No. 22-2845

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES W. JOHNSON,

Appellant.

On Appeal from the United States District Court for the Western District of Pennsylvania, No. 2-17-cr-00243-001

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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July 6, 2023

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Amici Curiae the National Association of Criminal Defense Lawyers and American Civil Liberties Union Foundation are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

/s/ Lisa A. Mathewson

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

STATEMENT REQUIRED BY FRAP 29(a)(4)(E) 2

INTRODUCTION 3

STATEMENT OF THE CASE 4

ARGUMENT 8

I. THE IMPACT OF IMPLICIT AND EXPLICIT RACIAL BIAS IN THE CRIMINAL JUSTICE SYSTEM IS WELL ESTABLISHED 8

II. COURTS SHOULD ENCOURAGE JURORS TO GUARD AGAINST THEIR OWN IMPLICIT BIAS. 13

III. COURTS SHOULD ENCOURAGE JURORS TO INCLUDE CONSCIOUSNESS OF IMPLICIT BIAS IN THEIR EVALUATION OF WITNESS TESTIMONY FOR BIAS GENERALLY 15

IV. ALLOWING THE EXCLUSION OF JURORS FOR MERE AWARENESS OF IMPLICIT BIAS WOULD UNDERMINE FUNDAMENTAL RIGHTS 19

A. The Practice Would Violate Sixth Amendment and Due Process Limitations on Courts' Ability to Exclude Jurors for Cause 20

B. The Practice Would Rely on Unconstitutional Viewpoint Discrimination 22

C. The Practice Would Undermine the Representativeness of Juries 24

CONCLUSION 27

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

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INTEREST OF *AMICI CURIAE*

This case raises issues directly related the role of courts in protecting people of color from racial prejudice and bias in jury selection. The case also implicates public confidence in the criminal legal system, and the rights of diverse jurors to serve as jurors. These issues are central to the missions of both *amici*.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association founded in 1958. It is the only nationwide professional bar association for public defense and private criminal defense lawyers. NACDL works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of approximately 10,000 lawyers, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of far-reaching importance to the criminally accused, criminal defense lawyers, and the criminal legal system as a whole. NACDL's Mission focuses on the

inequities in the criminal legal system including and especially systemic racism.

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has long been committed to due process and fundamentally fair procedures for defendants in all criminal cases, and, as relevant here, protection against racial bias in the criminal justice system.

STATEMENT REQUIRED BY FRAP 29(a)(4)(E)

No party or party's counsel has either authored this brief in whole or in part, or contributed money intended to fund preparing or submitting the brief. No person other than the amici organizations and their counsel has contributed money intended to fund the preparation or submission of the brief.

INTRODUCTION

The jury selection process at Mr. Johnson's trial failed to protect him from the impact of implicit racial bias. The district court excused a juror who (properly) promised to scrutinize her own reasoning for implicit racial bias, on the assumption that if she scrutinized the testimony of witnesses for implicit bias, that effort would increase the government's burden of proof. In effect, the court restricted an entirely proper and fundamental jury function: weighing bias in assessing witness credibility. At the same time, the court seated two jurors who openly expressed explicit anti-Black prejudice, even though Mr. Johnson and his trial counsel are Black. The court's decisions undermined the jury's duty—reflected in the model instruction for this Circuit—to assess witness testimony for bias, including implicit bias and prejudice.

The case presents a vehicle for this Court to give guidance to lower courts on how to approach issues of racial discrimination—both implicit (unconscious) bias and explicit (conscious) prejudice—during jury selection, safeguarding the constitutional guaranties of an

impartial jury, due process, effective assistance, and equal protection. U.S. CONST. AMENDS. VI, XIV.

Moreover, the issues presented in this case affect not only the rights of the accused; they also have the potential to bolster or undermine public confidence in the criminal legal system, and implicate the constitutional rights of prospective jurors to serve. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

STATEMENT OF THE CASE

Before *voir dire*, the district court gave prospective jurors a supplemental questionnaire, consisting of eight questions with "Yes" or "No" answers. Oct. 18, 2021 Tr. at 23:5–7 (DDE 323). Because both Mr. Johnson and his trial counsel are African American, the questionnaire asked prospective jurors, *inter alia*, (1) whether Mr. Johnson's and his lawyer's race would "have any impact on how you might consider any matter involved in this case?" and (2) "Do you believe that African American men are more likely than other people to engage in violence or criminal conduct, or to be involved in any way with guns or drugs?" *Id.*

Juror No. 2 answered the first of these questions affirmatively, but explained that she understood the "impact" of race to include taking precautions against her own "inherent bias," and that her awareness of it would make her "more focused on making sure" that her deliberations were not impacted by bias. App'x 282, 287. Jurors No. 4 and 44, on the other hand, not only answered the second question affirmatively, but later professed explicit bias in explaining those answers, giving reasons largely based on media depictions of African American men being involved in crime. App'x 551–52 (Juror No. 4), App'x 688–89 (Juror No. 44). The record reflects that while Juror No. 2 was nothing short of a model juror, Jurors No. 4 and 44 were precisely the sort of jurors whose expressed bias warranted their removal for cause.

Specifically, Juror No. 2 affirmed that she would have no "difficulty or hesitation in returning a guilty verdict" if she "concluded that the government had proven guilt beyond a reasonable doubt." App'x 288–89. And after the court asked a series of hypothetical questions about how she might decide the case if Mr. Johnson were of another race, she stated that she would not give him any "additional points that would help him" on account of his race. App'x 297.

Nevertheless, the prosecution moved to strike the juror, claiming that "she would give this case more scrutiny because the defendant's African American," which the prosecution argued was a "statement about race" that was "disqualifying." App'x 289–91, 297–98. Furthermore, the prosecution asserted, "she's going to scrutinize the evidence more closely because the defendant is African American," which the prosecution contended was a "disqualifying feature." App'x 298.

The district court granted the prosecution's motion. The court found "nothing problematic" about Juror No. 2's understanding of how implicit bias could affect her own decision-making. Nevertheless, accepting the prosecution's second argument, the court stated that it would excuse her out of a concern that she would "imput[e] [] those biases to others," which would "impos[e] an additional burden in this case that the law does not apply." App'x 447–48. The Court asked Juror No. 2 no questions about imputing biases to others.

By contrast, the district court rejected the defense request to strike Juror Nos. 4 and 44, each of whom answered the question "Do you believe that African American men are more likely than other people to engage in violence or criminal conduct, or to be involved in

any way with guns or drugs?" affirmatively. App'x 545–51, 688–92. The district court did not ask these jurors (as it asked Juror No. 2) how they might decide the case if Mr. Johnson were of a different race. Rather, the court primarily asked Juror Nos. 4 and 44 how they developed their beliefs. *See* App'x 545–47, 552 (questioning of Juror No. 4); App'x 689–91, 695 (questioning of Juror No. 44). In denying Mr. Johnson's motion to strike Juror 4, the district court did not even mention his professed belief that "African American men are more likely than other people to engage" in crime, but stated summarily that "based on the full range of the interrogation that was engaged in here," the juror said nothing that indicated he could not "decide this case[] based on the evidence and testimony presented just in this case and the legal instructions from the court." App'x 554–55.

As to Juror No. 44, the district court deemed his admitted bias neutralized by its source, saying it was merely "reflective of what he observed on the news as opposed to a belief that . . . because someone is an African American male they'll be involved in drug or gun crime." App'x 699. The district court's denial of the defense's cause challenges

to Jurors 4 and 44 forced the defense to use two peremptory strikes to remove them. App'x 554, 699.

Thus, the district court accepted two jurors who admitted to explicit (conscious) bias while it excluded a juror who would have guarded against the unconstitutional impact of implicit bias.

ARGUMENT

I. THE IMPACT OF IMPLICIT AND EXPLICIT RACIAL BIAS IN THE CRIMINAL JUSTICE SYSTEM IS WELL ESTABLISHED.

Courts and legal scholars have recognized that racial bias, both explicit and implicit, plays an influential role in our criminal legal system, just as it does in our society at large. The concept of explicit prejudice is familiar—it consists of attitudes and stereotypes that affect a person's understanding, decision-making, and behavior in a "consciously accessible" manner. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012). Examples of explicit bias include overt preferences for a particular group or racist comments. Community Relations Service, *Understanding Bias: A Resource Guide*, U.S. DEP'T OF JUSTICE, at 2, https://www.justice.gov/file/1437326/download ("*Understanding Bias*").

Implicit or unconscious bias, on the other hand, affects a person's understanding, decision-making, and behavior below the person's awareness, making it more difficult to detect and counter. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge–Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions,* 4 HARV. L. & POL'Y REV. 149, 152 (2010). Implicit bias is learned from one's social environment, often influencing an individual's thoughts and behavior in ways that reinforce existing patterns of discrimination. *See* Jennifer K. Elek & Andrea L. Miller, *The Evolving Science on Implicit Bias: An Updated Resource for the State Court Community*, NAT'L CENTER FOR STATE COURTS, 2–3 (Mar. 2021), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911/ ("*Evolving Science*").

A court's or juror's attention to the influence of bias does not "inject" bias into the proceedings. It has influence regardless of whether judges and litigants ignore it or acknowledge it and take steps to guard against it. As Judge McKee has written:

> Numerous studies have shown that even though we may not be aware of the bias that lurks within, our acculturation results in implicit bias in each of us that is imprinted onto our subconsciousness and is as intractable in its placement

> as it is pervasive in its influence. This bias is present in all jurisdictions, at all levels of our justice system, and in all types of cases. It affects our judgment as well as our actions and thereby infects the very institution that we depend upon for fairness and the just resolution of disputes: the courts. In speaking for a plurality of the U.S. Supreme Court in *Parents Involved in Community Schools v. Seattle School Dist. No. 1,*[1] Chief Justice Roberts opined that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Yet, research shows that our neurological circuitry does not include an on/off switch that, when tripped, disables the bias that has accumulated in our subconscious mind. Rather, the most we can hope for is that each of us will be sensitized to our own unconscious bias and then consciously guard against allowing it to affect our attitudes or behavior.

Hon. Theodore McKee, *Preface* to *Enhancing Justice: Reducing Bias* vi (Sarah E. Redfield, ed., ABA Book Publishing 2017); *see also Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals."); *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010) ("Like anyone else, trial attorneys possess those human frailties that make each of us far too susceptible to social conditioning and the subliminal bias that may result."); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082

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[1] 551 U.S. 701, 748 (2007).

(3d Cir. 1996) ("Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms.").

Neither jurors nor witnesses are immune from this reality. Implicit bias can affect a person's evaluation of evidence, especially ambiguous evidence, and distort a person's memory. *See* Appellant's Br. at 50 (collecting studies); *see also* Demetria D. Frank, *The Proof is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 24–25 & n.139 (2016); Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama's Election*, 37 N. KY. L. REV. 243, 256–57 (2010) (collecting studies); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 3–4 (2000); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).

Legal scholarship also shows, however, that the "conscious efforts" Judge McKee has recommended (and Juror No. 2 expressed her intention to make) can protect against implicit bias's influence. *See* Appellant's Br. at 44 n.18, 50–51 (collecting studies); *see also* Jerry

Kang, *Implicit Bias: A Primer for Courts, National Center for State Courts*, at 5 (2009), https://www.ncsc.org/__data/assets/pdf_file/0025/14875/kangibprimer.pdf ("In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking"); *Understanding Bias* at 7–8, at (recommending strategies for combatting implicit bias); *Achieving an Impartial Jury: Addressing Bias in Voir Dire and Deliberations*, AM. BAR ASSOC., at 16 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf; Micah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243 (2018) (suggesting ways to combat racial stereotypes in voir dire and jury instructions).

In this case, while the district court recognized that a juror properly should guard against her own implicit bias, it missed an opportunity to help uphold the jury's core duty to assess witness testimony for all kinds of bias, including implicit bias.

II. COURTS SHOULD ENCOURAGE JURORS TO GUARD AGAINST THEIR OWN IMPLICIT BIAS.

In timeworn instructions given for centuries throughout this country, courts have directed jurors to render their verdicts in a fair, impartial, and unbiased manner. Indeed, the model instruction for this Circuit provides in relevant part:

> Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, or gender[.]

Model Criminal Jury Instructions, Ch. 3, § 3.01 (3d Cir. Jan. 2018). *See also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). So important is juror impartiality to the functioning of our system of justice that, where a juror makes a clear statement that indicates a reliance on racial stereotypes or animus, the ordinary rule against impeaching jury verdicts must give way to allow the court to consider the juror's statement. *See Peña-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017).

To pursue this ideal in light of growing awareness of the role of implicit bias, the District Court for the Western District of Washington has published a model criminal jury instruction addressing it. The

instruction explains that "research supports that, as a general matter, awareness and mindfulness about one's own unconscious associations are important and thus a decision-maker's ability to avoid these associations, however that is achieved, will likely result in fairer decisions." *Criminal Jury Instructions*, DISTRICT COURT FOR THE WESTERN DIST. OF WASHINGTON, https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf. *See also State v. Plain*, 898 N.W.2d 801, 834 (Iowa 2017) (Appel, J., concurring specially) ("Research suggests that the problem of implicit bias may be moderated by attention to the issue.") (collecting sources).

In line with this thoughtful approach, the district court here told counsel that its instructions would guide jurors to "slow down in their decisionmaking"—just as Juror No. 2 promised to do—"to make sure in their own minds that they're making the decisions based only on the evidence and on the law and not whatever their predispositions are about anything." App'x 147. The court told the jurors:

> Please note that everyone may have feelings, assumptions, perceptions we may not even be aware of. Although held unintentionally or even unknowingly, they can impact on how we assess or remember what we see and hear, and how we make important decisions. Because you are making important decisions in this case, I encourage you to evaluate

> all of the evidence carefully and to resist jumping to conclusions that may be unintentionally based on personal likes or dislikes, generalizations, gut feelings, or assumptions.

App'x 1836.

Understanding this, the district court properly rejected the prosecution's argument that Juror No. 2 was disqualified merely because she made a "statement about race" during *voir dire* and might examine her decisionmaking for the influence of implicit bias. App'x 289. The court recognized that "slow" thinking about potential implicit bias is desirable, not disqualifying, in a juror. This Court should endorse that reasoning.

III. COURTS SHOULD ENCOURAGE JURORS TO INCLUDE CONSCIOUSNESS OF IMPLICIT BIAS IN THEIR EVALUATION OF WITNESS TESTIMONY FOR BIAS GENERALLY.

But the district court's decision to exclude Juror No. 2 because she might "imput[e] . . . [implicit] biases to others," *i.e.* trial witnesses, improperly undermined a core jury function. The Supreme Court has repeatedly held that the Constitution guarantees defendants the opportunity to have jurors evaluate bias as one measure of witness credibility. It has not only construed the Federal Rules of Evidence to allow impeachment with bias, *see United States v. Abel*, 469 U.S. 45,

50–51 (1984), but has also held that the Sixth Amendment guarantees the right to cross-examine for bias. *See Davis v. Alaska*, 415 U.S. 308, 315–17 (1974) ("[B]iases, prejudices, or ulterior motives" are "always relevant," and "the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.") (citing 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)); *accord Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986).

Accordingly, this Circuit's model instructions encourage jurors to consider "[w]hether the witness has an interest in the outcome of the case or any motive, bias, or prejudice[.]" Model Criminal Jury Instructions, Ch. 3, § 3.04 (3d Cir. Jan. 2018). The district court gave that instruction here, and also urged the jurors to "remember to use your common sense, your good judgment, and your experience." App'x 1841.

The court's decision to strike Juror No. 2 because she might "imput[e] . . . [implicit] biases to others" flew in the face of those instructions. Its underlying rationale restricts jurors' role as judges of credibility and, ultimately, the facts. Declaring racial bias, whether

explicit or implicit, off-limits is particularly pernicious. No judge would disagree that a juror may consider whether a witness's assessment of what she saw was affected by her unconscious assumptions about, say, a group of boisterous teenagers, or a person driving an expensive car in a low-income neighborhood, or a large man approaching the witness in the subway late at night. Yet, in the district court's apparent view, a juror who considered whether the *race* of the teens, the driver, or the man in the subway also affected the witness's perceptions would be violating their oath.

A rule that jurors should not consider the possibility that racial bias influenced the trial testimony would be inimical to the Sixth Amendment jury-trial guarantee, and to due process. Not only would it tell jurors to disregard relevant facts, it could not coexist with the duty to safeguard the trial right by taking steps to identify and neutralize any invidious influence of race.

In that effort an empowered jury is the judge's ally. As the only trial participant with the power to weigh the evidence, the jury presides where the judge cannot reach. Just as courts encourage jurors to consider their life experiences, and the "fair cross-section" ideal reflects

the value of bringing diverse experiences into deliberations (*see also* Sections IV.B and IV.C, below), so too does allowing jurors to examine the evidence for the improper influence of race, which brings into the jury room constitutional protections against a conviction infected by racial bias. Jurors who recognize how implicit bias may affect our perceptions of others—whether from personal experience, study of the topic, or the guidance of a jury instruction—should be free to apply that knowledge to judging witness credibility.

This does not assume that jurors will decide race *did* influence a given witness's testimony. It does not even mean that jurors must consider implicit racial bias for every witness or every case. Courts regularly instruct jurors on a range of tools for weighing the evidence and entrust them to choose those suited to the task. Given the unique and foundational role juries play in ensuring a fair trial, excluding jurors for mere awareness of this particular tool would prevent juries from conducting fully equipped deliberations.

The district court in this case excused Juror No. 2 out of a concern that she would "imput[e] [] those [implicit] biases to others," which in the district court's apparent view would "impos[e] an additional burden

in this case that the law does not apply." App'x 447–48. In effect this ruling removed consideration of a particularly insidious form of bias from the set of available measures of a witness's credibility, even though the court acknowledged that that bias affects "everyone." App'x 1836. Not only did the court draw an inference beyond anything the juror had said—she talked about scrutinizing her own reactions, not those of others—but any "imputation" of implicit bias the juror made in light of the evidence would have been an appropriate exercise of her duty. The district court abused its discretion in excusing her.

IV. ALLOWING THE EXCLUSION OF JURORS FOR MERE AWARENESS OF IMPLICIT BIAS WOULD UNDERMINE FUNDAMENTAL RIGHTS.

Even assuming that courts need not encourage jurors to factor an awareness of implicit bias into deliberations—although they should—they should never treat it as a ground for exclusion. Upholding the district court's inference of partiality, which it based on the juror's awareness that race can unconsciously affect human perception and decisionmaking, would undermine fundamental trial rights.

A. The Practice Would Violate Sixth Amendment and Due Process Limitations on Courts' Ability to Exclude Jurors for Cause.

Allowing trial courts to strike jurors for cause for merely acknowledging the concept of implicit bias implicates the constitutional promise that jurors may be excused for cause only on "narrowly specified, probable, and legally cognizable bas[e]s of partiality." *United States v. Salamone*, 800 F.2d 1216, 1226 (3d Cir. 1986) (brackets in original) (quoting *Swain v. Alabama*, 380 U.S. 202, 220 (1965)) (finding abuse of discretion in striking jurors for membership in National Rifle Association ("NRA") without inquiry into their impartiality)). Thus, a juror may not be excluded for cause for membership in a group that ascribes to a particular view absent a showing that such membership would "'prevent or substantially impair' [the] juror's impartiality." *Salamone*, 800 F.2d at 1226 (quoting *Wainwright v. Witt*, 469 U.S. 412 (1985)); *see also Dennis v. United States*, 339 U.S. 162, 171 (1950) ("A holding of implied bias to disqualify jurors because of their relationship with the Government is [not] permissible."); *United States v. Calabrese*, 942 F.2d 218, 226 (3d Cir. 1991) ("[E]xclusions for cause on the basis of

mere knowledge of a defendant, without more, is not consistent with the sound exercise of discretion.").

The limitation has a constitutional basis. *See Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968) (selection process that excluded potential jurors on unduly broad grounds respecting penalty determination "fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments") (citing cases); *see also Uttecht v. Brown*, 551 U.S. 1, 9 (2007) (reaffirming *Witherspoon* principle and holding that "if the juror is not substantially impaired, removal for cause is impermissible," although reviewing courts must defer to trial court's judgment on underlying facts); *Gray v. Mississippi*, 481 U.S. 648, 666 (1987) (improper excusal of one juror under *Witherspoon-Witt* test violates Sixth and Fourteenth Amendment rights).

Our adversary system places the duty of advocacy on the parties and relies on judges to remain neutral. Allowing courts to exclude jurors for cause on any basis broader than impaired impartiality would threaten that neutrality. It would result at best in unpredictable interference with the parties' voir dire strategy and at worst in

favoritism for one side or the other. In effect, the practice would bestow an unlimited and unregulated set of peremptory challenges on trial courts.

In this case, the juror assured the district court that she would have no "difficulty or hesitation" in finding Mr. Johnson guilty if the government proved its case, and that she would not give him "additional points" on account of his race. App'x 288–89, 297. Her comments on implicit bias demonstrated her awareness of the world around her, not any partiality. Upholding this excusal would endorse a violation of Mr. Johnson's constitutional rights.

B. The Practice Would Rely on Unconstitutional Viewpoint Discrimination.

Upholding the ruling would also tolerate exclusion from jury service based on viewpoint. "Jury competence is an individual rather than a group or class matter." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). In *Salamone*, this Court disapproved the exclusion of jurors based on NRA affiliation without juror-specific inquiry, reasoning that "allow[ing] trial judges and prosecutors to determine juror eligibility based solely on their perceptions of the external associations of a juror threatens the heretofore guarded right of an accused to a fair

trial by an impartial jury as well as the integrity of the judicial process as a whole." 800 F.2d at 1225. Similarly, in *Dennis*, the Supreme Court rejected the argument that, in a prosecution for failure to respond to the subpoena of a Congressional committee, all jurors who worked for the federal government should be excluded for cause on the basis of their assumed fear of investigation for disloyalty. 339 U.S. at 171–72*; see also Mason v. United States*, 170 A.3d 182, 187 (D.C. 2017) ("[S]tanding alone, the belief that the criminal-justice system is systemically unfair to blacks is not a basis to disqualify a juror. Rather, that belief is neither uncommon nor irrational. Moreover, there is no basis for an inference that potential jurors holding that belief are necessarily unable to be impartial.").

Our system of justice relies on robust jury deliberations reflecting a diversity of viewpoints. Allowing courts to exclude jurors who articulate an awareness that bias can operate in insidious ways would remove important voices from the jury room. Impartial jurors occupy a wide range of perspectives. As long as jurors remain within the bounds of impartiality, courts should allow and support diverse viewpoints, not limit or exclude them.

Approving the district court's approach would engender distrust in the justice system as well. It would create "the appearance of the prosecution, with the assistance of the court, attempting to 'stack the deck' against the defendant." *Salamone*, 800 F.2d at 1232 (Stapleton, J., concurring).

Here, the trial court excused Juror No. 2 because of her answers to questions about implicit bias, a much-discussed topic in current affairs. She gave no indication that she would apply her awareness of implicit bias in a way that flouted the court's instructions or that she would allow her awareness to "prevent or substantially impair the performance of [her] duties." *Witt*, 469 U.S. at 424. She was, in effect, improperly excused for her point of view and not for disqualifying bias.

C. The Practice Would Undermine the Representativeness of Juries.

Excluding for cause jurors who understand how implicit bias may affect perception could disproportionately limit jury service by people of color, who may have heightened sensitivity to implicit bias because of their lived experiences. *See, e.g.*, HAMEL ET AL., KAISER FAMILY FOUNDATION, RACE, HEALTH, AND COVID-19: THE VIEWS AND EXPERIENCES OF BLACK AMERICANS, 8 (Oct. 2020), https://files.kff.org/

attachment/Report-Race-Health-and-COVID-19-The-Views-and-Experiences-of-Black-Americans.pdf (reporting survey finding that 71% of Black adults list unconscious bias as "personal obstacles" in their lives). Research has shown, more generally, that Black citizens are "more likely to accept the possibility that racial factors play a role in decisionmaking in the criminal justice system[.]" Mona Lynch & Craig Haney, *Death Qualification in Black and White*, 40 L. & POL'Y 148, 151 (Apr. 2018) (citing PEW RES. CTR., SUPPORT FOR DEATH PENALTY LOWEST IN MORE THAN FOUR DECADES, Sept. 29, 2016, http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ (last visited June 30, 2023)); *see also* James D. Unnever et al., *Race, Racism, and Support for Capital Punishment*, 37 CRIME & JUST. 45–96 (2008); James D. Unnever & Francis Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. RSCH. CRIME & DELINQ. 124–58 (2007); Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race*

and the Death Penalty in America, 51 AMER. J. POL. SCI. 996–1012 (2007).[2]

That result would not only deprive the disqualified jurors of the opportunity to exercise a precious civic right and duty—it would also deprive deliberating juries, defendants, and the courts of their voices.[3] This Court should disapprove the district court's decision to excuse Juror No. 2 from jury service and grant Mr. Johnson a new trial.

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[2] *See also Voters Split on Whether Criminal Justice System Treats All People Fairly*, NBC NEWS EXIT POLL DESK (Nov. 8, 2016) (49 % of all voters, but 82% of black voters, believed criminal justice system unfair to blacks), https://www.nbcnews.com/card/nbc-newsexit-poll-voters-split-whether-criminal-justicesystem-n680366; *Race, the Criminal Justice System, and Police*, PUB. RELIGION RES. INST. (Nov. 14, 2014), https://www.prri.org/spotlight/prri-fact-sheet-race-the-criminal-justice-system-and-police/ (poll showing 52% of all Americans, but 75% of black respondents, disagreed with statement that "police officers generally treat blacks and other minorities the same as whites.").

[3] Studies have shown that racial diversity improves both the quality of jury deliberations, *see* Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & HU. BEHA. 232–49 (2019); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597–612 (2006); and the accuracy of jury verdicts. *See* Marian R. Williams & Melissa W. Burek, *Justice Juries, and Convictions: The Relevance of Race in Jury Verdicts*, 31 J. OF CRIME & JUST. 149 (2008); Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471 (2003).

CONCLUSION

For the foregoing reasons, as well as those explained in Mr. Johnson's brief, *amici curiae* NACDL and ACLU urge this Court to reverse Mr. Johnson's conviction and order a new trial.

Respectfully submitted,

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July 6, 2023

CERTIFICATE OF COMPLIANCE

1. Pursuant to Local Rule 28.3(d), I hereby certify that the attorneys whose names appear on this brief are members of the bar of this Court.

2. This brief complies with the type-volume requirements of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4796 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 3d Cir. L.A.R. 29.1(b).

3. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) and 3d Cir. L.A.R. 32.1(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in Century Schoolbook 14-point font.

4. Pursuant to Local Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies, and that it has been scanned for viruses using McAfee Endpoint Security, Version 10.7.1, and no virus was detected.

Dated: July 6, 2023 /s/ *Lisa A. Mathewson*

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the appeal are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Lisa A. Mathewson

Dated: July 6, 2023