Case No. A150512

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Respondent,

v.

SHELDON VAUGHN SILAS, JR., REGINALD LOUIS WHITLEY, JR., LAMAR CHARLES MICHAELS, AND LINDA ANN CHANEY,
Defendants-Appellants.

Appeal from the Judgment of the Superior Court of the State of California, County of Contra Costa
Honorable Claire Meier, Judge

BRIEF FOR AMICI CURIAE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; OFFICE OF THE STATE PUBLIC DEFENDER; CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE; AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA IN SUPPORT OF DEFENDANTS-APPELLANTS

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IDENTITY OF AMICI AND STATEMENT OF INTEREST[1]

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. **The ACLU of Northern California** is an affiliate of the national ACLU. Both

[1] No party or counsel for any party authored the amicus brief in whole or in part. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No entities other than amici curiae, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

organizations share a longstanding commitment to ensuring the constitutionally required protections of a fair trial and jury, and to combating racial discrimination.

Pursuant to its statutory mandate, the **Office of the State Public Defender** (OSPD) represents indigent defendants in both capital and non-capital criminal appeals. (Gov. Code, § 15421.) The State Public Defender is also more generally charged with providing oversight in regard to the representation of indigent persons in criminal appeals throughout the state. (Gov. Code, § 15403.) Among the most frequently litigated issues in indigent criminal appeals are those concerning invidious discrimination in the elimination of prospective jurors by prosecutors. OSPD has litigated such issues on behalf of indigent appellants in capital and other criminal cases too numerous to list and has appeared repeatedly before this Court as amicus curiae in cases touching on discrimination in jury selection, beginning with *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and continuing through *People v. Gutierrez* (2017) 2 Cal.5th 1150 (*Gutierrez*). It joins this brief to add its vehement objection to the practice of eliminating Black jurors on the basis of their support for Black Lives Matter.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law," and the improvement of "the quality of the administration of criminal law." (Article IV, CACJ By Laws.) CACJ's membership consists of approximately 1,300 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. CACJ has often appeared before this Court on matters of importance to its membership, and has several times been permitted to file briefs to address the incursion of illegal discrimination in jury selection processes.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area** (LCCRSF) works to advance, protect and promote the legal rights of communities of color, and low-income persons, immigrants, and refugees. Assisted by pro bono attorneys,

LCCRSF provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation and policy advocacy. LCCRSF's racial justice work provides direct legal services and advocacy on issues that disproportionately harm Black communities and other communities of color.

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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. And it did so because of stereotypes about Black activists that both are baseless and have an invidious historical pedigree. This Court should reverse the trial court and make clear that striking a juror because of her support of a movement asserting the worth of Black lives—the worth of her own life—is not tolerated by the Constitution.

Crishala Reed was targeted because of her support for Black Lives Matter.[2] After an extensive colloquy with Ms. Reed in which the prosecution linked Black Lives Matter to rioting and vandalism, the prosecution attempted to strike Ms. Reed for cause, claiming that her discomfort with its questioning made clear that she was biased. (7 RT 1245-46.) The trial court denied the challenge but deemed it a "very close call": Having "read up" on Black Lives

[2] Ms. Reed consented to be identified by name in this brief. During jury selection, she was referred to as Juror 275. At the time of the trial, her last name was Williams.

Matter, the trial court felt that support for the movement "gives cause to question whether or not" a veniremember is fit for jury service. (7 RT 1247-48, 1260-61.) And it later upheld the prosecution's use of a peremptory strike on Ms. Reed against a challenge under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*), finding that defendants had not made out a prima facie case of discrimination—although the prosecution volunteered that it struck Ms. Reed in part because of her reaction to questions about Black Lives Matter—simply because the for-cause challenge was so "close." (16 RT 2812; *see also* 5 RT 1207-08, 1221.)

The trial court's ruling was wrong, and its analysis runs afoul of *Batson* in two respects. First, support for Black Lives Matter is not a race-neutral justification for a strike. Such support is explicitly, statistically, and stereotypically associated with Black people. 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. The prosecution's hostile questioning about Black Lives Matter and invocation of

Black Lives Matter at both the for-cause and peremptory strike stages of voir dire thus give rise to a prima facie case of discrimination.

Moreover, the trial court was simply incorrect to suggest that support for Black Lives Matter "gives cause" to question a juror's fitness for service. Contrary to the caricature invoked by both the prosecution and the judge below, Black Lives Matter supporters are not inherently lawless or incapable of following a judge's instructions. But because of the trial court's misperceptions about Black Lives Matter, it deemed the prosecution's for-cause challenge a "very close call," and used the purported closeness of that call as a reason to deny defendants' *Batson* motion on the prosecution's peremptory strike.

Amici aim to correct those misperceptions by providing an accurate description of Black Lives Matter's goals, methods, and supporters, and by placing it in its proper historical context. 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 the trial court's misimpression that Ms. Reed's support for Black Lives Matter "gives

cause to question," (7 RT 1260), whether she was capable of obeying the law is founded on a baseless stereotype of lawlessness and anarchy—the same baseless stereotype deployed against now-revered Black civil rights icons by their contemporaries a half-century ago.

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. Deeming jurors unfit for jury service, striking them, or targeting them for hostile questioning on that basis is thus antithetical to the protections of *Batson*.

FACTUAL BACKGROUND

In this case, the trial court permitted the prosecution to strike Ms. Reed in light of her support for Black Lives Matter.

In response to a question about whether she belonged to any justice-focused special-interest group, Ms. Reed wrote, "I support Black Lives Matter." (7 Supp. CT 1857.) During voir dire, the trial court questioned Ms. Reed about her feelings toward law enforcement; Ms. Reed said that she would treat the testimony of a police officer the same way she would treat the testimony of another witness and that, although she believed the criminal justice system sentenced Black people to longer prison sentences than defendants of other races, she would be able to place aside any feelings she had based on that understanding. (7 RT 1083-84.)

The prosecution then asked Ms. Reed a series of questions regarding Black Lives Matter and vandalism. (*E.g.*, 7 RT 1156-58 ["[Y]ou have individuals as part of that particular movement that, for instance, destroy property that's not their own. Would you agree with that?"].) Ms. Reed explained that she supported Black Lives Matter but was not involved with any groups affiliated with the movement. (7 RT 1156.) She also said that she knew that property had been destroyed during Black Lives Matter demonstrations but that she did not support such conduct. (7 RT 1157-58.)

At the close of questioning, the prosecution challenged Ms. Reed for cause, arguing that "there may be an apparent bias that

[Ms. Reed] is refusing to acknowledge to this particular Court based on her behavior and her answers in total." (7 RT 1245-46.) In support of the juror's "apparent bias," the prosecution cited Ms. Reed's "attitude"; for example, she "rolled her eyes" when the prosecution questioned her about "civil unrest" allegedly caused by Black Lives Matter, including "open rioting where private property is damaged, which is well-known within the media." (*Ibid.*)

Defense counsel, by contrast, thought Ms. Reed was "taken aback" by the questioning about Black Lives Matter, which counsel characterized as "assaultive" and "accusatory." (7 RT 1248, 1250-52.) The prosecution defended its questioning, arguing that "[w]hen you have a social organization … [whose] purpose is to commit civil disobedience, and by that I mean jury nullification, they're not going to be ones who are simply going to say that," such that "[t]he only way … [to] probe at possible bias … is to ask questions about whether or not individuals could agree that maybe there is a bad portion of this particular movement that they're in." (7 RT 1257-58.)

The trial court found that the for-cause challenge was "a very close call." (7 RT 1261.) It explained that it had "read up" and "followed up on Black Lives Matter" and that Ms. Reed's support for

Black Lives Matter "gives cause to question" her fitness to serve as a juror:

> Going to the Bay Bridge and locking arms and stopping traffic and going downtown Oakland and, you know, organizing when they don't have a permit and, you know, over and over, you hear about other cities where the same things are occurring. If that's supported by the person, it gives cause to question whether or not they're going to support our system here. It's disobeying the law.

(7 RT 1247-48, 1259-60.) However, because the juror "consistently … said that she could be fair," the trial court denied the prosecution's for-cause challenge. (7 RT 1260-61.)

Three weeks later, Ms. Reed was slated to be seated as an alternate juror. (16 RT 2810.) The prosecution used a peremptory strike to eliminate her from the venire, and defendants challenged the strike under *Batson*. (*Ibid.*) In support of their prima facie case, defendants noted the prosecution's "aggressive and intense questioning" about Black Lives Matter, seemingly intended to "get a rise out of" the juror, as well as the number of challenges mounted by the prosecution against Black jurors and the prosecution's history of striking Black jurors. (16 RT 2810-11.) The trial court rejected the challenge: "I don't think this is close." (16 RT 2812.)

Although the trial court had not found a prima facie case at the first step of the *Batson* analysis because it concluded that the defendants did not raise an inference of discriminatory purpose, the prosecution nonetheless placed its reasons for the strike on the record. The prosecution cited seven reasons for striking Ms. Reed, including that "[s]he arrived late" and that "[s]he was a former security guard" (the prosecution claimed that it often encountered security guards as defendants in murder trials). (5 RT 1207-08.) As relevant here, the prosecution pointed to her colloquy with Ms. Reed over Black Lives Matter: "[Ms. Reed] was openly hostile, to say the least, when I was questioning her about Black Lives matter." (5 RT 1207.) The prosecution also described the defendants' *Batson* challenge as a "parlor trick" five times, disputing the basis for the challenge by explaining that she had "dedicated the majority of [her] career to black-on-black crime" because "there is a complete violence that is out of control." (5 RT 1200-04.)

The trial court once again rejected the defense's request to find a prima facie *Batson* case. (5 RT 1221; *see also* Respondent's Brief at 83.) The trial court explained that it "came extremely close to granting" the prosecution's request that Ms. Reed be struck for cause, and "[i]n retrospect, I could very easily have gone the

different direction." (5 RT 1221.) Ms. Reed was not reseated, and defendants were convicted.

SUMMARY OF THE ARGUMENT

The jury selection process in this case was riddled with misconceptions about Black Lives Matter, resulting in a patently erroneous ruling that defendants had not even established a prima facia *Batson* challenge. *Amici* aim to correct those misperceptions.

In Part I, *amici* offer an accurate record regarding Black Lives Matter's goals, tactics, supporters, and historical pedigree. Contrary to the trial court's analysis, 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. And, contrary to the trial court's conviction that Black Lives Matter supporters are unfit to serve on juries because they are unable to obey the law, there is no basis to presume that Black Lives Matter supporters are lawless or that the movement's tactics are incompatible with jury service.

In light of those facts about Black Lives Matter, Part II argues that support for Black Lives Matter cannot be deemed race-

neutral; accordingly, hostile questioning about Black Lives Matter, for-cause challenges based on support for Black Lives Matter, and peremptory challenges explained by support for Black Lives Matter are all suspect under *Batson*.

In Part III, *amici* urge this Court to affirm that support for Black Lives Matter does not "give cause," as the trial court opined, to question a juror's fitness for jury service. Finally, *amici* respectfully suggest in Part IV 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. Support for

Black Lives Matter thus does not make a juror unfit for service, nor is it a race-neutral reason for a strike.

ARGUMENT

I. Support For Black Lives Matter Is Inextricably Bound Up With Race And Does Not Render A Juror Unfit For Service.

Support for Black Lives Matter is not race-neutral, nor does it categorically render a juror unfit for service. 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, Black Lives Matter's tactics focus on organizing, lobbying, and direct action; neither jury nullification nor violence is part of Black Lives Matter's stated methods. (*Infra*, I.B.) Third, 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.C.) And fourth, Black Lives Matter continues the legacy of the Civil Rights Movement of the 1950s and 1960s: Like its forebears, Black Lives Matter uses direct action to achieve equality for Black citizens, and like its

forebears, Black Lives Matter has been inaccurately dismissed as anarchic and lawless. (*Infra*, I.D.)

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 therefore must be protected and allowed to thrive. (*See* Lowery, *They Can't Kill Us All: The Story of the Struggle for Black Lives* (2017) pp. 87, 89 [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." (Ransby, *Making All Black Lives Matter: Reimagining Freedom in the 21st Century* (2018) pp. 74-75.)

The phrase is the name of both an organization and a broader social justice movement. (Lowery, *They Can't Kill Us All*, *supra*, at p. 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." (Khan-Cullors, *We Didn't Start a Movement, We Started a Network* (Feb. 22, 2016) Medium <https://tinyurl.com/y3eorvzr>; *see also What We Believe*, Black Lives Matter <https://tinyurl.com/ybyusj25> [as of July 31,

2020].) It "eschews hierarchy and centralized leadership." (Cobb, *The Matter of Black Lives* (Mar. 7, 2016) The New Yorker <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> [as of July 31, 2020].)

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, *supra*.) 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*, *supra*, at p. 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 p. 231.) The phrase "became a mantle under which thousands of demonstrators, activists, and groups began protesting both online and in the streets." (*Id.* at p. 89.) Protesters used it to "assert[]" the "humanity" "of every slain black man and woman." (*Id.* at p. 195.)

Although neither the Black Lives Matter organization nor the broader movement has a "party line," "shared assumptions, values, and analyses" undergird them. (Ransby, *supra*, at p. 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*, *supra*, at p. 87.)

As the name suggests, Black Lives Matter "is an affirmation of Black folks' humanity," (*Herstory*, Black Lives Matter <https://tinyurl.com/y3c9zcqw> [as of July 31, 2020]), 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* (M.D. La. Aug. 7, 2017, No. 16-CV-0742) Dkt. No. 68-2.). It is, accordingly, "unapologetically Black in [its] positioning." (*What We Believe*, *supra*; *see also* Ransby, *supra*, at p. 97 ["The term *unapologetically Black* … has become one of the mantras for this movement."].)

That belief in the value of Black lives is not at the expense of other lives. To the contrary, Black Lives Matter "work[s] vigorously for freedom and justice for Black people and, by extension,

all people." (*What We Believe*, *supra*.) 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." (Ruffin, *Black Lives Matter: The Growth of a New Social Justice Movement* (Aug. 23, 2015) BlackPast <https://tinyurl.com/y6ellnfc>; *see also* Cohen, *Black Lives Matter Is Not A Hate Group* (July 19, 2016) Southern Poverty Law Center <https://tinyurl.com/jae5kxf>.)

B. Black Lives Matter Uses Peaceful Protest And The Political Process To Effect Change.

Black Lives Matter relies on a variety of methods to effect change.

Electing politicians who share the movement's values is one such method. The Black Lives Matter network seeks to "oust[] anti-Black politicians." (*What We Believe*, *supra*). To do so, the organization aims to "galvaniz[e] BLM supporters and allies to the polls," *BLM's #WhatMatters2020,* Black Lives Matter <https://tinyurl.com/y6w79w9y> [as of July 31, 2020], and to "build[] grassroots power with Black communities who have been left out [of] the political process," (*6 Years Strong*, Black Lives Matter

<https://tinyurl.com/y4dqcstx> [as of July 31, 2020]; *see also* Lowery, *How Civil Rights Groups Are Using The Election [to] Create Black Political Power* (Nov. 18, 2016) Wash. Post <https://tinyurl.com/y4yyh24j>.). The Black Lives Matter movement has succeeded in motivating politicians to develop policies geared toward police reform, for example. (Ruffin, *supra.*)

Black Lives Matter also supports legislation that safeguards Black lives. (*BLM's #WhatMatters2020, supra.*) For example, in 2015, a group within the Black Lives Matter movement published an agenda to reduce police violence, including guidelines to limit the use of force and prohibitions on quotas for tickets and arrests. (*Black Lives Matter Publishes 'Campaign Zero' Plan to Reduce Police Violence* (Aug. 26, 2015) NPR <https://tinyurl.com/yxr5sqn3>.) And in California, Black Lives Matter supported legislation to make public internal investigations conducted when police kill people. (*Victory: The 'Right to Know' Bill on Police Transparency Is Signed Into California Law* (Oct. 4, 2018) Black Lives Matter <https://tinyurl.com/yyvq8vql>.) Similarly, Black Lives Matter encouraged Congress to enact the Death in Custody Reporting Act to require States receiving federal funds to document and report all

deaths at the hands of police that occur in the process of arrest. (Ruffin, *supra*.)

Most fundamentally, Black Lives Matter seeks to "change[] the terms of the debate on Blackness around the world." (*What We Believe*, *supra*.) To that end, many Black Lives Matter activists have focused on "urgent awareness—the battle to convince the rest of the country that the police killings of black men and women were a crisis": "For all the stories of police abuse, brutality, and impunity that had been shared at black dinner tables, barbershops, and barstools for generations, these basic facts went ignored or unacknowledged by the nation at large." (Lowery, *They Can't Kill Us All*, *supra*, at pp. 158, 195.) For example, the Los Angeles chapter of Black Lives Matter obtains and publicizes body-camera video from police departments on social media "so that people can see what actually happened." (Castillo, *How Two Black Women in L.A. Helped Build Black Lives Matter from Hashtag to Global Movement* (June 21, 2020) L.A. Times <https://tinyurl.com/y7ng8pc5> [quoting Black Lives Matter activist Melina Abdullah].) Through similar tactics, Black Lives Matter has made "millions of people … aware of the ongoing impact of police brutality on black lives." (Ruffin, *supra*.)

Protests by Black Lives Matter activists and supporters have almost certainly contributed to that awareness. The organization has engaged in and supported acts of protest and civil disobedience. For example, on Black Friday in November 2014, Black Lives Matter disrupted holiday season shopping in several different cities "to remind shoppers and larger communities that the issues of police brutality, access to proper health care, housing discrimination, poor education, immigration reform, racial disparities in median wealth, and the prison industrial complex had to be addressed by the entire nation." (*Ibid.*) Black Lives Matter strategically targets acts of civil disobedience to draw attention to issues that non-Black people may be ignorant about. (Lowery, *They Can't Kill Us All*, *supra*, at pp. 61, 152-56; Ruffin, *supra*.)

Black Lives Matter is not, however, "attempting to operate outside of law." (Akbar, *Toward a Radical Imagination of Law* (2018) 93 N.Y.U. L. Rev. 405, 409.) Rather, "[l]aw is fundamental to what movement actors are fighting … for." (*Ibid.*) Indeed, Black Lives Matter aims to "reimagine [the law's] possibilities within a broader attempt to reimagine the state." (*Ibid.*) Nor does Black Lives Matter promote jury nullification: That phrase appears

nowhere on the Black Lives Matter organization's website, nor is it a tactic embraced by the broader movement.

And Black Lives Matter does not promote violence. To the contrary, the Black Lives Matter network is "dedicated to peaceful protest." (Decl. of Patrisse Cullors, *supra*.) Although many members of the media have insisted that "each person on the streets answer, repeatedly, the question of whether they condemned rioting," that insistence "served only to highlight the truth: that the majority of protesters were peaceful, and that violence was being carried out without the consent or sanction of the majority of those on the street." (Lowery, *They Can't Kill Us All*, *supra*, at p. 143.) Indeed, in many ways, violence is antithetical to the movement itself: "The movement began as a response to violence, it was a call to end violence, and that call to end violence was true [in 2014], was true [in 2016], and is true today." (Lowery, *"Shooting Police Is Not A Civil Rights Tactic": Activists Condemn Killing of Officers* (July 17, 2016) Wash. Post <https://tinyurl.com/y6bk9wke> [quoting DeRay Mckesson, a prominent voice in the Black Lives Matter movement].)

C. 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." (*Ibid.*)

In a July 2016 Pew poll, conducted around the time of the voir dire in this case, 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 August 2017, 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>; Easley, *Poll: 57 Percent Have Negative View of Black Lives Matter Movement* (Aug. 2, 2017) The Hill <https://tinyurl.com/y4lv4l7o>.)[3]

[3] Although support for the Black Lives Matter movement has grown in recent months, that racial disparity persists today: Seventy-one percent of Black respondents to a recent poll said that they "strongly support[ed]" Black Lives Matter, with an additional 15 percent saying they "somewhat support[ed]" the movement; among white respondents, only 31 percent said they "strongly support[ed]" the movement, with an additional 30 percent saying they "somewhat support[ed]" it. (Pew Research Center, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement* (June 12, 2020) <https://tinyurl.com/yborjgfg> [hereinafter Pew Research Center, *Amid*

Because "Black Lives Matter" is both a decentralized network and a broad coalitional movement, an expression of "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, *supra*, at p. 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-Cullors, who originated the

Protests].) In any event, the recent increase in white support of Black Lives Matter does not change the racially stratified nature of support at the time of voir dire in this case.

#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. (Khan-Cullors & bandele, *When They Call You a Terrorist: A Black Lives Matter Memoir* (2017) at p. 120.) 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 p. 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*, *supra*, at pp. 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 p. 45.)

D. The Trial Court's Comments In This Case Are Part Of A Long History Of Falsely Portraying Black Civil Rights Movements As Lawless.

The nonviolent direct action and civil disobedience tactics employed by Black Lives Matter reflect centuries-old traditions of Black civil rights protest. For "hundreds of years"—including during the Civil Rights Movement of the 1950s and '60s—Black people have used nonviolent "[d]irect action as a tactic" to demand their freedom. (Ransby, *supra*, at p. 155.) Direct action requires Black protesters to "present [their] very bodies as a means of laying [their] case before the conscience of the local and the national community." (Martin Luther King, Jr., *Letter From A Birmingham Jail* (Apr. 16, 1963) <https://tinyurl.com/ovcktqb>.) When protesters stage sit-ins, work slowdowns, or street blockades, the goal is to "create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue." (*Ibid.*) The "tension" created by direct action and civil disobedience has long given rise to false criticisms and false stereotypes of protesters as lawless and anarchic.

The story of Bloody Sunday, one of the major touchpoints of the Civil Rights Movement, illustrates the parallels between Black Lives Matter and its predecessor movements; like Black Lives

Matter today, the events leading up to Bloody Sunday were part of a protest movement that was misconstrued by others as unwarranted lawless agitation.

On the evening of February 18, 1965, Rev. C.T. Vivian led a group of Black protesters to a courthouse in Marion, Alabama to protest the state's refusal to register Black voters. (Halberstam, *The Children* (2012) at p. 503.) They encountered a posse of state troopers who unleashed "a nightmare of State Police … brutality," and 26-year-old Jimmie Lee Jackson was shot and killed while attempting to shield his mother from the violence. (Branch, *At Canaan's Edge*: *America in the King Years* (2006) p. 8 [hereinafter Branch, *Canaan's Edge*]; Halberstam, *supra*, at p. 503.) On the morning of March 7, 1965, approximately 600 protesters, led by a young John Lewis and Rev. Hosea Williams, peacefully marched across the Edmund Pettus Bridge to protest Lee's murder. (Halberstam, *supra*, at p. 510.) A sea of state troopers met the protesters at the base of the bridge. (*Id.* at p. 511.) The officers ordered the marchers to "disperse" the "unlawful assembly." (Branch, *Canaan's Edge*, *supra*, at p. 50.) One minute and five seconds later, the officers advanced on the crowd with horses, nightsticks, and tear gas. (*Id.* at p. 51.) Thirty minutes after the brutal beating

began with orders to get "all the N****** off the streets," not a single Black person of the 600 who had gathered on the bridge "could ... be seen walking the streets." (*Id.* at p. 53.)

The Bloody Sunday protesters were peaceful; it was state actors who perpetrated the violence. But state officials, including the governor, falsely criticized the protesters as "agitat[ors]" seeking to "foment local disorder and strife." (Ala. Sen. Joint Res. 28 (March 19, 1965) <https://tinyurl.com/y46mnqjc>.) These fallacious claims of encouraging general lawlessness and agitation were typical among government leaders who opposed the Civil Rights Movement. For instance, the Alabama Attorney General obtained an injunction on banning all NAACP activities within the entire state of Alabama on the grounds that the organization "was organizing, supporting, and financing an illegal boycott." (Branch, *Parting the Waters: America in the King Years* (1998) p. 186.) When 35 Black students of Alabama State University requested—and were refused—food service from the state capitol's basement cafeteria, Alabama governor John Malcolm Patterson threatened the students, stating that "[t]he citizens of this state do not intend to spend their tax money to educate law violators and race agitators." (*Id*. at p. 280.) And after police loosed violent dogs and water hoses

on child protesters in Birmingham—and just days after terrorists detonated bombs outside Martin Luther King, Jr.'s hotel room—Alabama Governor George Wallace "denounce[ed] the presence of U.S. Army troops … as an open invitation to resumption of street rioting by lawless Negro mobs." (Branch, *Pillar of Fire: America in the King Years* (1998) p. 83.)

The false messaging and stereotyping of nonviolent protests took hold among the general public. Asked in 1966 whether civil rights protests helped or hurt Black Americans' quest for equal rights, 85 percent of white adults said the protests were unhelpful. (Izadi, *Black Lives Matter and America's Long History of Resisting Civil Rights Protesters* (Apr. 19, 2016) Wash. Post <https://tinyurl.com/z4yj8qh>.) With respect to the events in Selma on the Edmund Pettus Bridge, less than half of Americans sided with the peaceful protesters. (*Ibid.*) History, and a clear-eyed view of the facts, proves these views wrong; it was not the protesters who behaved lawlessly.

When Black protesters "go[] to the Bay Bridge and lock[] arms and stop[] traffic" to protest police brutality, (7 RT 1247-48, 1259-60), then, they do so in the shadow of their elders who bravely undertook the same form of protest. And when those in power

dismiss these courageous protests as "disobeying the law" and "giv[ing] cause to question" the protesters' fitness for jury service, (7 RT 1247-48, 1259-60), they, too, act in the shadow of history. History ultimately honors the former and holds the latter in ignominy. Despite the false claims of lawlessness levied at C.T. Vivian, John Lewis, Hosea Williams, and Martin Luther King, Jr. and countless others, their actions are now both lauded and inseparable from the struggle for Black liberation. The events leading to the striking of Ms. Reed failed to regard this context and, if not corrected by this Court, will perpetuate the nation's shameful legacy of racial injustice.

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

The trial court in this case allowed the prosecution to question Ms. Reed about her support for Black Lives Matter, (7 RT 1156-58); entertained a for-cause challenge in part predicated on Ms. Reed's support for Black Lives Matter, (7 RT 1245-61); and found no prima facie case of discrimination even when the prosecutor cited the juror's "open[] hostil[ity]" during questioning about Black Lives Matter as a race-neutral reason for a strike, (5 RT 1207). This Part explains that support for Black Lives Matter

is *not* a race-neutral trait. Asking questions about Black jurors' support for Black Lives Matter and referencing that support as part of an explanation for striking the juror therefore give rise to at least a prima facie case of discrimination at the first step of the *Batson* analysis. (*See People v. Scott* (2015) 61 Cal.4th 363, 392 [where "the prosecutor provides a reason [for a strike] that is discriminatory on its face," reviewing court may consider that reason in assessing whether defendants have made out a prima facie case under *Batson*].)

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. ((9th Cir. 1992) 959 F.2d 820, 826, *overruled on other grounds in United States v. Nevils* (9th Cir. 2010) 598 F.3d 1158.) 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 p. 822.)[4]

Support for Black Lives Matter similarly "serve[s] as a mere surrogate for race." (*See ibid.*) As explained *supra*, Part I.C, around

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[4] (*See also People v. Gonzales* (2008) 165 Cal.App.4th 620, 631 [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"]; *People v. Turner* (2001) 90 Cal.App.4th 413, 420 (*Turner*), *as modified* (July 17, 2001) [prosecutor's reliance on a prospective juror's residence in the largely Black city of Inglewood was not race-neutral, noting that "African-Americans comprise 49.9 percent of [Inglewood's] voting age population," such that "[c]rediting past experiences with Inglewood jurors as the foundation for [a] view is a mere 'surrogate[]' or 'prox[y]' for group membership" (alterations in original)]; *United States v. Wynn* (D.D.C. 1997) 20 F. Supp. 2d 7, 14-15 (*Wynn*) [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* (1994) 535 Pa. 406, 411 (Nix, C.J.) ["Residence is too closely tied to race to accept the prosecutor's explanation."]; *Ex parte Bird* (Ala. 1991) 594 So. 2d 676, 682 [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"].)

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 who similarly answered. Conversely, far more white than Black respondents expressed disagreement with Black Lives Matter. (*Supra*, Part I.C.) In one poll, 83 percent of Black respondents had a favorable view of Black Lives Matter, whereas only 35 percent of white respondents did, (Harvard-Harris Poll, July 2017 Poll (July 26, 2017) <https://tinyurl.com/y27opc9y>); 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, then, 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* (2017) 341 Ga. Ct. App. 193, 199.)

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 pp. 196, 198.) 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 p. 199.)

Similarly, the South Carolina Supreme Court refused to accept a juror's dreadlocks as a race-neutral justification for a strike. (*McCrea v. Gheraibeh* (2008) 380 S.C. 183.) 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 p. 187.)

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*, *supra*, 380 S.C. at p. 187.) 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 p. 825), and are "likely to take the side of those who are having a tough time," (*id.* at p. 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 p. 825).[5] So, too, here: In a case that has no

[5] (*See also Turner*, *supra*, 90 Cal.App.4th at p. 420 ["To state that 'Inglewood jurors' have a different attitude toward the drug culture is just as stereotypical as the reason given in *Bishop*."]; *Wynn*,

connection to Black Lives Matter, the assumption that supporters of the movement "could not fairly try" a Black defendant similarly amounts to the kind of "group-based presupposition[]" forbidden by *Batson*.[6] And as explained *supra*, part I.D, it is a "presupposition" that has been leveled, for generations and without any basis in fact, at Black activists.

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supra, 20 F. Supp. 2d at p. 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 protection.'" (alteration in original)]; *Congdon v. State* (1993) 262 Ga. 683, 684 [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"].)

[6] For that reason, this case is also distinguishable from *People v. Miles* (2020) 9 Cal.5th 513, in which the California Supreme Court deemed a juror's support for the O.J. Simpson verdict a "race-neutral" justification for a strike, notwithstanding that Black people supported the verdict at a far higher rate than white people. In *Miles*, "the prosecutor considered Simpson's case to be similar to defendant's case given that both cases relied on DNA evidence and circumstantial evidence." (*Id.* at p. 552.) In the case at bar, by contrast, nothing about the trial makes a juror's feelings about Black Lives Matter relevant.

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.

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.C.) When Black people support Black Lives Matter, they are—like Black protesters half a century ago who carried placards proclaiming, "I Am A Man," (Sides, *Hellhound on His Trail* (2010) p. 81)—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* (2019) 139 S. Ct. 2228, 2247 ["[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.

Directing such "inflammatory" questioning to Black jurors is not race-neutral. 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." ((Fla. Dist. Ct. App. 2006) 959 So. 2d 275, 278.) "The term 'racial profiling,' standing alone," the court held, evokes a "visceral response," "particularly with black jurors." (*Id.* at p. 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." (*Ibid.*; *see also*

Love v. Yates (N.D. Cal. 2008) 586 F. Supp. 2d 1155, 1180 ["[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." ((Ill. App. Ct. 1995) 651 N.E.2d 608, 615.) 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. ((Tex. Ct. App. 1990) 792 S.W.2d 265, 268-

69.) 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. (*Ibid.*)

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*, *supra*, 792 S.W.2d, at p. 268 fn.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 prosecution's repeated questioning about Black Lives Matter and citation of Black Lives Matter in both its for-cause and peremptory

challenges to Ms. Reed should, at the very least, give rise to an inference of discrimination at the first step of the *Batson* analysis.

III. Support For Black Lives Matter Does Not "Give[] Cause To Question" A Juror's Fitness To Serve.

In assessing a for-cause challenge to Ms. Reed, the trial court declared that a juror's support for Black Lives Matter could "give[] cause to question whether or not they're going to support our system here. It's disobeying the law." (7 RT 1260.) Although the trial court denied the motion to strike Ms. Reed for cause, it later rejected defendants' *Batson* challenge because it had come "extremely close to granting" the for-cause challenge. (5 RT 1221; *see also* 7 RT 1261 ["[T]his is a very close call."].) But the notion that a supporter of Black Lives Matter is automatically unqualified to serve on a jury is both racially loaded, as explained *supra*, Part II, and breathtakingly wrong. And absent the trial court's wrong-headed assertion that support for Black Lives Matter in and of itself "gives cause to question" a juror's fitness for service, the for-cause challenge would not have been close.

California limits for-cause challenges by statute to ineligibility, implied bias, or actual bias. (Code Civ. Proc., § 225, subd. (b)(1)(A)-(C).) The bases for finding implied bias are also

circumscribed by statute. (Code Civ. Proc., § 229.) Those bases include "[h]aving an unqualified opinion or belief as to the merits of the action" or "[t]he existence of a state of mind in the juror evincing enmity against, or bias towards, either party." (*Id.* at § 229(e)-(f).) The key factor is "a juror's willingness and ability to follow the law," not any "broader views" about the case or judicial process, even if those broader views "lean[] significantly toward one side or the other." (*People v. Armstrong* (2019) 6 Cal.5th 735, 754 (*Armstrong*).)

Against Ms. Reed's repeated assertions that she could serve fairly and impartially as a juror, neither the prosecution nor the trial court pointed to any valid evidence that Ms. Reed had an actual or implied bias in this case. (*See* 7 RT 1260-61 [trial court finding that Ms. Reed "consistently … said that she could be fair"].) The trial court seemed to believe that support for Black Lives Matter meant a penchant for general lawlessness: The judge had "read up" on Black Lives Matter and concluded that "[g]oing to the Bay Bridge and locking arms and stopping traffic and going downtown Oakland and, you know, organizing when they don't have a permit and, you know, over and over, you hear about other cities where the same things are occurring" created real doubts that supporters

of Black Lives Matter could follow the law. (7 RT 1247, 1259-60.) But supporters of Black Lives Matter aren't lawless as a general matter; where the movement engages in civil disobedience, it does so in a targeted, intentional way designed to raise awareness and generate support for the cause. And Black Lives Matter, like its forebears, seeks to develop and build a more equal legal system—not tear down legal systems altogether. (*Supra*, Parts I.B, I.D.) Even if the statutory bases for a for-cause strike included a penchant for breaking the law, then, "going to the Bay Bridge and locking arms" does not evince such a predisposition.

Nor are any of the statutory bases for imputing bias to a juror relevant in this case. Support for Black Lives Matter doesn't mean "[h]aving an unqualified opinion or belief as to the merits of the action," (Code Civ. Proc., § 229 subd. (e))—there is no basis to conclude that a juror would prejudge the outcome in a case based on her bare assertion of support for Black Lives Matter, particularly in a case with no plausible connection to Black Lives Matter. And support for Black Lives Matter does not "evinc[e] enmity against" the prosecution or the victim, (Code Civ. Proc., § 229 subd. (f))—the movement's belief in the value of Black lives does not come at the expense of other lives. (*See supra*, Part I.A.)

The prosecution's misconceptions about Black Lives Matter are also an invalid basis for a for-cause challenge. The prosecution first based its for-cause challenge on the fact that Ms. Reed "denied knowing" of Black Lives Matter's "civil unrest of open rioting where private property is damaged, which is well-known within the media." (7 RT 1246.) Even if that were an accurate characterization of the relevant colloquy, it would not supply a reason to strike Ms. Reed for cause. As explained *supra*, Part I.B, violence is in many ways antithetical to the Black Lives Matter movement. Accurately answering that neither "open rioting" nor damage to private property are components of the Black Lives Matter movement could not serve as the basis of a for-cause challenge. And in any event, Ms. Reed stated unequivocally that she did not support rioting or looting, once she understood the prosecution's questions. (7 RT 1250, 1253.)

The prosecution also claimed that a for-cause strike was warranted because Black Lives Matter's "purpose" was to "commit civil disobedience, and by that I mean jury nullification." (7 RT 1257.) But that claim is entirely baseless. Black Lives Matter's key tactics are electing politicians who share the movement's values, supporting legislation that benefits Black lives, and changing the

terms of the debate on Blackness through media and protest. (*Supra*, Part I.B.) Jury nullification is not even mentioned on the Black Lives Matter website or embraced within the network's platform. (*Ibid.*) The prosecution was simply wrong about Black Lives Matter's "purpose," and that misconception cannot form the basis of a for-cause strike. (*See Armstrong*, *supra*, 6 Cal.5th at p. 757 [for-cause challenge appropriate only where there is "substantial evidence" that a juror "would have had any difficulty following the court's instructions"].)

Absent the trial court's conviction that support for Black Lives Matter in and of itself "gives cause to question" a juror's suitability to serve and the prosecutor's misinformation about the movement, the for-cause challenge against Ms. Reed would not have been a "close call." (7 RT 1260-61.) And absent a borderline for-cause challenge, it is difficult to understand how the trial court could have rejected a *Batson* challenge at the first step.

The prosecutor's racially disparate questioning and facially discriminatory reasons for striking Ms. Reed alone creates an inference of discrimination sufficient to proceed past the first step of the *Batson* analysis. And as detailed in the parties' briefs, the record also includes numerical evidence (the prosecution used

peremptory strikes against three of the five Black jurors who were not excused or struck for cause); evidence of the pattern and practice of the prosecutor's office; inconsistencies and inaccuracies in the prosecutor's list of reasons for striking Ms. Reed; and comparative juror evidence indicating that Ms. Reed's race was the salient trait leading to the peremptory strike (jurors who supported the ACLU, for example, or who criticized law enforcement were seated). (*See* Michaels AOB 62-64, 71.) That evidence is more than sufficient to clear the low threshold of establishing a prima facie case. (*See Johnson v. California* (2005) 545 U.S. 162, 168-70.)

IV. 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, Ms. Reed herself has stated that she views being struck from the jury as "a life-

changing experience," which she "tell[s] [her] kids about." When Ms. Reed received a jury summons, she was "eager" to perform jury duty; now, "she doesn't want to go through jury duty again." (Vansickle, *You Can Get Kicked Out of a Jury Pool for Supporting Black Lives Matter* (July 7, 2020) The Marshall Project <https://tinyurl.com/yyz5s83h>.)

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." (Bell, *Police Reform and the Dismantling of Legal Estrangement* (2017) 126 Yale L.J. 2054, 2105.)

Allowing questioning regarding Black Lives Matter may also give California's prosecutors yet another weapon in their arsenal of techniques to eliminate Black jurors. Of nearly 700 cases regarding peremptory strikes decided by the California Court of Appeals from 2006 through 2018, 72 percent involved prosecutors using strikes to remove Black jurors; less than one percent involved prosecutors striking white jurors. (Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020) p. vi.) Training manuals for

prosecutors already instruct on how to strike Black jurors while avoiding *Batson* challenges, including lengthy lists of "race-neutral" reasons that prosecutors can rely upon. (*Id.* at p. 44.) Adding support for Black Lives Matter to that list of "race-neutral" reasons would give prosecutors license to strike the vast majority of Black jurors. (*See* Pew Research Center, *Amid Protests, supra* [86 percent of Blacks express support for 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*, 476 U.S. at p. 87); (*see also, e.g.*, *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1172 ["[R]acial discrimination in jury selection 'undermines the structural integrity of the criminal tribunal.'"].) As members of this Court have explained, strikes can "compound[] institutional discrimination by excluding more minorities than non-minorities from juries, diminish[] public confidence in the fairness of our justice system, and undermine[] the value of having juries that represent a fair cross-section of the community, as it risks 'losing

perspectives that may be essential to the ideal of a jury made up of diverse experiences and viewpoints.'" (*People v. Bryant* (2019) 40 Cal.App.5th 525, 546 (Hume, J., concurring).)

Black Lives Matter is grounded in the idea that Black people have inherent value. To suggest that a juror who holds that belief is ineligible for jury service or 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* (1991) 500 U.S. 352, 360.) 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.*, *State v. Campbell* (N.C. Ct. App. 2020) 838 S.E.2d 660, 663; *Cooper v. State* (Nev. 2018) 432 P.3d 202, 206-07; *State v. Gresham* (Minn. Ct. App., Dec. 19, 2016, No. A15-1691) 2016 WL 7338718, at *1.) 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*, *supra*, 432 P.3d at pp. 206-07.) This Court should follow suit and make clear that support for Black Lives Matter is not a race-neutral reason for a strike and does not give cause for the prosecution to excuse a juror.

CONCLUSION

The very purpose of the Black Lives Matter movement is to affirm the value and equality of *Black* lives; support for Black Lives Matter cannot be race-neutral. And a judge cannot properly treat support for Black Lives Matter as a presumptive basis for excluding a prospective juror for cause. This Court should reverse appellants' convictions.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants, pursuant to Rule 8.204(c)(1) of the California Rules of Court, certifies that Appellant's Opening Brief contains 10,594 words, as counted by the word count of the computer program used to prepare the brief.

Dated: July 31, 2020

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PROOF OF SERVICE

The undersigned declares under penalty of perjury:

That I am a citizen of the United States; that I am over the age of eighteen years and not a party to the within aforementioned action; and that my business address is MacArthur Justice Center, 2443 Fillmore St., #380-15875, San Francisco, CA 94115.

I further declare that on July 31, 2020, I, with the assistance of Sheyeen Chuang at Orrick, Herrington & Sutcliffe LLP, served a copy of the attached:

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on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

Appeals Clerk
The Superior Court of
California
County of Contra Costa
A.F. Bray Courthouse
1020 Ward Street
Martinez, CA 94553

Ms. Chuang is employed in the county from which the mailing occurred. On the date indicated above, Ms. Chuang placed the sealed envelope(s) for collection and mailing at Orrick's office business address at 701 5th Ave., Ste. 5600, Seattle, WA 98104. Ms. Chuang is readily familiar with Orrick's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, Orrick's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Berkeley, California, this 31st day of July 2020.

Easha Anand	/s/ *Easha Anand*
(typed)	(signature)