mantle under which thousands of demonstrators, activists, and groups began protesting both

online and in the streets.” *Id.* at 89. Protesters used it to “assert[]” the “humanity” “of every slain black man and woman.” *Id.* at 195.

Although neither the Black Lives Matter organization nor the broader movement has a “party line,” “shared assumptions, values, and analyses” undergird them. Ransby at 96. Chief among those shared beliefs is the fundamental premise that Black lives have value and must be protected—particularly from state-sanctioned violence—and allowed to thrive. Lowery, *They Can’t Kill Us All* at 87.

As the name suggests, Black Lives Matter “is an affirmation of Black folks’ humanity,” *Herstory*, and promotes “the validity of Black life,” Decl. of Patrisse Cullors, co-founder of Black Lives Matter, in Support of Black Lives Matter Network, Inc.’s Motion to Dismiss and Special Motion to Strike, *Doe v. Mckesson*, No. 16-CV-0742 (M.D. La. Aug. 7, 2017), Dkt. No. 68-2. Accordingly, “[t]he term *unapologetically Black* ... has become one of the mantras for this movement.” Ransby at 97.

That belief in the value of Black lives is not at the expense of other lives. To the contrary, Black Lives Matter “call[s] for a united focus on issues of race, class, gender, nationality, sexuality, disability, and state-

sponsored violence. It argues that to prioritize one social issue over another issue will ultimately lead to failure in the global struggle for civil and human rights.” Herbert G. Ruffin II, *Black Lives Matter: The Growth of a New Social Justice Movement*, BlackPast (Aug. 23, 2015), <https://tinyurl.com/y6ellnfc> [hereinafter *Ruffin, New Social Justice Movement*]; see also Richard Cohen, *Black Lives Matter Is Not A Hate Group*, Southern Poverty Law Center (July 19, 2016), <https://tinyurl.com/jae5kxf>.

Black Lives Matter relies on a variety of methods to effect change. It aims to “build[] grassroots power with Black communities who have been left out [of] the political process” and to elect politicians who share its visions. *6 Years Strong*, Black Lives Matter, <https://tinyurl.com/y4dqctx> (last visited May 19, 2021); see also Wesley Lowery, *How Civil Rights Groups Are Using The Election [to] Create Black Political Power*, Wash. Post (Nov. 18, 2016), <https://tinyurl.com/y4yyh24j>. It supports legislation that safeguards Black lives. See, e.g., *Black Lives Matter Publishes ‘Campaign Zero’ Plan to Reduce Police Violence*, NPR (Aug. 26, 2015), <https://tinyurl.com/yxr5sqn3> (plan to reduce police violence, including

guidelines to limit the use of force and prohibitions on quotas for tickets and arrests); *Victory: The ‘Right to Know’ Bill on Police Transparency Is Signed Into California Law*, Black Lives Matter (Oct. 4, 2018), <https://tinyurl.com/yyvq8vql> (support for legislation to make public internal investigations conducted when police kill people); Ruffin, *New Social Justice Movement* (support for federal Death in Custody Reporting Act, which would require states receiving federal funds to document and report all deaths at the hands of police that occur during arrest).

Black Lives Matter ultimately seeks to drive public discourse, with a particular focus on “the battle to convince the rest of the country that the police killings of black men and women [are] a crisis.” Lowery, *They Can’t Kill Us All* at 158, 195. Black Lives Matters activists and supporters raise that “urgent awareness,” *id.*, through protests and acts of civil disobedience. *See, e.g., id.* at 61, 152-56 (strategic acts of civil disobedience to draw attention to issues that non-Black people may be ignorant about); Ruffin, *New Social Justice Movement* (same). “Law is fundamental to what movement actors are fighting” for, and Black Lives Matter aims to “reimagine [the law’s] possibilities.” Amna A.

Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 409 (2018). The views of Black Lives Matter supporters in no way preclude them from faithful and capable jury service.

B. Support For Black Lives Matter Is Connected To Race.

Since its inception, support for Black Lives Matter has been sharply divided along racial lines, particularly in the first few years of the movement. For instance, in September 2015, 65 percent of African-American respondents reported that they “mostly agreed” with Black Lives Matter, compared to just 31 percent of white respondents; correspondingly, while 5 percent of African-American respondents reported that they “mostly disagreed” with Black Lives Matter, that figure was 27 percent for white respondents. PBS NewsHour/Marist Poll (September 2015), <https://tinyurl.com/y46rxzl4>. At the same time, 65 percent of African-American respondents agreed that Black Lives Matter “focuses attention on the real issues of racial discrimination,” a view shared by just 25 percent of white respondents; 26 percent of African-American respondents and 59 percent of white respondents believed it “[d]istracts attention from the real issues of racial discrimination.” *Id.*

In a July 2016 Pew poll, 65 percent of Black respondents reported that they supported Black Lives Matter, with 41 percent of Black respondents strongly supporting Black Lives Matter, compared to 40 percent of white respondents reporting support for Black Lives Matter and only 14 percent of white respondents strongly supporting Black Lives Matter. Pew Research Center, *How Americans View the Black Lives Matter Movement* (July 8, 2016), <https://tinyurl.com/y5gd6w7y>. That skew has persisted: According to a poll conducted by the Harvard Center for American Political Studies and The Harris Poll in July 2017, around the time of voir dire in this case, 83 percent of Black respondents had a favorable view of Black Lives Matter, whereas only 35 percent of white respondents shared that favorable view. See Harvard-Harris Poll, July 2017 (July 26, 2017), <https://tinyurl.com/y27opc9y> [hereinafter Harvard-Harris Poll]; Jonathan Easley, *Poll: 57 Percent Have Negative View of Black Lives Matter Movement*, The Hill (Aug. 2, 2017), <https://tinyurl.com/y4lv4l7o>.²

² Although support for the Black Lives Matter movement has grown in recent months, that racial disparity persists today: Eighty-seven percent of Black respondents expressed support for the movement, with 62 percent “strongly” supporting it; among white respondents, only 45 percent expressed support for

Because “Black Lives Matter” is both a decentralized network and a broad coalitional movement, support for Black Lives Matter can signal a range of views, from general alignment with the fight against police anti-Black violence to active participation in activism and protests coordinated by the network and its allies. Many of the people who express support for Black Lives Matter are “a mass base of followers and supporters, who may not be formally affiliated with any of the lead organizations but are supportive of and sympathetic toward the spirit of the movement and are angered by the practices, policies, and events that sparked it.” Ransby at 5.

Black supporters of Black Lives Matter have offered a range of reasons for their support, but their reasons are often rooted in their identity and lived experiences: Many supporters came to the movement after they or their family members or close friends encountered police violence, and many have described their support as stemming from a desire to protect their loved ones from future violence. Patrisse Khan-

the movement, with just 22 percent expressing strong support. Pew Research Center, *Support for Black Lives Matter Has Decreased Since June but Remains Strong Among Black Americans* (Sept. 16, 2020), <https://tinyurl.com/y42xf7mm> [hereinafter Pew Research Center, *Support for BLM*].

Cullors, who originated the #BlackLivesMatter hashtag and co-founded the Black Lives Matter network, has explained that her own “call to action” came when her brother, who suffers from mental illness, was arrested. Patrisse Khan-Cullors & asha bandele, *When They Call You a Terrorist: A Black Lives Matter Memoir* 120 (2017). She described many Black supporters of the nascent movement drawing on their personal connections to the movement: “We talk about Trayvon and some of us talk about our little brothers. Some women talk about their lovers and remember Oscar Grant. Some talk about their fathers and remember Eric Garner.” *Id.* at 218.

Other Black supporters of the movement have made similar statements. Edward Crawford, a Ferguson protester, explained that “the reason he had come out into the streets was because he had previously been subject to traffic stops and searches and had felt he was harassed by Ferguson police because of the color of his skin.” Lowery, *They Can’t Kill Us All* at 57-58. As another Ferguson organizer explained, “There is this overwhelming feeling that [police] can shoot us, they can beat us—we can even have this stuff on video and the police officer still gets off.” *Id.* at 45.

II. Support For Black Lives Matter Is Not A Race-Neutral Trait.

The trial court in this case found no prima facie case of discrimination—and, in the alternative, accepted the prosecution’s justification for the strike as not racially motivated—even when the prosecutor cited Ms. Holden’s participation in Black Lives Matter as a basis for striking her. This Part explains that support for Black Lives Matter is *not* a race-neutral trait.

A. Support For Black Lives Matter Is A Proxy for Race.

Support for Black Lives Matter is not race-neutral because it is both highly correlated and stereotypically associated with race.

The weight of precedent makes clear that traits that serve as statistical proxies for race are not race-neutral under *Batson*. Courts have not hesitated to recognize this principle where Black venire members have been struck because they resided in predominantly Black cities or neighborhoods. In *United States v. Bishop*, for instance, the Ninth Circuit concluded that a Black juror’s residence in Compton was not a race-neutral justification for striking her from the jury. 959 F.2d 820, 826 (9th Cir. 1992), *overruled on other grounds in United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010). The court accepted

defense counsel’s argument that “in view of the fact that approximately three quarters of Compton’s population was black, ... residence in this case served as a mere surrogate for race.” *Id.* at 822.³

Support for Black Lives Matter similarly “serve[s] as a mere surrogate for race.” As explained in Part I.B, around the time of voir dire in this case, the percentage of Black respondents who supported Black Lives Matter was between two and three times the percentage of white respondents. Conversely, far more white than Black respondents

³ See also *State v. Robinson*, 375 N.C. 173, 181 846 S.E.2d 711, 718 (2020) (death row inmate “presented specific instances ... where the race-neutral explanations given by prosecutors were pretextual or overtly based on race,” including “evidence that an African-American juror was struck from the jury because of his membership in a historic African-American civil rights organization, the NAACP, and that another juror was struck from the jury because she graduated from a historically black college and university”); *People v. Gonzales*, 165 Cal. App. 4th 620, 631 (2008) (striking jurors because they spoke Spanish “is strongly suspicious of being a ruse for excusing those persons who may be perceived as more closely identifying with their national origin and or their Hispanic ethnicity”); *United States v. Wynn*, 20 F. Supp. 2d 7, 14-15 (D.D.C. 1997) (concluding that striking white jurors because they resided in a predominantly white area had a “disparate impact on white members of the venire,” raising the likelihood the residency criterion was being used as “a proxy for race”); *Commonwealth v. Horne*, 535 Pa. 406, 411 635 A.2d 1033, 1035 (1994) (Nix, C.J.) (“Residence is too closely tied to race to accept the prosecutor’s explanation.”); *Ex parte Bird*, 594 So. 2d 676, 682 (Ala. 1991) (describing striking a venire-member for being from a “high crime” area as “constitutionally deficient” because, were that justification “given credence,” it could “serve as [a] ‘convenient talisman[] transforming *Batson*’s protection against racial discrimination in jury selection into an illusion”).

expressed disagreement with Black Lives Matter. In one poll, 83 percent of Black respondents had a favorable view of Black Lives Matter, whereas only 35 percent of white respondents did, *see* Harvard-Harris Poll. A prosecutor aiming to strike Black jurors can safely point to support for Black Lives Matter as a basis for a strike to ensure that most Black jurors, but very few white jurors, will be removed from the venire. Like residing in Compton, support for Black Lives Matter should be treated as an unconstitutional “surrogate for race” when used as a justification for striking a prospective juror.

Other supposedly race-neutral justifications have also been rejected where they depended on traits stereotypically associated with a particular race. For instance, the Georgia Court of Appeals found a *Batson* violation where a prosecutor struck a Black prospective juror because that venire member had “a full set of gold teeth.” *Clayton v. State*, 341 Ga. Ct. App. 193, 199, 797 S.E.2d 639, 644 (2017). Rejecting the prosecutor’s explanation that he viewed having gold teeth as analogous to dyeing one’s hair blue in signaling that the prospective juror was “being iconoclastic,” the court said it could not “ignore the fact that having a full mouth of gold teeth is a cultural proxy stereotypically

associated with African-Americans.” *Id.* at 196, 198, 797 S.E.2d at 642, 644. The court acknowledged that, “[a]s with most stereotypes, this characteristic is not couched in terms that explicitly reference race,” but concluded that “striking the African-American juror because he had a full set of gold teeth cannot be said to be race neutral.” *Id.* at 199, 797 S.E.2d at 644.

Similarly, the South Carolina Supreme Court refused to accept a juror’s dreadlocks as a race-neutral justification for a strike. *McCrea v. Gheraibeh*, 380 S.C. 183, 669 S.E.2d 333 (2008). It reasoned that “[r]egardless of their gradual infiltration into mainstream American society, dreadlocks retain their roots as a religious and social symbol of historically black cultures.” *Id.* at 187, 669 S.E.2d at 335.

Like the “full mouth of gold teeth” in *Clayton*, support for Black Lives Matter is a “proxy stereotypically associated with” Black prospective jurors. As the *Clayton* court held, pointing to a trait that, at least in public consciousness, is largely linked to one particular race cannot serve as a race-neutral justification for a strike. And despite Black Lives Matter’s “gradual”—and long overdue—“infiltration” into mainstream American society, Black Lives Matter has, and will

necessarily retain, its “roots” in Black culture. *See McCrea*, 380 S.C. at 187, 669 S.E.2d at 335. For these reasons, this Court should reject the notion that support for Black Lives Matter is race-neutral and instead find that it is a “proxy stereotypically associated with” Black prospective jurors.

Finally, a purportedly race-neutral justification must be rejected if it depends on racial stereotypes. In *Bishop*, for example, the Ninth Circuit expressed concern that the prosecutor’s stated bases for his strike—“that people from Compton are likely to be hostile to the police because they have witnessed police activity and are inured to violence,” 959 F.2d at 825, and are “likely to take the side of those who are having a tough time,” *id.* at 822—drew on “group-based presuppositions” and amounted to “little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant,” *id.* at 825.⁴ So, too, here: In a case that has no connection to

⁴ *See also People v. Turner*, 90 Cal. App. 4th 413, 420 (2001) (“To state that ‘Inglewood jurors’ have a different attitude toward the drug culture is just as stereotypical as the reason given in *Bishop*.”); *Wynn*, 20 F. Supp. 2d at 15 (“Although residence may appear to be a facially neutral explanation for the exercise of a peremptory challenge, ‘where residence is utilized as a surrogate for racial stereotypes ... its invocation runs afoul of the guarantees of equal

Black Lives Matter, the assumption that supporters of the movement might have “implied unstated issues” precluding them from jury service similarly amounts to the kind of “group-based presupposition[]” forbidden by *Batson*.

B. Support For Black Lives Matter Is Inherently Racialized.

Support for Black Lives Matter is also inextricably intertwined with race because of what the movement represents. Questions asked of a Black juror about Black Lives Matter target that juror’s racial identity and rarely have a parallel to questions asked of white jurors; strikes made of a Black juror for supporting Black Lives Matter similarly have no parallel among strikes made of white jurors. Moreover, cases holding that membership in the NAACP cannot constitute a race-neutral basis for a strike dictate that support for Black Lives Matter can’t either.

protection.” (alteration in original)); *Congdon v. State*, 262 Ga. 683, 684, 424 S.E.2d 630, 631-32 (1993) (finding a constitutional violation where Black residents of a predominantly Black small town were struck because “unnamed [B]lack residents of [the town] had harshly criticized the sheriff for his handling of another case” and thus the strikes were based on the “stereotypical belief” that all Black residents “were biased against the sheriff”).

For Black supporters of Black Lives Matter, the movement often represents far more than social affiliation; it involves an assertion of their humanity in the face of state-sponsored violence and systemic racism. *See supra*, Part I.B. When Black people support Black Lives Matter, they are—like Black protesters half a century ago who carried placards proclaiming, “I Am A Man,” Hampton Sides, *Hellhound on His Trail* 81 (2010)—asserting the basic value of their own lives. This assertion is unique to Black people and cannot be separated from the Black experience in America.

Questioning Black prospective jurors regarding their support for Black Lives Matter thus necessarily entails an inquiry into whether their lives, and the lives of their children and loved ones, have inherent value and are entitled to protection from deadly racial discrimination—a question that white Americans do not face. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2247 (2019) (“[D]isparate questioning can be probative of discriminatory intent.”). And striking a Black prospective juror for supporting Black Lives Matter is tantamount to striking a Black juror for believing in her own dignity and humanity—a prospect that white Americans do not encounter.

In *Turnbull v. State*, the Florida Court of Appeal reversed a “trial court’s decision to accept elicited responses to questions on racial profiling as race-neutral.” 959 So. 2d 275, 278, 31 Fla. L. Weekly D2728 (Fla. Dist. Ct. App. 2006). “The term ‘racial profiling,’ standing alone,” the court held, evokes a “visceral response,” “particularly with black jurors.” *Id.* at 277. Given the inherently racial nature of racial-profiling questions, the court concluded that Black prospective jurors’ responses are “not a genuinely race-neutral justification to purge them from the final jury panel.” *Id.*; see also *Love v. Yates*, 586 F. Supp. 2d 1155, 1180 (N.D. Cal. 2008) (“[I]t would require willful intellectual blindness for the Court to conclude that a juror’s combined experience of racism, concern about racism, and support of an African-American charity do not correlate to race.”). The same is true here. Black Lives Matter has “visceral” meaning for Black supporters and cannot provide a race-neutral basis to strike them from jury service.

An analogy to NAACP membership is instructive. Courts have also rejected the contention that membership in the NAACP is a race-neutral basis to strike Black jurors, under reasoning that similarly precludes the conclusion that a juror’s support for Black Lives Matter is

race-neutral. In *People v. Holmes*, the Illinois Court of Appeals held that because a Black prospective juror’s “membership in the NAACP relates to race and is thus race specific, a court would appear to condone racial discrimination if it were to accept a potential juror’s membership in the NAACP as a racially neutral explanation for the prosecution’s peremptory strike of that individual.” 651 N.E.2d 608, 615, 272 Ill. App. 3d 1047, 1057 (Ill. App. Ct. 1995). A Texas Court of Appeals held the same in *Somerville v. State*, even though prosecutors in that case claimed a concern regarding “a radical element” in the NAACP. 792 S.W.2d 265, 268-69 (Tex. Comm’n App. 1990). All other things being equal, a Black prospective juror’s NAACP membership is a “race-specific” reason for a peremptory strike that cannot stand under *Batson*, the court held. *Id.*

Like the National Association for the Advancement of Colored People, Black Lives Matter has a race-specific focus that inheres in the movement’s name. Black Lives Matter, like the NAACP, is heir to the legacy of the Black Civil Rights Movement of the 1950s and 1960s and works to advance the same goals. And Black Lives Matter further shares the NAACP’s “principal concern [for] equal treatment for black[]

people.” *Somerville*, 792 S.W.2d at 268 n.6. Just as courts have held that membership in the NAACP is not a race-neutral justification for a strike, then, this Court should hold that support for Black Lives Matter isn’t one, either.

* * *

Because support for Black Lives Matter is statistically and stereotypically connected to Blackness and because the movement for Black lives is inextricably intertwined with race, the Constitution does not permit striking a prospective juror based on her support for Black Lives Matter.

III. Allowing A Juror’s Support For Black Lives Matter To Factor Into Voir Dire Undermines The *Batson* Framework.

Allowing prosecutors to strike jurors for their support for Black Lives Matter not only harms defendants, but also injures the excluded juror, opens the door to prosecutorial gamesmanship, and undermines public confidence in the judicial system.

Jurors singled out based on their support for Black Lives Matter may feel excluded and discriminated against; they may emerge from the experience with their opinions about jury duty and the justice system irreparably damaged. Indeed, a prospective juror from California who

was struck for her support of Black Lives Matter described it as “a life-changing experience” that made her never “want to go through jury duty again.” Abbie Vansickle, *You Can Get Kicked Out of a Jury Pool for Supporting Black Lives Matter*, The Marshall Project (July 7, 2020), <https://tinyurl.com/y5pf9s5d>.

Individuals’ negative experiences with jury duty can affect an entire community’s perception of the justice system: “Legal estrangement is born of the cumulative, collective experience of procedural and substantive injustice.” Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement* 126 *Yale L.J.* 2054, 2105 (2017).

Allowing strikes based on a prospective juror’s support for Black Lives Matter would also give North Carolina’s prosecutors yet another weapon in their arsenal of techniques to eliminate Black jurors. Since *Batson*, prosecutors in North Carolina have excluded Black citizens from juries at about twice the rate that they have removed white jurors. See Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 *U. Ill. L. Rev.* 1407, 1425, 1428 (2018); Catherine M. Grosso & Barbara O’Brien, *A Stubborn Legacy: The*

Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 Iowa L. Rev. 1531, 1548-49 (2012).

Some North Carolina district attorney offices even train prosecutors how to strike Black jurors while avoiding *Batson* challenges. See Prosecutors' Amicus Brief of Joseph diGenova, et al., *Foster v. Chatman*, 136 S. Ct. 1737 (2016). That training pays off: Since *Batson* was decided, North Carolina appellate courts have *never* found that a non-white juror was peremptorily struck because of racial bias. See Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1959 (2016). Adding support for Black Lives Matter to the list of "race-neutral" reasons that prosecutors may invoke would give prosecutors license to strike the vast majority of Black jurors. See Pew Research Center, *Support for BLM* (87 percent of Black respondents support Black Lives Matter).

Finally, condoning the peremptory strike in this case would diminish public confidence in the justice system more generally. As *Batson* explained, "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch

the entire community” and “undermine public confidence in the fairness of our system of justice.” *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

Black Lives Matter is grounded in the idea that Black people have inherent value. To suggest that such a belief is a constitutionally valid reason for a strike undermines the view that the system treats people of different races equally. To put it in *Batson* parlance, when a prosecutor strikes a Black person because she believes that Black lives (i.e., lives including her own) have worth, “discriminatory intent is inherent in the prosecutor’s explanation.” *Hernandez v. New York*, 500 U.S. 352, 360 (1991). This Court should not give government imprimatur to the idea that belief in the humanity of Black people makes one unfit for service on a criminal jury.

Prosecutors and judges around the country are grappling with how to factor jurors’ support for Black Lives Matter into voir dire. *See, e.g., Cooper v. State*, 134 Nev. 860, 864-65, 432 P.3d 202, 206-07 (Nev. 2018); *State v. Gresham*, No. A15-1691, 2016 WL 7338718, at *1 (Minn. Ct. App. Dec. 19, 2016). The Supreme Court of Nevada recently cautioned that “we are concerned that by questioning a veniremember’s support for social justice movements with indisputable racial overtones,

the person asking the question believes that a ‘certain, cognizable racial group of jurors would be unable to be impartial, an assumption forbidden by the Equal Protection Clause,” at least where questions about Black Lives Matter have “minimal relevance” to a case. *See Cooper*, 432 P.3d at 206-07. This Court should follow suit and make clear that the Constitution does not condone striking a prospective juror because of her support for Black Lives Matter.

CONCLUSION

The very purpose of the Black Lives Matter movement is to affirm the value and equality of Black lives. Relying on a juror’s support for that movement to excuse her is thus inconsistent with Batson’s protections. This Court should reverse Appellant’s conviction.

June 18, 2021

Respectfully submitted,

/s/ Cassandra Stubbs

Cassandra Stubbs

AMERICAN CIVIL LIBERTIES UNION

201 W. Main St. Suite 402, Durham,
NC 27701

(919) 688-4605

State Bar No. 37172

cstubbs@aclu.org

N.C.R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list

their names on this document as if they had personally signed it.

Elizabeth R. Cruikshank
(Pro Hac Vice pending)
Sarah H. Sloan
(Pro Hac Vice pending)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
ecruikshank@orrick.com

Daniel Rubens
(Pro Hac Vice pending)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
drubens@orrick.com

Easha Anand
(Pro Hac Vice pending)
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

*Attorneys for Amici Curiae of The Roderick and Solange Macarthur
Justice Center and The American Civil Liberties Union*

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/s/Cassandra Stubbs

Cassandra Stubbs

Counsel for Amicus Curiae

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Peter A. Regulski
Joseph L. Hyde
Nicholas R. Sanders
Assistant Attorney General North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6549
pregulski@ncdoj.gov
jhyde@ncdoj.gov
nsanders@ncdoj.gov

Geeta N. Kapur
Attorney & Counselor at Law
Post office Box 51035
Durham, NC 27717
(919) 260-1977
gkapuratty@aol.com

June 18, 2021

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/s/Cassandra Stubbs

Cassandra Stubbs

Counsel for Amici Curiae