No. _____

IN THE

Supreme Court of the United States

DARRYL CARTER, THERESA HAWTHORNE, AND DIANE JOHNSON,

Petitioners,

v.

JAMES E. STEWART, SR., IN HIS OFFICIAL CAPACITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Carter, Johnson, and Hawthorne are Black citizens of Louisiana's First Judicial District who joined an existing § 1983 suit against Respondent in his official capacity as District Attorney. Each Petitioner was excluded from jury service by peremptory challenges exercised by Respondent's assistants. Petitioners alleged that these strikes followed Respondent's policy, custom, or usage of racially-discriminatory peremptory challenges.

Petitioners relied in part on a statistical analysis of jury selection records in 395 criminal trials conducted by Respondent's prosecutors, showing that Black jurors had 4.97 times greater odds of being struck by prosecutors than non-Black jurors; where the defendant on trial was Black, the Black jurors' odds of prosecutorial exclusion increased to 5.54 times greater than those of non-Black jurors. This evidence was corroborated by testimony of a former prosecutor and a defense attorney, as well as a public statement by Respondent, issued days before his first election as District Attorney, condemning the office's racially-discriminatory jury practices. Moreover, in the trials where Petitioners were struck, the prosecutors used their peremptories exclusively on Black citizens.

The district court, evincing skepticism regarding the viability of a civil action under § 1983 brought by peremptorily-challenged jurors alleging their exclusion was racially discriminatory, granted summary judgment, ignoring the factual disputes which would ordinarily preclude such a ruling. The Court of Appeals affirmed this dismissal, similarly disregarding settled summary judgment standards.

This ruling presents the following questions for review by this Court:

1. Does a prospective juror who alleges they were struck as the result of a policy, custom, or usage of racial discrimination have a cause of action under § 1983?

2. If the answer to Question One is "yes," must such claims be adjudicated in the same manner as other § 1983 lawsuits, including the submission of genuine issues of material fact to a jury?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Carter, Johnson, and Hawthorne respectfully petition this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit affirming the district court's order granting summary judgment to Respondent Stewart. That order dismissed Petitioners' § 1983 action for damages and a declaratory judgment for their exclusion from jury service in criminal trials as a result of Respondent's policy, custom, or usage to exercise peremptory challenges to prevent Black citizens from participation on criminal trial juries on account of their race.

OPINIONS BELOW

The Court of Appeals' decision on petition for rehearing, reported as *Pipkins v. Stewart*, 105 F 4th 358 (5th Cir. 2024), is attached as Appendix A. That opinion replaced the panel's prior opinion in *Pipkins v. Stewart*, 98 F.4th 632 (5th Cir. 2024), which is attached as Appendix B. The opinion of the United States District Court for the Western District of Louisiana, granting summary judgment to Respondent, *Pipkins v. Stewart*, No. 5:15-cv-2722, 2022 WL 4454385 (W.D. La. Sept. 23, 2022), is attached as Appendix C. The district court's opinion denying Respondent's motion to dismiss as to the three Petitioners here (Carter, Johnson, and Hawthorne), but restricting the scope of the litigation, *Pipkins v. Stewart*, No. 5:15-cv-2722, 2019 WL 1442218 (W.D. La. April 1, 2019), is attached as Appendix D.

JURISDICTION

The Fifth Circuit's opinion affirming the district court's summary judgment ruling was entered June 20, 2024.[1] Justice Alito granted two requests for extension of time, the second of which set November 1, 2024 as this petition's due date.

This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Title 42, Section 1983, of the United States Code provides, in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in [a] . . . suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioners Carter, Johnson, and Hawthorne are Black citizens qualified to serve as criminal trial jurors in Louisiana's First Judicial District.[2] They

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[1] App. 1a.

[2] The district is co-extensive with Caddo Parish, of which Shreveport is the seat of government. App. 14a n.1.

were added to the original complaint in this case, which sought only declaratory and injunctive relief.[3] Because Carter, Johnson, and Hawthorne were excluded from criminal trial juries due to peremptory challenges by Respondent's assistants, the amended complaint also sought damages for the violation of their Fourteenth Amendment rights to the equal protection of the laws.[4] All of the claims in the operative Third Amended Complaint were brought against Respondent in his official capacity as District Attorney of the First Judicial District.[5]

The district court abstained from exercising jurisdiction over the requests for injunctive relief, thus dismissing the claims of all plaintiffs except those who had appeared for jury service and been struck by Respondent's assistants.[6] After discovery, Respondent's motion for summary judgment and associated relief was granted.[7] On appeal, a Fifth Circuit panel affirmed,[8] on rehearing, the panel modified its opinion.[9]

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[3] ROA.147; ROA.173.

[4] *Id*.

[5] ROA.173.

[6] App. 51a.

[7] *Id*. at 14a.

[8] *Id*. at 8a.

[9] *Id*. at 1a.

FACTS RELEVANT TO THIS PETITION

I. The peremptory challenges used by Respondent's assistants to strike Petitioners from criminal trial juries followed Respondent's policy, custom, or usage of racial discrimination in jury selection.

A. Each Petitioner was excluded by the exercise of peremptory challenges by Respondent's office in trials where the prosecution's strikes were used exclusively against Black prospective jurors.

State v. Odums, a felony prosecution, came on for trial on April 20, 2015.[10] Carter and Johnson were summoned for jury service for that day and were presented for selection to lead prosecutor Jason Brown and defense attorney J. Antonio Florence. The prosecutor exercised seven peremptory challenges against seven Black jurors, not using any peremptory challenges against non-Black jurors.[11] A written *Batson v. Kentucky*[12] objection filed by Florence was denied by the trial judge without requiring the prosecutor to give reasons for the strikes.[13]

During *voir dire*, Carter was the only juror on his panel asked by the prosecutor if he knew Odums, the Black defendant in the case. This comports with

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[10] Louisiana allows each side twelve peremptory challenges in felony cases. La. C. Cr. P. art. 799.

[11] ROA.5620:24-5621:6.

[12] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[13] ROA.4348:6-16.

Florence's experience, in which Respondent's ADAs, specifically including the one who struck Carter, question Black jurors more persistently than white jurors whether they know persons involved in the criminal legal system.[14] Carter did not know Odums.[15]

State v. Carter, a misdemeanor case, came on for trial on June 16, 2015.[16] Holly McGinnis Pailet was lead prosecutor on the case.[17] Hawthorne was on the venire for voir dire in the case. The prosecution used three peremptories to strike three Black jurors, including Hawthorne.[18] The prosecutor did not remember why she struck Hawthorne.[19] The transcript shows that the prosecutor did not direct any *voir dire* questions to Hawthorne.[20] In answer to a question from defense counsel, however, Hawthorne testified to a view favorable to the prosecution.[21] Even

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[14] ROA.4793 ¶3.

[15] ROA.5673:4-19; ROA.4795. ¶11.

[16] Louisiana allows each side six peremptory challenges in misdemeanor cases. La. C. Cr. P. art. 782(A).

[17] ROA.5754:12-17. The second prosecutor on the case had no memory of the trial, ROA.5841:23-5842:2, and even after reviewing the available documents, could not recall any reasons for the peremptory challenge against Hawthorne. ROA.5850:23-24.

[18] ROA.5958; ROA.4542:19-24.

[19] ROA.5775:9-22.

[20] ROA.5959-6029.

[21] Defense counsel asked the panel as a whole: "By a show of hands, is there anyone here that thinks Mr. Carter is here because he did something wrong?" Hawthorne responded, "He's here for a reason," and explained further, "Well, I feel like he's here for a reason. It's got to be something he done did or they got the proof that he did it, so it's a reason." ROA.5995:7-15;

then, the prosecutor did not follow up with Hawthorne.[22] Neither the prosecution nor the defense moved to strike Hawthorne for cause.[23]

B. Statistical analysis of nearly ten thousand jury selection decisions by ADAs in 395 trials over a twelve-year period demonstrates that the race of a prospective juror played a role in Respondent's use of peremptory challenges.

The peremptory challenges against Carter, Johnson, and Hawthorne were part of a larger pattern. Dr. Shari Diamond, J.D., Ph.D., and Dr. Joshua Kaiser, J.D., Ph.D.,[24] studied jury selection records in 395 Caddo Parish criminal trials from January 2003 through June 17, 2015.[25] Diamond and Kaiser controlled for a series of non-racial case[26] and

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ROA.5781:12-5782:4.

[22] ROA.5959-6029.

[23] ROA.5783:4-10.

[24] Dr. Diamond is the Howard J. Trienens Professor of Law and Professor of Psychology at Northwestern University, where she directs the JD/PhD Program. She is also a Research Professor at the American Bar Foundation. ROA.4389-90. Dr. Kaiser is an Assistant Professor of Sociology at the University of Massachusetts, Amherst, and a Collaborating Scholar at the American Bar Foundation. ROA.4390-91.

[25] This was the last day of the second of the two trials in which Petitioners were excluded by prosecutorial peremptories, and was thus the endpoint of the statistical analysis related to their damages claims. ROA.4391 n.1.

[26] "Case characteristics" are variables expected to exist in each case: number of defendants, defendant(s)'s race, defendant(s)'s gender, offense type (using the FBI's National Incident-Based Reporting System), whether 6 or 12 jurors were selected for trial,

juror characteristics[27] that might account for that pattern.[28] The race and gender of the judge and prosecutor were additional variables.[29] The experts measured the extent to which these characteristics predicted the odds of an ADA striking any one juror.[30]

Diamond and Kaiser concluded that "[t]he substantially disproportionate use of peremptory challenges on Black jurors by the prosecutors in Caddo Parish is consistent with the conclusion that race played a role in these prosecutorial decisions throughout the time between 2003 and June 17, 2015."[31]

The statistical analysis which formed the basis for this conclusion was not contested:

- Black jurors had 4.97 times greater odds of being struck by Respondent's assistants than did non-Black jurors[32] (with the probability

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the jury-to-venire ratio (the ratio between the final number of juror seats on the jury (including alternates) and the number of eligible jurors in the venire after jurors for cause have been excused), the percentage of the eligible jurors in the venire who were white, and the percent of the eligible jurors in the venire who were male. ROA.4394 ¶16.

[27] "Juror characteristics" (variables expected to exist for each juror) are race and gender. ROA.4395 ¶18.

[28] Kaiser testified, "we included variables that had the potential to impact prosecutorial strike behavior." ROA.4695:3-7.

[29] ROA.4395 ¶17.

[30] ROA.4394 ¶15.

[31] ROA.4399, ¶24.

[32] ROA.4396 ¶19; ROA.4598:13-20.

that this is due to chance, as opposed to race, being less than one in one thousand);[33]

- this odds ratio difference was consistent on a year-to-year basis throughout the 2003-15 time period;[34] and
- this pattern of racially disproportionate use of prosecutors' peremptories pervaded over 90% of the 395 trials, indicating "a system-wide pattern across cases."[35]

Where the defendant was Black, the odds of peremptory exclusion of Black jurors by prosecutors increased to 5.54 times greater than non-Black jurors.[36] Diamond explained that this finding in particular signified a pattern of discriminatory behavior, due to the implausibility of any other "juror-based explanation" which could explain "why a juror should be treated differently if the defendant is black versus the defendant is white."[37] Kaiser concurred that no factor other than race could account for all of

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[33] ROA.4936 ¶19.

[34] ROA.4398, ¶22. ROA.4611:21-4612:15.

[35] ROA.4398, ¶23. ("In 91.6% of the cases, the prosecution struck a higher percentage of Black than Non-black jurors; in 2.5% of the cases the percentages were equal; and in 5.8% of the cases the prosecution struck a lower percentage of Black than Non-black jurors," indicating "a system-wide pattern across cases").

[36] ROA.4938 ¶20. The probability that this result is due to chance, as opposed to the race of the juror and the defendant, is less than one in one thousand. Kaiser testified that the "one-in-one-thousand" measure was an abbreviation by convention, and that the actual calculations showed that "we can be sure that there's less than a one in a hundred trillion chance. That's how low that P value is." ROA.4764:2-3, 11-13.

[37] ROA.4570:7-17.

the systematic patterns identified in the analysis, [38] saying "we are very, very sure that this is not the result of random patterns. This is a systematic pattern."[39]

Respondent's expert did not challenge this statistical methodology, did not contest any of the underlying data in the report, and neither requested nor reviewed any of that data.[40] Rather, he testified that Diamond and Kaiser "are two reputable individuals who did not lie about the data, who entered the data properly, and that all the statistical analyses were done properly using a computer entering data."[41] He admitted that he used the same methodology in discrimination cases where he was engaged as expert for plaintiffs.[42]

Diamond and Kaiser both testified that the patterns displayed in the 395-trial dataset also existed in the jury selection in the *Odums* and *Carter* cases.[43]

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[38] ROA.4769:9-19.

[39] ROA.4764:17-19.

[40] ROA.4910:5-7; ROA.4910:25-4911:4; ROA.4912:5-11.

[41] ROA.4910:9-22.

[42] ROA.4930-4936.

[43] ROA.4542:2-10; ROA.4544:1-9; ROA.4734:22-4735:8, ROA.4735:17-19.

C. Statements from a former Caddo prosecutor, a Shreveport defense attorney, and Respondent himself confirm the use of race in prosecutors' peremptory challenges.

In addition to the statistical evidence, three statements—two sworn, and one from Respondent himself—confirm the existence of a policy, custom, or usage of racial discrimination in the use of peremptories by Respondent's office.

Ben Cormier was a full-time ADA in Caddo Parish from 2008 through 2009-10, responsible for trial prosecutions.[44] When, in August 2015, the non-profit Reprieve Australia announced the results of an earlier study of racial discrimination in jury selection in that jurisdiction, Cormier posted in a private Facebook group that "[w]e were trained to strike black jurors. The Honorable Brady [O'Callaghan][45] once told [me] you just need a race neutral excuse to avoid a *Batson* challenge."[46]

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[44] Although Cormier's tenure predated the 2015 trials in which Petitioners were excluded, the racially-disproportionate exercise of peremptory challenges by Respondent's assistants remained consistent throughout the 2003-15 time period. ROA.4398, ¶22; ROA.4611:21-4612:15.

[45] O'Callaghan, now a state court judge, was an experienced prosecutor who trained other ADAs in Respondent's office. ROA.5069:19-24, ROA.5963:18-5964:14, 5069:19-24. Training of newer attorneys in Respondent's office in the years before Petitioners' exclusion was primarily accomplished by watching more experienced attorneys in trials and being guided in their own cases by more established prosecutors such as O'Callaghan. ROA.5425:18-5426:24; ROA.6078:5-21; ROA.5260:10-5261:4.

[46] ROA.4792.

In his sworn declaration offered in opposition to summary judgment, Cormier elaborated:

> In my experience as an ADA, trial prosecutors in the Caddo Parish DA's Office provided advice and counsel that striking black jurors with peremptory challenges because of the tendency of black jurors to vote not guilty could prove beneficial to obtaining a conviction. I was also given advice on more than one occasion that if I was ever confronted with a *Batson* challenge, I should be prepared to offer a race neutral reason for striking a minority juror so that the *Batson* challenge could be overruled.[47]

Florence, the defense attorney in the *Odums* trial where Carter and Johnson were struck, testified that Respondent's ADAs commonly admitted the desirability of a predominantly white "Caddo jury" to a "Shreveport jury" which would be comprised of "more than a couple of Black jurors." [48]

Finally, in an "open letter" to voters in the *Shreveport Times* personally drafted by Respondent after the filing of this lawsuit and before the election where he first became District Attorney, he asserted that "[t]he systematic exclusion of a group of people from jury service by Dhu Thompson and others without valid legal reason, but based only upon their

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[47] ROA.4791, ¶9. Cormier further testified, "I understood that, even if the race of a prospective juror was all or part of the reason for striking that juror, if I gave a race neutral excuse, I could prevent any *Batson* challenge from being successful." ROA.4791, ¶8.

[48] ROA.4793-94, ¶4.

race, offends the basic principles of justice and due process, and is shocking to any fair-minded person."[49]

D. Respondent's final policymaker had notice of allegations of racial discrimination in jury selection together with records supporting those allegations, but did nothing about it.

Dale Cox was Respondent's final policymaker at the time of the exclusion of Petitioners from the *Odums* and *Carter* juries. Cox was appointed First Assistant District Attorney on May 15, 2012,[50] and became Acting District Attorney by operation of law when District Attorney Charles Scott died on April 22, 2015.[51] As First Assistant, Cox supervised all trial and appellate ADAs.[52] Then, as Acting District Attorney, Cox had "entire charge and control of every criminal prosecution instituted or pending in his district."[53]

On several occasions prior to the trials where Petitioners were excluded, Cox was made aware of "defense motions filed in other cases alleging systematic exclusion of African-Americans solely on

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[49] ROA.4823:3-11; ROA.4797-4799. Thompson was an experienced ADA during the administrations of the two previous District Attorneys, and was perceived as the candidate preferred by then-Acting DA Cox, who testified that "the entire letter is a criticism of my leadership of the office," ROA.5125:5-6, and "[Stewart] was running against me even though I was not running in the race." ROA.5127:23-24.

[50] ROA.5069:4-12.

[51] ROA.5050:3-12.

[52] ROA.5050:13-24; ROA.5052:5-6.

[53] La. C. Cr. P. art. 61.

grounds of race." [54] The briefs cited a summary of jury selection records in 120 trials prosecuted by Respondent's office between 1997 and 2009, showing that Black jurors were struck by ADAs at a rate 3.4 times that of all other races.[55] In a hearing in one of those cases in February 2014, Cox was personally provided a computer disk with the data from the referenced cases.[56] Although he supervised all trial prosecutors at the time of this hearing,[57] Cox took no action with regard to this information.[58] He neither reviewed nor assigned anyone to review the files of the 120 trials on the disk.[59]

REASONS FOR GRANTING THE WRIT

I. Under this Court's settled precedent, a prospective juror alleging their exclusion via peremptory challenge was based on race may seek redress through a civil rights action.

This Court stated in *Powers v. Ohio* that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[60] This echoed Alexis de Tocqueville's nineteenth-century admiration for the American jury, which "places the real direction of society in the hands

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[54] ROA.5108:1-6, ROA.5108:13-5109:10.

[55] ROA.5194.

[56] ROA.5524:14-18; ROA.5120:8-14.

[57] ROA.5120:25-5121:9.

[58] ROA.5120:15-24.

[59] ROA.5121:17-21.

[60] *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

of the governed" and "invests the people . . . with the direction of society."[61]

More recently Justice Gorsuch wrote, "Together with the right to vote, those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions."[62]

Where the scourge of racial discrimination raises its head to block Black citizens from participation on juries, this Court has been steadfast. As this Court recognized in *Flowers v. Mississippi*, "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many."[63]

The recognition of the Fourteenth Amendment rights of a prospective juror excluded from a grand or petit jury due to racial discrimination has a long pedigree. The Equal Protection Clause's application to such jurors was first announced in *Strauder v. West Virginia*, decided twelve years after the amendment's ratification. Striking down a statute categorically excluding Black citizens from jury service, *Strauder* stressed that the Fourteenth Amendment's "design

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[61] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282-83 (Phillips Bradley ed., 1945).

[62] *United States v. Haymond*, 588 U.S. 634, 640-41 (2019) (Gorsuch, J.) (plurality opinion) (citations omitted).

[63] *Flowers v. Miss.*, 588 U.S. 284, 298 (2019).

was to protect the emancipated race, and to strike down *all possible* legal discrimination against those who belong to it."[64] Based on this founding-era interpretation alone, it is eminently clear that an individual juror may sue to vindicate his or her expansive rights.

As is well-documented, *Strauder* was only the beginning of this Court's crusade against racial discrimination in the jury selection process. Throughout the first half of the Twentieth Century, decision after decision re-emphasized the capacious protections afforded to jurors by the Fourteenth Amendment.[65]

In 1970, in *Carter v. Jury Commission of Greene County*, this Court heard "the first case . . . in which an attack upon alleged racial discrimination in choosing juries has been made by plaintiffs . . . rather than by defendants challenging judgments of criminal conviction."[66] The Court "found no barrier to such a suit," reasoning that "[s]urely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit."[67] Echoing *Strauder*'s authoritative reading of the Fourteenth Amendment, the *Carter* majority held that "[o]nce the State chooses to provide *grand or petit* juries . . . it must hew to federal constitutional criteria

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[64] *Strauder v. State of W. Va.*, 100 U.S. 303, 310 (1879) (emphasis added).

[65] *Flowers,* 588 U.S. at 295 (collecting cases).

[66] *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 329 (1970)

[67] *Id.* at 330.

in ensuring that the selection of membership is free of racial bias."[68]

Batson, too, emphasized that the Fourteenth Amendment protects jurors in addition to criminal defendants. In support of its holding, the majority stressed, "[r]acial discrimination in selection of jurors harms *not only the accused* whose life or liberty they are summoned to try."[69] Further solidifying the availability of Petitioners' claim here, the majority continued: "As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."[70] As such a denial "constitutes a primary example of the evil the Fourteenth Amendment was designed to cure,"[71] there is no doubt that excluded jurors may sue to vindicate their rights.[72]

The existence of Petitioners' claim was—yet again—placed beyond dispute in *Powers v. Ohio*. Specifically, the majority's third-party standing analysis—upon which its extension of *Batson* relies—fundamentally hinges on *Carter*'s holding "that

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[68] *Id*. (emphasis added).

[69] *Batson v. Ky.*, 476 U.S. 79, 87 (1986) (emphasis added).

[70] *Id*.

[71] *Id*. at 85.

[72] *See also Allen v. Hardy*, 478 U.S. 255, 259 (1986) ("Our holding [in *Batson*] ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice").

individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf."[73][74]

Beyond reinforcing this Court's unbroken line of precedent, the *Powers* majority underscored the precise harms that excluded venirepersons may suffer from discrimination in jury selection. Having been subject to the precise evil the Fourteenth Amendment is meant to eradicate, such jurors "suffer[] a profound personal humiliation heighted by its public character," one likely to cause a loss of "confidence in the court and its verdicts."[75]

One aspect of the *Powers* Court's reasoning deserves particular attention. In assessing the "likelihood and ability of . . . the excluded venirepersons [] to assert their own rights," *Powers* noted that such "challenges are rare" because of "the small financial stake involved and the economic burdens of litigation."[76] Based on the "reality" that a dismissed juror will "possess[] little incentive . . . to vindicate his own rights," the majority afforded

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[73] *Powers*, 499 U.S. at 414 (citing *Carter*, 396 U.S. at 329-330). The district court's suggestion that the *Powers* majority should have "provid[ed] a mere extension of *Batson* without creating the legal fiction of third-party representation and without the language suggesting that the challenged venireperson has a separate right for damages," App. 60a, ignores this doctrinal foundation of *Powers*.

[74] App. 60a.

[75] *Powers*, 499 U.S. at 414-15; *see also id.* at 410 ("[T]he assumption that no stigma or dishonor attaches [for excluded jurors] contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence").

[76] *Id.* at 414.

criminal defendants the ability to raise third-party equal protection claims.[77]

The district court, interpreting this language as an expression of "caution[]" from the *Powers* majority, cited it in support of the proposition that excluded venirepersons should not be allowed to sue on their own behalf.[78] But this analysis was not a warning regarding the wisdom of affording jurors a robust claim; rather, it was an acknowledgment that while jurors certainly *do* have this legal vehicle for suit, such cases are difficult to sustain.[79]

Thus, this Court's precedent, dating back to ratification of the Fourteenth Amendment, points in one direction: jurors excluded from service via racial discrimination have an established claim to access the extensive protections of that constitutional guarantee.

As will be discussed below, the district court paid no more than lip service to this clear direction, wielding groundless skepticism and a speculative parade of horribles to poison Petitioners' claim at the root. And while not adopting the same language as the district court, the Fifth Circuit affirmance treated Petitioners' claim as one in which judges, rather than juries, decide contested factual issues.

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[77] *Id*. at 415.

[78] App. 63a.

[79] The potentially "small financial stake" for excluded jurors does nothing to undermine their legal standing to bring otherwise available Fourteenth Amendment claims. *See Uzuegbunam v. Preczewski*, 592 U.S. 279, 802 (2021) (prayer for nominal damages satisfies the Article III redressability requirement where claim is based on a completed violation of a legal right).

Accordingly, this Court should summarily reverse, directing the courts below to recognize the validity of Petitioners' claim and to submit that claim to a jury for trial. Such a rejoinder is imperative to guarantee that jurors' "cognizable legal interest in nondiscriminatory jury selection" is more than a hollow judicial proclamation.[80]

II. The district court cast a jaundiced eye toward the viability of Petitioners' right to sue for racial discrimination in jury selection.

A. The district court never accepted the viability of Petitioners' damages claim.

Throughout this litigation, the district court expressed skepticism toward Petitioners' constitutional claim. Even a cursory reading of that court's dispositive rulings makes clear that such skepticism—at times bordering on incredulity—infected the court's adjudication of that claim.

The district court exposed its foundational error near the outset of the proceedings, seizing the first opportunity to inject its global disagreement with Petitioners' legal theory. Thus, at oral argument on the motion to dismiss, the district court inquired whether a civil action by struck jurors would "place a chilling effect on every criminal prosecution not only in Caddo Parish but in the state of Louisiana?"[81] The court gave its own response to this question in the part

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[80] *Carter*, 396 U.S. at 239.

[81] ROA.6696:14-16.

of its Rule 12(b)(6) opinion abstaining from advancing the injunctive relief claims.[82]

Then, laundered as an "observation" in the part of its opinion denying Respondent's motion to dismiss Petitioners' damages claim, the court began by warning of "the possible, likely or probable consequences of a right which allows a challenged juror to claim damages."[83] Specifically, it foreshadowed one of the concerns that would later become one of the many erroneous bases for its grant of summary judgment:

> [H]ow in the world would one determine the real reason why a particular juror was challenged on a particular day in a trial that is past? . . . Does it mean that the prosecutor, defense counsel or judge could be deposed in such a suit? Could they be required to disclose internal memos, trial notes or the like to determine (maybe) if there is some extra notation about a particular juror?[84]

These "reservations" proved to be more than harmless judicial provocations; they were a prophecy, a manifestation of the district court's dismissive posture towards Petitioners' Fourteenth Amendment claim and the evidence presented to support it. The

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[82] App. 75a ("During oral argument, Plaintiffs' counsel attempted to sidestep addressing this inevitability by referring to them as 'entirely salutary, prophylactic measure[s] for those prosecutors to follow the Constitution. It is not the practice of the Court, however, to issue injunctions for which it has no intent or means to enforce").

[83] *Id*. at 59a.

[84] *Id*. at 59a-60a.

court went on to document its unwillingness to apply appropriate review of a § 1983 claim for violation of constitutional rights:

> Even if a system could be devised to allow for discovery and litigation of the claim, what is next? If, in the odd case, a plaintiff is able to make out such a claim, would it mean that a whole new method for collateral attack on a final conviction would be created thereby? At stake is the principle, at least given credence sometimes, that the public has a right to see that, at some point, a defendant in a criminal trial is fully and fairly convicted. And, what would be the remedy? A 28 U.S.C. § 2254 petition for inadequacy of counsel, or some other habeas corpus relief yet undeveloped or unheard of? In our view this is the most serious potential consequence, as it can mean that years later an otherwise sustainable prosecution may have to be completely redone because one juror convinced one jury, or judge in the event of a bench trial, that he/she was discriminated against.[85]

The district court closed its musings by questioning whether prospective jurors such as Petitioners should have a claim at all: "While we . . . cannot be said to have the collective wisdom of the Supreme Court, we . . . could have read *Powers* as providing a mere extension of *Batson* without creating the legal fiction of third-party representation and without the language suggesting that the challenged

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[85] *Id*. at 60a.

venireperson has a separate right for damages."[86] Invoking Justice Scalia's *Powers dissent*—and ignoring the clear logic of the majority—the district court concluded by "question[ing] whether the *Powers* Court seriously intended to allow suits such as this one to proceed."[87]

B. The district court's summary judgment decision was tainted by its refusal to accept the validity of a civil action on the part of prospective jurors alleging racial discrimination.

The district court's unfounded doubt of the validity of this civil action persisted into its summary judgment ruling: "As in our earlier ruling in this case, we continue to question the practicality of the right of a challenged juror to seek damages due to dismissal for racially discriminatory reasons."[88]

This was no random occurrence. The court's previously-expressed doubt about the viability of Petitioners' claims was exploited by Respondent in oral argument on his motion for summary judgment: "[t]his is an agenda-driven lawsuit for the purpose of disrupting *Batson* and its effect in the judicial system."[89] Concluding this line of argument, Respondent claimed:

> [T]his case is not limited to just these three plaintiffs in 2015. There's a purpose for this

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[86] *Id*.

[87] *Id*. at 64a.

[88] *Id*. at 48a.

[89] ROA.6738:1-3.

> case, and that's to really cause disruption in the criminal justice system, and this is not the case to do it. They haven't met any burden of proof on this case, and it shouldn't be allowed. It shouldn't be allowed against Caddo Parish. It shouldn't be allowed against Jefferson Parish. It shouldn't be allowed against East Baton Rouge Parish. *It just is not the type of case that should be allowed to move forward,* even assuming all of the evidence that they've alleged is considered by the Court, and we don't think it should be.[90]

1. Petitioners' statistical analysis was disregarded by the district court.

Although the district court recognized that "substantively, these are *Monell*[91] claims against the District Attorney as a municipal entity,"[92] that court misapprehended the significance of Petitioners' statistical evidence of an established policy, custom, or usage.[93] Instead, the court disregarded this

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[90] ROA.6738:23-6739:8 (emphasis added).

[91] *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978).

[92] App. 86a. The Office of the District Attorney is a municipal entity under Louisiana law. *Burge v. Parish of St. Tammany*, 187 F.3d 452, 465-68 (5th Cir. 1999).

[93] Below, Petitioners asserted that the nearly 10,000 jury selection decisions examined in the Diamond-Kaiser Report were, among other things, proof of a widespread practice that consitituted a "custom" under cases such as *Bd. of Cty. Com'rs of Bryan Cty., Ok. v. Brown*, 520 U.S. 397, 404 (1997) ("an act performed pursuant to a custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law").

evidence as showing mere "trends" insufficient to preclude summary judgment. Like its skepticism regarding the viability of a § 1983 discrimination claim by excluded jurors, this rejection of statistical evidence was also foreshadowed in the court's grudging denial of Respondent's motion to dismiss the damages claims:

> Evidence specific to Carter, Johnson, Horton, and Hawthorne showing that the District Attorney exercised peremptory challenges against each of them because of their race will be needed. Statistics appearing to show general trends will not suffice. Accordingly, discovery will be limited to the cases from which Carter, Johnson, Horton, and Hawthorne were excused.[94]

The district court disregarded the Diamond-Kaiser Report[95] as evidence of such "general trends,"

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[94]App. 89a. Relying on the language of the 12(b0(6) opinion—which pre-dated the discovery period—Respondent objected to Petitioners' requests to produce documents, including voir dire transcripts, prosecutors' trial notes or jury strike sheets, or memoranda or email messages about jury selection which did not arise from the *Odums* and *Carter* trials. ROA.852-57. Respondent also blocked testimony from the *Odums* and *Carter* prosecutors about previous trials, even those which took place earlier in that same year. *E.g.*, ROA.5585-88 (testimony about jury selection in a March 2015 trial blocked by objection relying on discovery rulings). Denying Petitioners' motion to compel, the district court affirmed the magistrate judge's holding that "only policies, memoranda, directives, and communications applicable to the exercise of peremptory challenges during the time frame of the *Odums* and *Carter* cases (April 2015 to June 2015) need be produced," ROA.936, stating that Petitioners' position "borders on the frivolous." ROA.1932.

[95] The district court's lack of respect for the two academics was

reasoning that "[t]he Supreme Court has advised that 'statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances," citing this Court's opinion in *Int'l Br. Of Teamsters v. United States*. [96]

The district court mis-read *Teamsters*. In that case, the Government alleged racial and ethnic disparity in employment decisions. Reviewing a final judgment for permanent injunctive relief after a bench trial, this Court considered "whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were 'racially premised.'"[97]

The language quoted from *Teamsters* by the district court includes a paragraph in which this Court held that the Government's statistical analysis was, together with other evidence, not only sufficient to establish the Government's prima facie case but also to support a judgment.[98] The opinion stated that

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highlighted by its use of quotes to refer to them as "experts." App. 77a. Considering the unimpeachable qualifications of Diamond and Kaiser, *see supra* n. 21, and the recognition granted them by Respondent's expert witness, *supra* nn. 40-42, this backhanded disregard was unjustified.

[96] App. 28a, quoting *Int'l Br. Of Teamsters v. United States*, 431 U.S. 324, 340 (1977).

[97] *Teamsters*, 431 U.S. at 335.

[98] The statistics in *Teamsters* showed that at the time of the complaint, the company had 6,472 employees; of these, 314 (5%) were African-American and 257 (4%) were Latinos or Latinas. But out of the 1,828 incumbents of the positions at issue, there were only 8 (0.4%) Black employees and 5 (0.3%) Latinos, and all of the African-Americans were hired after the litigation had

"our cases make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue."[99] It went on to note that:

> We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases.[100]

Only after this endorsement did the *Teamsters* Court "caution" that "statistics are not irrefutable," in the sentence quoted by the district court. In that context, it is unremarkable: obviously statistical evidence can be "rebutted" at trial if conflicting evidence is presented to the factfinder. But *Teamsters'* core holding is that statistical analysis is valid evidence of racial discrimination.

Thus, *Teamsters* stands for the opposite proposition than that asserted by the district court. This is particularly true in the context of summary-judgment review, where the district court is barred from resolving factual disputes.[101]

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commenced. *Teamsters,* 431 U.S. at 337.

[99] *Teamsters*, 431 U.S. at 339, (citing *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620 (1974), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973), and *Washington v. Davis*, 426 U.S. 229, 241-242 (1976).

[100] *Teamsters*, 431 U.S. at 339 (citing *Turner v. Fouche*, 396 U.S. 346 (1970), *Hernandez v. Texas*, 347 U.S. 475 (1954), and *Norris v. Alabama*, 294 U.S. 587 (1935)).

[101] *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (Fifth Circuit opinion in qualified immunity case "reflects a clear misapprehension of summary judgment standards in light of our

2. The district court likewise discarded the testimony of two attorneys and Respondent's "open letter."

Here, the statistical analysis was supported by sworn testimony from two lawyers (one prosecutor, one defense counsel) and from the published acknowledgment of Respondent himself of "[t]he systematic exclusion of a group of people from jury service by Dhu Thompson and others without valid legal reason, but based only upon their race."[102] The district court disregarded this evidence as well, citing hearsay concerns; however, the statements about which Cormier and Florence testified [103] were made by Respondent's assistants regarding matters within the scope of their employment,[104] and the "open letter" was Respondent's own statement.[105]

3. The district court treated its review as if no civil jury was contemplated.

Having discarded the statistical analysis, the testimony of Cormier and Florence, and Respondent's "open letter," the district court proceeded as if it were reviewing a *Batson* issue in a habeas case, exercising the deference appropriate in an appellate or post-conviction review context, but not on review of a

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precedents").

[102] ROA.4823:3-11; ROA.4797-4799.

[103] Former ADA Cormier testified to statements made to him by more experienced prosecutors, and defense attorney Florence to statements made to him by the prosecutors opposing him in trials (including in the *Odums* trial).

[104] Fed. R. Evid. 801(d)(2)(D).

[105] Fed. R. Evid. 801(d)(2)(A).

summary-judgment motion in a civil case: "In the context of *Batson* challenges, we provide significant deference to trial judges, who are present and attentive during jury selection processes and can holistically assess whether prosecutors are dismissing venirepersons based on their race."[106] Consequently, the court deferred to the *Odums* trial judge, who ruled that the strikes exercised by Respondent's assistant (seven total strikes, all on Black jurors) did not constitute a *prima facie* case of discrimination under *Batson*.[107].

Because the *Batson* motion was denied at this first stage, the prosecutor was not required to state race-neutral reasons for his peremptory challenges, and he did not volunteer any.[108] In his deposition, that prosecutor attempted to justify his strikes against Petitioners Carter and Johnson, but acknowledged that the absence of the voir dire transcript compromised this effort.[109]

These post-hoc explanations were accepted at face value by the district court.[110] But they are not

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[106] App. 46a.

[107] *Id.* This Court has rejected the notion that the striking of seven Black jurors was insufficient to move to the next stage of *Batson* analysis because there were remaining Black venire-members who served on the jury. See *Flowers*, 588 U.S. at 307 (citing and quoting *Miller-El v. Dretke*, 545 U.S. 231, 250 (2005) ("In *Miller-El II*, this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors")).

[108] ROA.5348:6-16.

[109] ROA.5299:9-12.

[110] App. 46a.

dispositive. Rather, it is for the factfinder to determine whether the reasons given by the prosecutor are pretexts for racial discrimination in jury selection.[111] In this civil action, the factfinder is the jury.[112]

And despite the fact that the prosecutor in the *Carter* trial could not recall the reasons for striking Hawthorne,[113] and that the only three strikes she exercised were all used against Black jurors, the district court, reviewing the *voir dire* transcript in that case *de novo*, determined that Hawthorne "made statements suggestive of presumed guilt," which served as a sufficient race-neutral reason for the peremptory challenge against her.[114] Despite these "suggestive" statements, Hawthorne was not challenged for cause by either prosecution or defense.[115]

C. The Court of Appeals likewise adopted a standard of review which invaded the province of a Federal civil trial jury.

The Court of Appeals pretermitted any review of the district court's *Monell* analysis by focusing on what it called the "predicate constitutional claim"—whether Petitioners had evidence that the strikes against them were motivated in substantial part by

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[111] *Flowers*, 588 U.S. at 302-03. (citing *Snyder v. La.,* 552 U.S. 472, 477 (2008)).

[112] *Tolan*, 572 U.S. at 659.

[113] ROA.5782:5-14.

[114] App. 47a.

[115] ROA.5783:4-10.

discriminatory intent.[116] The Fifth Circuit panel held that:

> In this case, Plaintiffs cannot establish a predicate constitutional violation. Without a viable *Powers* claim, their *Monell* claim fails too.[117]

But like the district court, the Court of Appeals employed the appellate review standard applicable to a trial judge's decision on a *Batson* challenge, not that appropriate to an appeal from summary judgment in a Federal civil action:

> To establish an Equal Protection violation based on a discriminatory peremptory strike, a plaintiff must make a prima facie case that the peremptory strike was made on the basis of race. Prosecutors may then respond by offering a race-neutral explanation for the peremptory strike. We review that explanation in light of all of the relevant facts and circumstances to determine whether the race-neutral explanation was pretextual, asking whether

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[116] App. 4a.

[117] *Id*. In the original panel opinion, these two sentences bookended one which said, "That is because they cannot show the Caddo Parish prosecutors dismissed them 'solely by reason of their race.' *Powers*, 499 U.S. at 409." App. 11a. This sentence was removed after Petitioners' pointed out that it was in conflict with the panel's quote from *Flowers* setting forth the standard as whether the strike was "motivated in substantial part by discriminatory intent." *Flowers*, 588 U.S. at 302-03. See also *Foster v. Chatman*, 578 U.S. 488, 512-14 (2016); *Snyder v. La.*, 552 U.S. 472, 478, 485.

> the prosecutor's actions were instead motivated in substantial part by discriminatory intent.[118]

Applying this standard, the Fifth Circuit panel conducted a *de novo* review of the record which improperly resolved factual disputes:

> Caddo Parish prosecutors offered race-neutral explanations for each Plaintiff's dismissal. For Carter, the prosecutor noted that he expressed bias against evidence from Shreveport. For Johnson, the prosecutor highlighted that Johnson or her family member had been convicted of a felony and she might be biased against the police department. And for Hawthorne, the prosecutor found Hawthorne's colloquies with defense counsel problematic because those colloquies revealed bias against the defendant. These facts sufficiently explain each juror's dismissal without reference to race.[119]

The panel then explained, "we are not convinced any of these reasons was mere pretext for a race-based dismissal."[120] While paying lip service to the factors governing the determination whether a prosecutor's purported race-neutral reasons were pretextual,[121]

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[118] App. 4a (citations and quotations omitted).

[119] *Id.* at 5a.

[120] *Id.*

[121] *Id.* (citing *Flowers*, 588 U.S. at 301–02) (In considering whether an explanation was pre-textual, we may consider (1) "statistical evidence . . . in the case," (2) evidence of "disparate questioning," (3) "side-by-side comparisons" of dismissed Black jurors and accepted white jurors, (4) "a prosecutor's misrepresentations of the record," (5) "relevant history of the State's peremptory strikes in past cases," or (6) "other relevant

the panel discounted the evidence presented by Petitioners which, under *Flowers*, raised genuine issues of material fact as to whether the prosecutor's post-hoc race-neutral justifications were pretextual under the *Flowers* criteria.[122]

With respect to Carter and Johnson, struck in the *Odums* trial, this evidence included:

- The prosecutor used his peremptory challenges exclusively on Black prospective jurors (seven strikes on seven Black jurors);
- The transcript of the day of jury selection in which Carter and Johnson were struck has been lost;
- The prosecutor did not remember the reasons for his peremptory challenges, and acknowledged he was relying on an interpretation of his jury strike sheet six years after the trial;
- Carter testified he was the only juror on his panel who was asked if he knew Odums, the Black man who was the defendant in the case;[123]
- The defense attorney's notes do not indicate that Carter stated he knew Odums;[124]

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circumstances").

[122] *Id*. at 5a-6a.

[123] ROA.5673:4-19.

[124] ROA.4795, ¶11. Respondent certified that he could not locate the transcript of the second day of voir dire in *Odums*, when both Carter and Johnson were questioned in voir dire and excluded by the ADA's peremptories.

- The claim that Carter "may know" the defendant was one of the central post-hoc reasons offered in the prosecutor's 2021 deposition for his peremptory challenge against Carter;[125]
- The defense attorney's declaration that a white juror who had similar characteristics to Johnson was accepted by the prosecutor;[126] and
- The prosecutor struck other Black jurors who, although not Petitioners, indicated they could be expected to be favorable to the prosecution.[127]

The facts presented by Petitioners with respect to Hawthorne's peremptory challenge in the *Carter* trial included:

- All of the prosecutor's peremptory challenges were used to exclude Black prospective jurors;[128]
- The prosecutor could not remember the reason she struck Hawthorne;[129]

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[125] ROA.5324:7-20. Thus, the jury can infer from the prosecutor's disparate questioning that he was seeking pretexts on which to prevent his racially-discriminatory strikes from being reviewed under *Batson*, consistent with Cormier's testimony about evading legitimate *Batson* objections by offering a pretextual race-neutral reason for striking a Black juror. ROA.4791, ¶9

[126] ROA.4795, ¶9.

[127] ROA.4794-95, ¶8.

[128] Id.

[129] ROA.5775:9-22.

- After the end of the trial, the prosecutor discarded her handwritten notes from the trial, including any regarding jury selection; and
- The prosecutor did not direct any questions at all to Hawthorne,[130] even when she had the opportunity to question after Hawthorne had said of the defendant, "He's here for a reason."[131]

All of these indicia of discrimination were weighed and discarded by the Fifth Circuit.[132]

The panel, like the district court, also discarded the statistical analysis, concluding that: "[t]he study critically omits any controls for individualized reasons a juror might be excused. It therefore shows only general numbers, with no nuance to tell us whether the struck jurors shared characteristics other than race with Plaintiffs—characteristics (like bias) that might provide a race-neutral basis for a peremptory strike."[133]

This ignored the fact that, given the 395-trial sample of nearly 10,000 decisions by prosecutors on whether to strike a prospective juror, the experts testified that no "juror-based" reason such as bias could account for the overwhelmingly disproportionate strikes of Black prospective jurors from 2003 through mid-2015.[134] It also ignored the district court's refusal to compel discovery of the

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[130] ROA.5959-6029.

[131] ROA.5995:10-25; ROA.5781:12-5782:4.

[132] App. 5a.

[133] *Id*. at 6a.

[134] *See supra* nn. 37-39.

materials that would have been necessary to conduct such an analysis, such as *voir dire* transcripts, jury strike notes, and the like.[135]

Petitioners respectfully suggest that the Fifth Circuit's analysis, which made no reference to the summary-judgment standard, is flawed in the same manner as the opinion summarily reversed in *Tolan v. Cotton*. In that case, after recounting the genuine issues of material fact regarding the dispositive issue (qualified immunity), this Court held that "these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion," and thus that "the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents."[136]

The same is true here. Petitioners met their prima facie burden to present colorable claims of racial discrimination. The statistical analysis alone is sufficient for that purpose, but it stands with Cormier's declaration that he was "counseled and advised" by senior ADAs both to strike Black prospective jurors and to concoct race-neutral reasons to withstand *Batson* review, the validation of Petitioners' allegations by Respondent immediately before taking office, and the fact that ADAs struck exclusively Black prospective jurors in the *Odums* and *Carter* trials. It is impossible to say that the prima facie case for racial discrimination here is less compelling than in *Flowers*, *Foster*, or *Snyder*.

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[135] App. 89a; ROA.1932.

[136] *Tolan,* 572 U.S. at 659.

For the same reasons as in *Tolan*, then, the Fifth Circuit's opinion in this case should be reversed:

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to [plaintiff]'s competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.[137]

The jury is the factfinder here, and they must determine whether the prosecutors' belated justifications are pretexts for racial discrimination. To illustrate the point, the term "factfinder" is substituted for "trial court" in this quotation from *Flowers*:

> [O]nce a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The [factfinder] must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. . . . . The [factfinder] must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the

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[137] *Id*. at 660.

> prosecutor instead exercised peremptory strikes on the basis of race.[138]

Unless, as the district court apparently believed, a § 1983 claim of discrimination in jury selection cannot be brought by excluded jurors, the adjudication of contested factual issues is fundamentally flawed and must be reversed.

III. This case provides an adequate vehicle for underscoring the viability of § 1983 lawsuits on behalf of citizens who allege racial discrimination in their exclusion from jury service.

Powers was correct that juror-generated Fourteenth Amendment claims of peremptory-challenge discrimination are exceedingly rare.[139] At the same time, the promise of *Batson* is largely unfulfilled, a classic case of a principle honored in the breach rather than the observance. As early as 2005, Justice Breyer noted in his *Miller-El* concurrence that "I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson,* the discriminatory use of peremptory challenges remains a problem."[140] Studies since Justice Breyer's

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[138] *Flowers*, 588 U.S. at 302-03 (quoting *Snyder*, 552 U.S. at 477, and *Foster*, 578 U.S. at 513).

[139] Prior to the instant case, Federal Courts of Appeal have only entertained Fourteenth Amendment discrimination claims brought by excluded jurors on three occasions; each case was dismissed for failure to state a claim. *See Shaw v. Hahn*, 56 F.3d 1128 (9th Cir. 1995); *Hall v. Valeska*, 509 Fed.Appx. 834 (11th Cir. 2012); *Attala Cnty., Miss. Branch of NAACP v. Evans*, 37 F.4th 1038 (5th Cir. 2022).

[140] *Miller-El*, 545 U.S. at 268-69 (2005) (Breyer, J., concurring)

observation demonstrate that *Batson* alone cannot eradicate racial discrimination in jury selection.[141]

This Court should take this opportunity to re-emphasize the availability of § 1983 actions brought by struck jurors as a method separate from *Batson* in the elimination of this evil.

CONCLUSION

If citizens of this republic have the right to be free of racial discrimination in jury selection, and if citizens denied this right have a cause of action under § 1983, the rules for determining whether a civil jury should be empaneled to hear their claims must be the same as in every other case governed by the Federal Rules of Civil Procedure.

Petitioners respectfully request this court to summarily reverse the Fifth Circuit's opinion, and remand this case with instructions that summary

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[141] A. Offit, *Race-Conscious Jury Selection*, 82 Ohio St. L. J. 201, 238-42 & nn. 324-49 (2021) (citing "mounting evidence of continued juror discrimination and the perpetuation of exclusionary practices aimed at empaneling disproportionately [w]hite juries." N. Marder, *Batson Revisited*, 97 Iowa L. Rev. 1585, 1588-91 (2012) (arguing that among *Batson*'s shortcomings, lawyers are able to circumvent *Batson* challenges by offering false or pretextual rationales for excusing jurors, trial judges are reluctant to find that *Batson* has been violated, and appellate courts are deferential to trial courts when reviewing challenges); J. Bellin and J. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Inattentive Attorney*, 96 Cornell L. Rev. 1075, 1093 (July 2011) (studying all 269 Federal appellate decisions applying Batson from 2000-09 and concluding "the *Batson* response [to the reality of race-based peremptory challenges] is as ineffective as a lone chopstick").

judgment shall be denied and this case set for jury trial.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[filed June 20, 2024]

No. 22-30687

RENEE PIPKINS; EVERITT PIPKINS; THERON JACKSON; LAWHITNEY JOHNSON; ADRIANA THOMAS; REGINALD AUTREY; DARRYL CARTER; THERESA HAWTHORNE; DIANE JOHNSON,
Plaintiffs—Appellants,

versus

JAMES E. STEWART, SR., *in his official capacity*,
Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:15-CV-2722

Before CLEMENT, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED. On our own motion, we withdraw our prior opinion, 98 F.4th 632, and issue the following in its place.

Plaintiffs Darryl Carter, Diane Johnson, and Theresa Hawthorne reported for jury duty in Caddo

Parish, Louisiana, and were struck during *voir dire*. Plaintiffs claim their strikes violated the Fourteenth Amendment's Equal Protection Clause. The district court rejected that claim at summary judgment. We affirm.

I.

Carter, Johnson, and Hawthorne are Black citizens of Caddo Parish, Louisiana. All three served as venirepersons in 2015. Caddo Parish prosecutors peremptorily struck all three.

In April 2015, Carter reported for jury duty in a case styled *State v. Odums*. Carter alleges he "was the only juror on his panel asked if he knew Odums, the Black defendant in the case." Blue Br. 6. Carter further alleges he did not know Odums and that the prosecutor struck him anyway. According to the record, however, the prosecutor asked numerous jurors whether they knew the defendant. And according to the prosecutor's notes, Carter expressed bias against evidence from Shreveport.

Johnson also reported for jury duty in *State v. Odums*. Johnson alleges she gave the same answers as a white venireperson—both had been the victim of car theft—but the prosecutor only struck Johnson. Again, however, the record is more complicated. Johnson's jury questionnaire revealed that she "or [a] close family member" had been convicted of a felony, ROA.2018, and the prosecutor's notes indicated Johnson showed bias against the police department. The defense counsel in *State v. Odums* filed a motion for a *Batson* challenge, but the state court denied the motion.

In June 2015, Hawthorne reported for jury duty in *State v. Carter*. The prosecution did not ask Hawthorne any direct questions before striking her. But Hawthorne, in colloquies with defense counsel, indicated she had preconceived notions about firearm possession, and believed the defendant was in court "for a reason." ROA.5995.

Plaintiffs joined an ongoing litigation challenging the Caddo District Attorney's alleged custom of peremptorily striking Black venirepersons on the basis of race. Plaintiffs sued District Attorney James E. Stewart, in his official capacity, under 42 U.S.C. § 1983.

The district court dismissed all Plaintiffs except Carter, Johnson, and Hawthorne. The District Attorney then moved for summary judgment. The district court granted the motion. Plaintiffs timely appealed. Our review is *de novo*. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

II.

A.

An official-capacity suit against a local officer, like the Caddo Parish District Attorney, is a suit against the local government itself. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Under *Monell*, local government entities can be held liable for (1) constitutional violations (2) for which the "moving force" was (3) an official policy or "governmental custom." *Id.* at 690–91, 694 (quotation omitted). It is well settled that "without a predicate constitutional violation, there can be no *Monell* liability." *Loftin v. City of Prentiss*, 33 F.4th 774, 783 (5th Cir. 2022) (citing *Garza v. Escobar*, 972 F.3d 721, 734 (5th Cir.

2020)); *see also, e.g.*, *Hicks-Fields v. Harris Cnty.*, 860 F.3d 803, 808 (5th Cir. 2017).

The relevant predicate constitutional claim sounds in the Equal Protection Clause. While "[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race." *Powers v. Ohio*, 499 U.S. 400, 409 (1991). To establish an Equal Protection violation based on a discriminatory peremptory strike, a plaintiff must make a prima facie case that the "peremptory strike[] w[as] made on the basis of race." *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019). Prosecutors may then respond by offering a race-neutral explanation for the peremptory strike. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986) ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. [T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." (citations omitted)). We review that explanation "in light of all of the relevant facts and circumstances" to determine whether the race-neutral explanation was pretextual, asking whether the prosecutor's actions were instead "motivated in substantial part by discriminatory intent." *See Flowers*, 588 U.S. at 302–03 (citation omitted); *see also Foster v. Chatman*, 578 U.S. 488, 499–500 (2016) (discussing the *Batson* framework).

B.

In this case, Plaintiffs cannot establish a predicate constitutional violation. Without a viable *Powers* claim, their *Monell* claim fails too.

Caddo Parish prosecutors offered race-neutral explanations for each Plaintiff's dismissal. For Carter, the prosecutor noted that he expressed bias against evidence from Shreveport. For Johnson, the prosecutor highlighted that Johnson or her family member had been convicted of a felony and she might be biased against the police department. And for Hawthorne, the prosecutor found Hawthorne's colloquies with defense counsel problematic because those colloquies revealed bias against the defendant. These facts sufficiently explain each juror's dismissal without reference to race.

Moreover, we are not convinced any of these reasons was mere pretext for a race-based dismissal. In considering whether an explanation was pretextual, we may consider (1) "statistical evidence . . . in the case," (2) evidence of "disparate questioning," (3) "side-by-side comparisons" of dismissed Black jurors and accepted white jurors, (4) "a prosecutor's misrepresentations of the record," (5) "relevant history of the State's peremptory strikes in past cases," or (6) "other relevant circumstances." *See Flowers*, 588 U.S. at 301–02. Here, Plaintiffs rely in part on (2) disparate questioning and (3) side-by-side comparisons. But, as noted above, only Carter contends that he was subjected to targeted questioning, and the prosecutor clarified that he asked the same questions to each venire panel. And a side-by-side comparison of Johnson's questionnaire with those of the white jurors accepted by both sides shows that none had a felony history like hers or her family's. *Compare* ROA.2012–25 (juror questionnaires) *with* ROA.2301–03 (notes indicating which jurors were struck or accepted in *Odums*).

Plaintiffs therefore primarily rely on factors (1) and (5) to rebut the DA's race-neutral reasons. But neither can overcome the race-neutral reasons for Plaintiffs' dismissals. As to statistical evidence, *Flowers* held that prosecutors can create an inference of racial discrimination where, in five out of six trials, prosecutors repeatedly used all or almost all their peremptory strikes to excuse (1) all Black venirepersons, (2) all Black venirepersons, (3) 15 of 16 eligible Black venirepersons, (4) 11 of 16 Black venirepersons, evidently running out of peremptory strikes, and (5) 5 of 6 Black venirepersons. *Flowers*, 588 U.S. at 289–92, 305. But this case is far, far afield. Here, the Caddo Parish prosecutors in both *Odums* and *Carter* had peremptory strikes left over, yet numerous Black jurors served on both juries. *See* LA. CODE CRIM PROC. art. 799. Thus, *Flowers* provides no support to Plaintiffs' case.

Plaintiffs' proffered statistical study fares no better. The study critically omits any controls for individualized reasons a juror might be excused. It therefore shows only general numbers, with no nuance to tell us whether the struck jurors shared characteristics other than race with Plaintiffs—characteristics (like bias) that might provide a race-neutral basis for a peremptory strike. Without greater context, numbers alone cannot prove discriminatory motive. *Cf. Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) ("[T]he Constitution is not violated by racial imbalance . . . without more."). At a minimum, Plaintiffs' evidence cannot show that despite the prosecution's race-neutral explanations, the strikes were nonetheless "motivated in substantial part by discriminatory intent." *Flowers*, 588 U.S. at 303 (quotation omitted).

Without an underlying Equal Protection claim, Plaintiffs' *Monell* claim must fail. AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[filed April 11, 2024]

No. 22-30687

RENEE PIPKINS; EVERITT PIPKINS; THERON JACKSON; LAWHITNEY JOHNSON; ADRIANA THOMAS; REGINALD AUTREY; DARRYL CARTER; THERESA HAWTHORNE; DIANE JOHNSON,
Plaintiffs—Appellants,

versus

JAMES E. STEWART, SR., *in his official capacity*,
Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:15-CV-2722

Before CLEMENT, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Plaintiffs Darryl Carter, Diane Johnson, and Theresa Hawthorne reported for jury duty in Caddo Parish, Louisiana, and were struck during *voir dire*. Plaintiffs claim their strikes violated the Fourteenth Amendment's Equal Protection Clause. The district court rejected that claim at summary judgment. We affirm.

I.

Carter, Johnson, and Hawthorne are Black citizens of Caddo Parish, Louisiana. All three served as venirepersons in 2015. Caddo Parish prosecutors peremptorily struck all three.

In April 2015, Carter reported for jury duty in a case styled *State v. Odums*. Carter alleges he "was the only juror on his panel asked if he knew Odums, the Black defendant in the case." Blue Br. 6. Carter further alleges he did not know Odums and that the prosecutor struck him anyway. According to the record, however, the prosecutor asked numerous jurors whether they knew the defendant. And according to the prosecutor's notes, Carter expressed bias against evidence from Shreveport.

Johnson also reported for jury duty in *State v. Odums*. Johnson alleges she gave the same answers as a white venireperson—both had been the victim of car theft—but the prosecutor only struck Johnson. Again, however, the record is more complicated. Johnson's jury questionnaire revealed that she "or [a] close family member" had been convicted of a felony, ROA.2018, and the prosecutor's notes indicated Johnson showed bias against the police department. The defense counsel in *State v. Odums* filed a motion for a *Batson* challenge, but the state court denied the motion.

In June 2015, Hawthorne reported for jury duty in *State v. Carter*. The prosecution did not ask Hawthorne any direct questions before striking her. But Hawthorne, in colloquies with defense counsel, indicated she had preconceived notions about firearm possession, and believed the defendant was in court "for a reason." ROA.5995.

Plaintiffs joined an ongoing litigation challenging the Caddo District Attorney's alleged custom of peremptorily striking Black venirepersons on the basis of race. Plaintiffs sued District Attorney James E. Stewart, in his official capacity, under 42 U.S.C. § 1983.

The district court dismissed all Plaintiffs except Carter, Johnson, and Hawthorne. The District Attorney then moved for summary judgment. The district court granted the motion. Plaintiffs timely appealed. Our review is *de novo*. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

II.

A.

An official-capacity suit against a local officer, like the Caddo Parish District Attorney, is a suit against the local government itself. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Under *Monell*, local government entities can be held liable for (1) constitutional violations (2) for which the "moving force" was (3) an official policy or "governmental custom." *Id.* at 690–91, 694 (quotation omitted). It is well settled that "without a predicate constitutional violation, there can be no *Monell* liability." *Loftin v. City of Prentiss*, 33 F.4th 774, 783 (5th Cir. 2022) (citing *Garza v. Escobar*, 972 F.3d 721, 734 (5th Cir. 2020)); *see also, e.g.*, *Hicks-Fields v. Harris Cnty.*, 860 F.3d 803, 808 (5th Cir. 2017).

The relevant predicate constitutional claim sounds in the Equal Protection Clause. While "[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race."

Powers v. Ohio, 499 U.S. 400, 409 (1991). To establish an Equal Protection violation based on a discriminatory peremptory strike, a plaintiff must show "a prosecutor . . . us[ed] the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race." *Ibid.* Prosecutors may then respond by offering a race-neutral explanation for the peremptory strike. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986) ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . [T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." (citations omitted)). We review that explanation "in light of all of the relevant facts and circumstances" to determine whether the race-neutral explanation was pretextual, asking whether the prosecutor's actions were instead "motivated in substantial part by discriminatory intent." *See Flowers v. Mississippi*, 588 U.S. 284, 302–03 (2019) (citation omitted); *see also Foster v. Chatman*, 578 U.S. 488, 499–500 (2016) (discussing the *Batson* framework).

B.

In this case, Plaintiffs cannot establish a predicate constitutional violation. That is because they cannot show the Caddo Parish prosecutors dismissed them "solely by reason of their race." *Powers*, 499 U.S. at 409. Without a viable *Powers* claim, their *Monell* claim fails too.

Caddo Parish prosecutors offered race-neutral explanations for each Plaintiff's dismissal. For Carter, the prosecutor noted that he expressed bias against evidence from Shreveport. For Johnson, the prosecu-

tor highlighted that Johnson or her family member had been convicted of a felony and she might be biased against the police department. And for Hawthorne, the prosecutor found Hawthorne's colloquies with defense counsel problematic because those colloquies revealed bias against the defendant. These facts sufficiently explain each juror's dismissal without reference to race.

Moreover, we are not convinced any of these reasons was mere pretext for a race-based dismissal. In considering whether an explanation was pretextual, we may consider (1) "statistical evidence . . . in the case," (2) evidence of "disparate questioning," (3) "side-by-side comparisons" of dismissed Black jurors and accepted white jurors, (4) "a prosecutor's misrepresentations of the record," (5) "relevant history of the State's peremptory strikes in past cases," or (6) "other relevant circumstances." *See Flowers*, 588 U.S. at 301–02. Here, Plaintiffs rely in part on (2) disparate questioning and (3) side-by-side comparisons. But, as noted above, only Carter contends that he was subjected to targeted questioning, and the prosecutor clarified that he asked the same questions to each venire panel. And a side-by-side comparison of Johnson's questionnaire with those of the white jurors accepted by both sides shows that none had a felony history like hers or her family's. *Compare* ROA.2012–25 (juror questionnaires) *with* ROA.2301–03 (notes indicating which jurors were struck or accepted in *Odums*).

Plaintiffs therefore primarily rely on factors (1) and (5) to rebut the DA's race-neutral reasons. But neither can overcome the race-neutral reasons for Plaintiffs' dismissals. As to statistical evidence, *Flowers* held that prosecutors can create an inference

of racial discrimination where, in five out of six trials, prosecutors repeatedly used all or almost all their peremptory strikes to excuse (1) all Black venirepersons, (2) all Black venirepersons, (3) 15 of 16 eligible Black venirepersons, (4) 11 of 16 Black venirepersons, evidently running out of peremptory strikes, and (5) 5 of 6 Black venirepersons. *Flowers*, 588 U.S. at 289–92, 305. But this case is far, far afield. Here, the Caddo Parish prosecutors in both *Odums* and *Carter* had peremptory strikes left over, yet numerous Black jurors served on both juries. *See* LA. CODE CRIM PROC. art. 799. Thus, *Flowers* provides no support to Plaintiffs' case.

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Without an underlying Equal Protection claim, Plaintiffs' *Monell* claim must fail. AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

[filed Sept. 23, 2022]

RENEE PIPKINS ET AL	CASE NO. 5:15-cv-2722
-vs-	JUDGE DRELL
JAMES E STEWART SR	MAGISTRATE JUDGE HORNSBY

MEMORANDUM RULING

Before the Court are the following motions: (1) a motion for summary judgment, (Doc. 132), filed by Defendant James E. Stewart, Sr., in his official capacity as District Attorney of Caddo Parish, First Judicial District of Louisiana ("District Attorney")[1]; (2) a "Motion to Strike Inadmissible Evidence" also filed by the District Attorney, (Doc. 147); (3) the District Attorney's Daubert motion excluding new expert evidence included in Plaintiffs' opposition,

[1] The First Judicial District of Louisiana and Caddo Parish are coterminous jurisdictions. As such, the descriptions will be used interchangeably throughout. See Louisiana District Court Judicial Districts, THE LOUISIANA SUPREME COURT, https://www.lasc.org/About/MapsofJudicialDistricts (last visited Aug. 22, 2022). Additionally, Plaintiffs originally filed suit against former District Attorney Dale Cox, in his official capacity. For simplicity's sake, the court will refer to the Office of the District Attorney of Caddo Parish, First Judicial District of Louisiana, whether under the administration of former District Attorney Cox or current District Attorney Stewart, as the "District Attorney."

(Doc. 148); and (4) Plaintiffs' motion to strike exhibits submitted by the District Attorney in his reply to Plaintiffs' opposition, (Doc. 152). All motions and responses have been filed and briefed, and the matters are ready for disposition. For the reasons below, (1) Plaintiffs' motion to strike, (Doc. 152), will be **DENIED**; (2) the District Attorney's motion to strike, (Doc. 147), and (3) Daubert motion, (Doc. 148), will be **GRANTED**; and (4) the District Attorney's motion for summary judgment, (Doc. 132), will be **GRANTED**.

I. BACKGROUND

This suit alleges that the District Attorney systematically exercised and continues to exercise peremptory challenges against African American prospective jurors based on their race. (Doc. 18). Plaintiffs further allege the District Attorney purposely excluded Black venirepersons to empanel predominately White criminal trial juries, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). (Doc. 18). Despite our earlier ruling in this case, where we held Plaintiffs' evidence to be improper on these facts, Plaintiffs continue to center their case on a statistical analysis conducted by Reprieve Australia ("Reprieve"). See Pipkins v. Stewart, No. 5: l 5-cv-2722, 2019 WL 1442218 (W.D. La. Apr. 1, 2019). Reprieve is a nonprofit organization said to not be affiliated with Plaintiffs or their counsel. (Doc. 18). Reprieve acquired the records of 332 non-sealed criminal trials from Caddo Parish from January 8, 2003 through December 5, 2012, pursuant to the Louisiana Public Records Act. (Doc. 18). Among other findings, the Reprieve Study concluded that when a defendant was White, the District Attorney was 2.6 times more likely to strike African American prospective jurors than non-African American

prospective jurors, and when an African American defendant stood trial, the District Attorney was 5. 7 times more likely to strike African American prospective jurors than non-African American prospective jurors.[2]

Leaning on the Reprieve Study, Plaintiffs filed suit November 19, 2015, and amended their complaints three times. (Docs. 1, 6, 16, 18). The sum of those complaints ("Complaint") sought the following: (1) class certification of all Black citizens of Caddo Parish eligible to serve as jurors in criminal trials; (2) declaratory relief that (a) the District Attorney systematically exercised and continues to exercise racially discriminatory peremptory challenges and that (b) several provisions of Louisiana law providing for the use of peremptory challenges are unconstitutional; (3) injunctive relief to enjoin the District Attorney from using peremptory challenges against Black prospective jurors; and (4) damages pursuant to 42 U.S.C. § 1983 ("Section 1983") for certain Black plaintiffs who were actually dismissed from the venire through allegedly racially discriminatory jury selection practices. (Doc. 18).

The District Attorney filed a motion to dismiss earlier in the case, (Doc. 20), which we granted in part, dismissing Plaintiffs' request for class certification and their claims for declaratory and injunctive relief. Pipkins, 2019 WL 1442218, at * 16. We found that those forms of relief sought were an intrusive and unworkable supervision of the State under O'Shea v. Littleton, 414 U.S. 488 (1974). See Pipkins, 2019 WL

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[2] We mention the Reprieve Study here only for context. We have previously rejected its usefulness. Pipkins v. Stewart, No. 5:15-cv-2722, 2019 WL 1442218, at *16 (W.D. La. Apr. 1, 2019).

1442218, at *8-11. However, we also observed that the Section 1983 Plaintiffs had standing under Powers v. Ohio, 499 U.S. 400, 414 (1991), for the purposes of seeking damages: "We [the Supreme Court] have held that individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf." (citing Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320,330 (1970)). In so finding, we clearly cautioned:

> To prevail on the merits or for that matter to survive a motion for summary judgment, is a significantly higher bar [than that of a motion to dismiss]. Evidence specific to [the remaining Section 1983 Plaintiffs] showing that the District Attorney exercised peremptory challenges against each of them because of their race will be needed. Statistics appearing to show general trends will not suffice.

Pipkins, 2019 WL 1442218, at *16.

The result of our ruling was the elimination of all claims, except those of four plaintiffs who claimed they qualified to sue, since they were actually excused as prospective jurors by certain assistant district attorneys in Caddo Parish criminal cases. Thereafter, among the four Section 1983 Plaintiffs seeking damages, Kimberly Horton's claims were dismissed for failure to prosecute. (Doc. 126). Three Section 1983 Plaintiffs remain: Darryl Carter, Diane Johnson, and Theresa Hawthorne (collectively "Plaintiffs"). In the instant motion for summary judgment, the District Attorney asserts that the Plaintiffs cannot establish the existence of a policy or custom, or inadequacy of training, to prevent exercising challenges against prospective jurors based on their race in violation of

Monell v. Dep't of Social Services., 436 U.S. 658 (1978). (Doc. 132).

II. MOTIONS IN LIMINE

Before proceeding to the merits of the District Attorney's motion for summary judgment, (Doc. 132), we must first address (1) the District Attorney's objections to Plaintiffs' summary judgment evidence and his motion to strike that evidence as inadmissible, (Doc. 147); (2) his motion to exclude certain "expert" report offerings from Plaintiffs, (Doc. 148); and (3) Plaintiffs' motion to strike "new" evidence in the District Attorney's reply to Plaintiffs' opposition, (Doc. 152).

Structurally speaking, in their opposition, Plaintiffs have submitted several items hoping to bolster their initial failed attempt to obtain injunctive and other relief in a global sense. In other words, despite being told clearly in our previous ruling that the only things left for them were the claims of the three remaining individual prospective jurors, Plaintiffs have persisted in trying to supplement and buttress issues no longer before the court. To do so, they have submitted three large binders of materials purporting to be their opposition to summary judgment. In support of Plaintiffs' claims for damages, they immediately returned to "records of 395 criminal trials from January 2003 through July 17, 2015" as showing a "pervasive, extended practice of the excision of Black prospective jurors. . . ." (Doc. 143). The District Attorney objects to much of the material Plaintiffs submitted in his blocking motions. (Docs. 147-148).

Before going further in the analysis, we must note the Fifth Circuit's recent approbation in Marzett v.

Tigner, No. 20-30154, 2022 WL 1551895 (5th Cir. May 17, 2022), wherein the court states, "It is well settled in our circuit that a claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court." Id. at *4 (internal citation and quotation marks omitted). The court remarks that "[o]ur precedent precludes a plaintiff from advancing a new claim or reframing a previously presented one in response to a motion for summary judgment." Id. The District Attorney did not raise this point. Rather, he has chosen motions to strike and to exclude, but for other briefed reasons. Yet, we cannot help observing that the submission of Plaintiffs' opposition, (Doc. 143), is a reframing of issues already determined in our previous ruling.

We decline to regurgitate each of the District Attorney's arguments in the two blocking motions. The briefs in support are generally well-written, documented, and have merit. The two motions—the motion to strike, (Doc. 14 7), and the motion to exclude, (Doc. 148)—therefore will be **GRANTED**. Our determination, however, does not end here.

Should we be wrong about the granting of the District Attorney's motion to strike, (Doc. 147), and his Daubert motion, (Doc. 148), we will analyze Plaintiffs' countermotion, (Doc. 152), which seeks to block submissions by the District Attorney in his reply to the opposition. As such, we must address Plaintiffs' motion to strike alleged new evidence, (Doc. 152), and the associated arguments in the District Attorney's reply. More specifically, these are: (1) a response to Plaintiffs' "Statement of Uncontested Material Facts," (Doc. 146-1); (2) the affidavit of Laura Fulco, (Doc. 146-2); and (3) a disciplinary committee report

regarding defense attorney J. Antonio Florence, a declarant for Plaintiffs. Of note, Plaintiffs' motion to strike specifically disclaims a prayer for surreply. (Doc. 146-3).

The District Attorney argues that Plaintiffs' motion to strike, (Doc. 152), is untimely because it was filed more than 21 days after the District Attorney's reply. FED. R. CIV. P. 12(f)(2). Because the District Attorney's reply, (Doc. 146), was filed February 7, 2022, and Plaintiffs' motion to strike, (Doc. 152), was filed March 29, 2022, the District Attorney is correct in this regard, and the Plaintiffs' motion to strike, (Doc. 152), is **DENIED** as untimely with one caveat. As we see it, despite its tardiness, we still have obligations of propriety when considering new evidence and arguments submitted in a reply brief. See, e.g., RedHawk Holdings Corp. v. Schreiber Tr. of Schreiber Living Tr. – DTD 2/8/95, 836 F. App'x 232, 235 (5th Cir. 2020) (internal citations omitted) ("[A] district court abuses its discretion when it denies a party the opportunity to file a surreply in response to a reply brief that raised new arguments and then relies solely on those new arguments in its decision."). Accordingly, we consider whether the alleged new evidence and arguments presented in the District Attorney's reply are in fact "new," bearing in mind that the District Attorney's rebuttal evidence that is responsive to new evidence and arguments first raised in Plaintiffs' opposition is appropriate. See, e.g., United States v. Ramirez, 557 F.3d 200, 203 (5th Cir. 2009) (internal citations omitted) ("This court does not entertain arguments raised for the first time in a reply brief. However, this court views the situation differently when a new issue is raised in the appellee's brief, and the appellant responds in his reply brief.").

That is the situation here. We will now address each of the exhibits raised by Plaintiffs' motion to strike.

A. Defendant's Response to Plaintiffs' "Statement of Uncontested Material Facts"

The District Attorney appropriately filed a first statement of uncontested facts with his motion for summary judgment, (Doc. 132-2), to which Plaintiffs responded with their own statement. (Doc. 143-1). In his reply, the District Attorney included a response to Plaintiffs' "Statement of Uncontested Material Facts." (Doc. 146-1). There is no provision in either the Federal Rules of Civil Procedure or this court's Local Rules allowing additional statements or responses to a nonmovant' s statements of uncontested facts without leave of court. Accordingly, we decline to consider parts of the District Attorney's response to Plaintiffs' statement of uncontested facts. (Doc. 146-1). We do, however, consider those portions of the response that constitute a reply to Plaintiffs' opposition to the motion for summary judgment. (Doc. 143).

B. Affidavit of Laura Fulco

Laura Fulco's affidavit, (Doc. 146-2), can be viewed in two parts. First, the affidavit analyzes Batson challenges made in Caddo Parish criminal jury trials over a twelve-year span. Second, it summarizes the criminal cases tried by Plaintiffs' declarant, J. Antonio Florence, and any Batson challenges raised therein.

1. *Batson Challenges in Caddo Parish Criminal Jury Trials (2003-2015)*

The first part of Fulco' s affidavit details the number of Batson challenges actually raised in Caddo Parish criminal jury trials between 2003 and 2015 and the outcomes of those challenges. (Doc. 146-2). As we observed in our 2019 ruling, the original complaint sought to rely on the Reprieve Study to prove the elements of a Monell claim. See Pipkins, 2019 WL 1442218, at *8-11. However, and as we have already discussed, this court has previously admonished that the Reprieve Study is inefficient to prove a Monell claim, and that "evidence specific to [Plaintiffs] showing that the District Attorney's peremptory challenges against each of [the Plaintiffs] because of their race will be needed." Pipkins, 2019 WL 1442218 at *16. Further, the District Attorney's motion for summary judgment posits that Plaintiffs are unable to prove the existence of a policy or custom, or inadequacy of training, that illustrates the exercise of racially discriminatory peremptory challenges. Plaintiffs' opposition argues, among other things, that not only does a policy or custom exist, but the District Attorney had both actual and constructive knowledge of the policy or custom. This knowledge argument is new and goes beyond the instant motion, which is limited to only the existence of a policy or custom. Thus, we find that the District Attorney is appropriately allowed, in reply, to offer evidence and argument to rebut Plaintiffs' continuing claim that the District Attorney had actual or constructive knowledge of a policy or custom. The first part of Fulco's affidavit clearly addresses the knowledge issue. (Compare Doc. 146-2 with Doc. 146). Accordingly, we may and will consider this exhibit.

2. *J. Antonio Florence's Caddo Parish Criminal Cases and Batson Challenges*

The second part of Fulco's affidavit summarizes the number of cases tried by J. Antonio Florence, who submitted a declaration in support of Plaintiffs' allegations, (Doc. 143-7). Florence, who primarily works as a criminal defense attorney, points to several Batson challenges he raised as having a persuasive effect here. (Doc. 146). Plaintiffs' Opposition seeks to rely on Florence's declaration to prove the existence of a policy or custom in Caddo Parish jury challenges. (Docs. 143, 143-5). However, we note this declaration was apparently created and signed after the motion for summary judgment was filed; therefore, its content was not previously presented during discovery.[3] Thus, the District Attorney's only opportunity to rebut Florence's declaration and Plaintiffs' reliance thereon was in his reply. Accordingly, we also find it appropriate to consider the second part of Fulco's affidavit, in addressing the first-time claims made by Florence.

C. Disciplinary Committee Hearing Report Regarding J. Antonio Florence

The District Attorney's reply also includes a disciplinary committee hearing report on Florence, issued by the Louisiana Attorney Disciplinary Board. (Doc. 146-3). The same reasoning discussed above regarding the timing of Florence's declaration applies with equal force here. Thus, the District Attorney's only opportunity to rebut, or in this instance to

[3] Plaintiffs filed Florence's Declaration, (Doc. 143-7), on December 20, 2021, nearly two months after the District Attorney filed the instant motion, (Doc. 132), on October 22, 2021.

discredit, Florence's declaration was in his reply. We therefore accept the disciplinary report as a valid submission and will consider this in our determination.

III. APPLICABLE LAW

A. Law Governing Summary Judgment

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute of material fact is genuine if evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). We consider "all evidence in the light most favorable to the party resisting the motion." Seacor Holdings, Inc. v. Commonwealth Ins. Co., 635 F.3d 680 (5th Cir. 2011) (internal citations omitted). It is important to note that the standard for summary judgment is twofold: (1) there is no genuine dispute as to any material fact, and (2) the movant is entitled to judgment as a matter of law. Id.

The movant has the burden of pointing to evidence proving there is no genuine dispute as to any material fact, or the absence of evidence supporting the nonmoving party's case. Liberty Lobby, 477 U.S. at 250. The burden shifts to the nonmoving party to come forward with evidence which demonstrates the essential elements of his claim. Id. The nonmoving party must establish the existence of a genuine dispute of material fact for trial by showing the evidence, when viewed in the light most favorable to her, is sufficient to enable a reasonable jury to render a verdict in her favor. Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 312 (5th Cir. 1995) (citing Celotex

Corp. v. Catrett, 477 U.S. 317, 321 (1986)). A party whose claims are challenged by a motion for summary judgment may not rest on the allegations in the complaint and must articulate specific factual allegations which meet his burden of proof. Id. "Conclusory allegations unsupported by concrete and particular facts will not prevent an award of summary judgment." Duffy, 44 F.2d at 312 (citing Liberty Lobby, 477 U.S. at 247).

B. Law Governing Municipal Liability

A municipality[4] is not liable under Section 1983 on a theory of *respondeat superior*. Monell, 436 U.S. at 694. Nonetheless, a municipality may be liable for acts directly attributed "through some official action or imprimatur." Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001). To establish municipal liability under Section 1983, "[a] plaintiff must identify: (1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom." Valle v. City of Houston, 613 F.3d 536, 541-

[4] Here, "municipality" refers to the Caddo Parish District Attorney's Office. Louisiana law prohibits suits against a district attorney's office in its own name. Hudson v. City of New Orleans, 174 F.3d 677, 680 (5th Cir. 1999). However, a plaintiff may hold a district attorney's office responsible under a theory of Monell liability if the plaintiff initiates a suit that names the district attorney in his or her official capacity. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("A suit against a public official in his [or her] official capacity is not a suit against the official personally," but is "to be treated as a suit against the entity.") This is because bringing Monell claims against district attorneys in their official capacities amounts to "another way of pleading an action against an entity of which an officer is or was an agent." Id. at 166.

42 (5th Cir. 2010) (quoting Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002) (internal quotation marks omitted) (citing Piotrowski, 237 F.3d at 578)).

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of Section 1983." Connick v. Thompson, 563 U.S. 51, 61 (2011). "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Id. (citing Okla. City v. Tuttle, 471 U.S. 808, 822-23 (1985) (plurality opinion). "[A] policy of inadequate training is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in Monell." Tuttle, 471 U.S. at 822-23 (internal quotation marks omitted). In either case, be it a formal policy, custom, or inadequate training, parties must sufficiently show all elements of a Monell claim to prove that the municipality is liable for its deprivation of rights. Compare Valle, 613 F.3d at 541-42 (discussing the elements of a Monell claim), with Connick, 563 U.S. at 60-63 (discussing inadequacy of training as a Monell claim and the deliberate indifference standard necessary to establish actual or constructive knowledge).

IV. ANALYSIS

To bring the focus back into view, it is worth restating that Plaintiffs assert the District Attorney's Office of Caddo Parish had and continues to have a policy or custom of exercising racially discriminatory peremptory challenges, or alternatively, has failed to train its prosecutors to abstain from exercising racially discriminatory peremptory challenges, and as

a result, Plaintiffs suffered a civil rights injury. (Doc. 18). Plaintiffs have *not*, however, proved up their claims to survive the District Attorney's motion for summary judgment for the reasons outlined below.

A. Plaintiffs have not demonstrated the existence of either a formal policy or custom that the Caddo Parish District Attorney's Office has followed or currently follows, that systematically excludes Black venirepersons based on their race.

There is no evidence offered in this record, other than opinions proffered by Plaintiffs and their declarants, that the District Attorney ever promulgated or disseminated a formal policy requiring or encouraging its prosecutors to execute race-based peremptory challenges. Unable to identify such a formal policy, Plaintiffs attempt to show a custom of racial discrimination by prosecutors exercising peremptory challenges by presenting information mired in vagueness that is allegedly demonstrative of this custom. Still, we find that no such custom has been shown to exist.

1. *The statistical analysis in the Diamond-Kaiser Report shows only general trends and patterns, not a custom of systematic racial discrimination by the District Attorney and fails to consider nondiscriminatory explanations for the study's results.*

In our prior ruling, we cast doubt on the ability of the Reprieve Study to prove the elements of a Monell claim. Pipkins, 2019 WL 1442218, at* 16. In response to and with the assistance of two "experts" Drs. Shari Seidman Diamond and Joshua Kaiser, Plaintiffs now

attempt to rehabilitate the otherwise inapplicable Reprieve Study, which encompassed data from only January 28, 2003 through December 5, 2012, to include jury selection data through July 17, 2015. (Doc. 143-2). In our view, the experts' study ("Diamond-Kaiser Report") attempts to shoehorn the period in which Plaintiffs were prospective jurors. This derivative analysis produces, supposedly, results much like those produced in the initial Reprieve Study.

The Supreme Court has advised that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." Int'l Bd. of Teamsters v. United States, 431 U.S. 324,340 (1977). And, the District Attorney "may rebut the [P]laintiffs' *prima facie* case [of racially discriminating against prospective jurors] by introducing proof that [P]laintiffs' statistics are 'inaccurate or insignificant' or by providing a 'nondiscriminatory explanation for the apparently discriminatory result.'" Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1285 (5th Cir. 1994) (citing Teamsters, 431 U.S. at 340). Moreover, even if we take the Diamond-Kaiser Report at face value, it does not show intentional or purposeful discrimination at the behest of the District Attorney; it is only illustrative of a disparity. Disparity alone, frankly, does not prove discrimination. See, e.g., Milliken v. Bradley. 433 U.S. 267, 280 n.14 (1977) (noting that the Supreme Court "has consistently held that the Constitution is not violated by racial imbalance . . . without more."). While discriminatory impact acts as a relevant source of evidence of discriminatory purpose, "it is not the sole touchstone

of an invidious racial discrimination forbidden by the Constitution." Washington v. Davis, 426 U.S. 229, 242 (1976). The Diamond-Kaiser Report takes a showing of racial disparities in peremptory challenges and extrapolates this observation to mean that the central, if not the only cause for such outcomes lies in the District Attorney's endorsement of or acquiescence to a custom of systematically excluding Black prospective jurors based on their race. Yet, what the Diamond-Kaiser Report fails to consider are nondiscriminatory reasons for exercising peremptory challenges against these jurors.

While the court appreciates the disparities among jurors based on race highlighted in the conclusions of the Diamond-Kaiser Report, (Doc.143-2), we take issue with the experts' methodology employed to reach these conclusions. Generalizations regarding racial attitudes and discriminatory practices cannot be inferred based on the data provided. And, assuming arguendo that they can be, we cannot impute temporally-distant and factually-dissimilar instances of discrimination onto the claims in the instant litigation or apply this metric in future cases. Numbers only tell part of the story. Nuances and insights to other reasons for the disparity highlighted in the Diamond-Kaiser Report lurk in the part of the narrative not explored. Namely, Plaintiffs did not furnish Drs. Diamond and Kaiser with key information that would better elucidate for the court suggestions or tendencies towards race-based discrimination: voir dire transcripts, prosecutors'

notes, and other qualitative, contemporaneous information.[5]

To that end, the District Attorney correctly argues that the Diamond-Kaiser Report, like its predecessor, the Reprieve Study, is flawed because it fails to examine juror questionnaires and voir dire transcripts for nondiscriminatory explanations for supposedly discriminatory results.[6] For example,

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[5] Tension occupies the space between the law and statistics. The law primarily deals with deciding the particular dispute in the case and does not concern itself with whether a general method will apply to a family of cases. For that reason, this court excluded evidence previously submitted by Plaintiffs known as the "Reprieve Study," (Doc. 1), which undertook similar methodologies to show a pattern of systematic discrimination against prospective Black jurors. We reiterate that in our 2019 ruling, we admonished that "[s]tatistics appearing to show general trends will not suffice." Pipkins, 2019 WL 1442218, at *16. In fact, it is rare that two cases are viewed as being identical at law; cases can usually be distinguishable factually. The factual details of any given racial discrimination dispute, including any statistics proffered as evidence of such discrimination, will be unique to the dispute in question at a given point in time. Thus, underlying statistical assumptions may not be met. See Joseph L. Gastwirth, *Statistical Reasoning in the Legal Setting*, 46 AM. STATISTICIAN 55 (1992). In theory, all jury selection processes should functionally resemble one another. However, the questions raised to prospective jurors, the responses of those prospective jurors, whether prosecutors elect to use peremptory challenges, whether Batson challenges occur, or whether prosecuting and defense counsel consent to a challenge for cause are all idiosyncratic to a particular jury selection process.

[6] It is worth noting that in addition to Drs. Diamond and Kaiser holding doctorates in social psychology and sociology, respectively, (Doc. 143-2), they also hold law degrees and presumably would be more than capable of reviewing court documents to draw the kinds of case-specific conclusions requested by this court.

when prosecutors are seeking the death penalty, peremptory challenges are legitimate and nondiscriminatory if levied against each juror who strongly favors a life sentence over the death penalty, even if the result of such peremptory challenges disproportionately removes the prospective jurors of one race. See State v. Dorsey, 2010-KA-021674, pp. 13-24 (La. 9/7/11); 74 So. 3d 603, 617-22. Additionally, neither study can speak to the *mens rea* of the prosecutors exercising peremptory challenges against Plaintiffs. In fact, neither even attempt to do so.

2. *Declarants' statements and campaign speech made by the current Caddo Parish District Attorney also fail to show a custom endorsed and enforced by the District Attorney to systematically exclude Black venirepersons from criminal jury service.*

In further support of their argument, Plaintiffs offer (1) a declaration from former Caddo Parish prosecutor Benjamin Cormier, (Doc. 143-6); (2) a declaration from defense attorney J. Antonio Florence, (Doc. 143-5); and (3) an open letter authored by the current District Attorney Stewart that was published in a local newspaper when he ran as a candidate for the Caddo Parish's top prosecutorial post, (Doc. 143-8). For the following reasons, we find that neither the declarations nor the District Attorney's campaign speech proves a custom of pervasive racial discrimination via peremptory challenges by the District Attorney when selecting jurors for criminal trials.

Benjamin Cormier's declaration claims that a former prosecutor for Caddo Parish, who was not the District Attorney, trained him to strike African

American jurors. (Doc. 143-6). Federal Rule of Civil Procedure 56(c)(4) mandates that declarations like the one in question "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." However, "any inadmissible hearsay statement contained in an affidavit is not proper summary judgment evidence." Ball v. Book, No. 1: 19-CV-01283, 2022 WL 509389, at *5 (W.D. La. Feb. 18, 2022) (citing Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987)). Here, Cormier's declaration contains hearsay in the form of his recounting, via a Facebook comment, what a former prosecutor at the District Attorney's Office told him after allegedly being trained to strike Black prospective jurors: "you just need a race neutral excuse to avoid a Batson Challenge." (Doc. 143-5) (internal quotation marks omitted). This is an out-of-court statement being offered for the truth of the matter asserted therein, and is, therefore, indisputably hearsay evidence. See FED. R. EVID. 801. As Plaintiffs have not provided an exception to the admissibility of this hearsay evidence, it is inadmissible for the purposes of summary judgment evidence. Ball, 2022 WL 509389, at * 5. Even if useable, Cormier's declaration *in globo* is devoid of evidence that the alleged misconduct was the result of any policy, procedure, or training from the District Attorney, thereby making it insufficient to infer municipal liability and causation. Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 406-07 (1997) (noting that even where "a plaintiff [who] has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that

the employee acted culpably."). Further, Cormier was employed by the District Attorney only between December 2007 and May 2009, (Doc. 146), and the trials in which Plaintiffs were released from jury duty took place in 2015. In other words, Cormier's limited experience is temporally so far removed from Plaintiffs' alleged injury that it cannot be probative of even a modicum of racial discrimination by prosecutors exercising peremptory challenges when Plaintiffs were prospective jurors.

Additionally, Florence's declaration claims that during his tenure as a criminal defense attorney who tried cases in Caddo Parish (2008-2015), he witnessed a disproportionate use of peremptory challenges against African Americans by the District Attorney's Office, suggestive of a policy or custom. (Doc. 143-5). He also claims to have witnessed a pattern of biased questioning practices, including additional questions for White prospective jurors to absolve responses indicative of partiality, or otherwise meriting a strike for cause, while refraining from employing the same rehabilitative practices for Black prospective jurors with similar responses. (Doc. 143-5). Finally, he claims to have witnessed the District Attorney's Office use "coded" language among themselves and with judges to describe the racial profile of the venire. (Doc. 143-5).[7] However, Florence never worked for the

[7] Although not dispositive, the District Attorney argues that Florence only tried twelve criminal cases in Caddo Parish from 2008 to 2015, and in those twelve cases, he filed Batson challenges only twice. (Doc. 146-2). The District Attorney also presents that, unlike its prosecutors who are in good standing, a disciplinary recommendation has been issued against Florence by the Louisiana Disciplinary Board but that no final decision has been implemented. (Docs. 146, 146-3).

District Attorney, and therefore nothing presented here shows that he has actual knowledge of the District Attorney's customs or training protocol to infer municipal liability and causation. There is also no explanation or evidence that his perceived "code" actually exists or existed. Further, there are no voir dire transcripts in the record to corroborate Florence's claims. Florence's declaration does reflect that he raised a Batson challenge in the case where Plaintiffs Diane Johnson and Darryl Carter were prospective jurors. (Doc. 143-5). However, the presiding judge considered those challenges and ultimately did not find that Florence made a *prima facie* showing of discrimination. The case was appealed, but the issue of racial discrimination by prosecutors during voir dire was not pursued. See State v. Odums, No. 50,969-KA (La. App. 2 Cir. 11/30/16); 210 So. 3d 850, writ denied, No. 17-0296 (La. 11/13/17); 229 So. 3d 924 (affirming conviction).

Finally, Plaintiffs argue the applicability of the political speech of District Attorney Stewart during his campaign ("Candidate Stewart") for his currently held elective office. Candidate Stewart' s comments were published in The Shreveport Times after an announcement of the filing of this suit. (Doc. 143-8). In the publication, Candidate Stewart claimed that the filing of the instant suit and the allegations presented were an embarrassment to the citizens of Caddo Parish. (Doc. 143-8). Indeed, Candidate Stewart's comments were critical of former District Attorney Dale Cox, but Candidate Stewart neither stated nor inferred that District Attorney Cox in fact trained prosecutors to exercise racially discriminatory strikes against Black prospective jurors or that District Attorney Cox failed to train prosecutors to

abstain from exercising racially discriminatory peremptory challenges. When *The Shreveport Times* published the letter, Candidate Stewart did not work for the District Attorney and therefore could not comment on the actual customs or training of the Office to infer municipal liability and causation. In short, Candidate Stewart's political comments on the existence of the litigation and its allegations to form his political speech are not determinative of anything and are not "smoking guns."

B. Plaintiffs have not proven that the District Attorney had actual or constructive knowledge of a custom that systematically excluded Black venirepersons from jury service.

Plaintiffs argue that the Diamond-Kaiser Report demonstrates the existence of an extended and pervasive practice and that "constructive knowledge of a custom or usage exists where the alleged practices are 'sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct' because 'pervasive practice can be evidence that the official policymaker knew of and acquiesced to the misconduct, making the municipality culpable.'" (Doc. 143) (citing Sanchez v. Young Cnty., Tex., 956 F.3d 785, 793 (5th Cir.), cert. denied, 141 S. Ct. 901 (2020)) (internal citations and quotation marks omitted). This argument goes beyond the holding in Sanchez, wherein the relevant policymaker was put on notice by "numerous" reports issued by a Texas commission describing inadequacies. 956 F.3d at 789, 792-93. There is no evidence in this record of previously documented irregularities by District Attorney Cox nor his successor, District Attorney Stewart, other than the bald claims in this suit and two instances of

temporally disparate judicial review. Moreover, the pervasiveness argument, like the Reprieve Study and the Diamond-Kaiser Report upon which it is based, does not eliminate explanations for even arguably discriminatory results.

The District Attorney also replies with a valid suggestion that the actual occurrence of Batson challenges in the Caddo case population better serves to determine the existence of constructive knowledge of an alleged prohibited custom. (Doc. 146). A review of criminal jury trials between 2003 and 2015 reveals that Batson challenges were made in only sixteen of 385 reviewable cases. (Docs. 146, 146-2). Of those sixteen challenges, two were granted at the trial level. (Doc. 146-2). In other words, a Batson challenge was raised in only 4.15% of cases between 2003 and 2015 and only 0.52% were granted at the trial level. (Doc. 146-2). The District Attorney's argument is well taken. See, e.g., Hall v. Robinson, 618 F. App'x 759, 764 (5th Cir. 2015) (finding constructive knowledge of custom of rule violations was not established despite "seventeen reported incidents of [juvenile supervision officer] misconduct . . . filed over a five-year period"). Raising a Batson challenge, which protects a criminal defendant's rights, provides notice of perceived racial discrimination, and a trial court's grant of such a challenge may provide notice of actual racial discrimination. With so few Batson challenges being raised, and even fewer being granted between 2003 and 2015 in Caddo Parish, we do not find that the District Attorney was put on constructive notice of perceived or actual racial discrimination.

Additionally, Plaintiffs claim that six cases predating the trials from which Plaintiffs were excused should have provided the District Attorney

with actual knowledge of racial discrimination by prosecutors exercising peremptory challenges. We disagree, because, among other reasons, four of those cases fail to establish a single instance of racial discrimination by prosecutors exercising peremptory challenges, and the remaining two cases predate the trials from which the Plaintiffs were excused by ten and fourteen years. However, to bolster these conclusions and ensure the most fulsome analysis, we now address each trial where counsel filed a Batson challenge and discuss why the outcomes of those challenges (or lack thereof) fail to buttress Plaintiffs' position.

1. *State of Louisiana v. Felton Dorsey*

In 2009, Felton Dorsey was convicted of first degree murder and sentenced to death in Caddo Parish. State v. Dorsey, No. 10-216, pp. 1-2 (La. 9/7/11); 74 So. 3d 603, 610. Relevant here, during voir dire for his trial, Dorsey's attorney filed a timely Batson challenge claiming to have "established a *prima facie* case of discrimination numerically because the State used peremptory challenges to excuse five of seven prospective [B]lack jurors (71 %) and only six of twenty-seven prospective [W]hite jurors (22%), thereby striking [B]lack jurors at a rate of more than three times that of [W]hite jurors." Id. at 616. To rebut the statistical basis for the Batson challenge, the State argued that it released every prospective juror, regardless of race, who indicated a strong preference towards a life sentence over the death penalty. Id. That included four White and four Black prospective jurors, or four of the five Black prospective jurors excused from jury service. Id. at 617 n.5. The trial judge denied the Batson challenge finding "there was no systematic pattern of exclusion

based upon race." Id. at 610. After the trial court denied Dorsey's motion for a new trial, he appealed to the Louisiana Supreme Court claiming, among other things, that the trial judge erred in denying his Batson challenge. Id. at 615. The Louisiana Supreme Court reviewed the issue and held that the trial court did not abuse its discretion when it denied the Batson challenge and affirmed Dorsey's conviction. Id. at 610, 617-22.

Despite this outcome, Plaintiffs argue that the statistical evidence of prosecutors exercising peremptory challenges in Dorsey's jury selection process provided the District Attorney with actual knowledge of a custom of racial discrimination by prosecutors exercising peremptory challenges against Black venirepersons. (Doc. 143). We disagree. By finding no abuse of discretion in the district court's denial of the Batson challenge, the Louisiana Supreme Court effectively ruled that the statistical evidence offered by Dorsey was legally insufficient to establish racial discrimination. Dorsey, 74 So. 3d at 610, 617-22. Accordingly, the Dorsey case fails to support Plaintiffs' position.

2. *State of Louisiana v. Lamondre Tucker* ("Tucker I")

In 2011, Lamondre Tucker was convicted of first degree murder and sentenced to death in Caddo Parish. State v. Tucker, No. 13-1631, p. 1 (La. 9/1/15); 181 So. 3d 590, 596 ("Tucker I"). Unlike the Dorsey case, Tucker's counsel filed no Batson challenge during jury selection. Tucker I, 181 So. 3d at 625-26. Tucker moved for a new trial, raising, among other claims, a Batson challenge for the first time. Id. at 625. Tucker claimed to have established a *prima facie*

case of discrimination numerically because four of nine prospective Black jurors (44%) were excused, and one of the four was excused without an apparent race-neutral reason. Id. In his motion for a new trial, Tucker provided an analysis of 120 jury cases prosecuted by the District Attorney between 1997 and 2009 demonstrating that the District Attorney exercised peremptory challenges against African Americans at a rate 3.4 times that of all other races ("Tucker Study"). Id. at 614-16; (Doc. 143). The trial court found that a Batson challenge could not be asserted for the first time in the motion for a new trial, and the Louisiana Supreme Court agreed. Tucker I, 181 So. 3d at 625-26.

Plaintiffs argue again that the statistical evidence of prosecutors exercising peremptory challenges in Tucker's jury selection and the Tucker Study provided the District Attorney with actual knowledge of a custom of racial discrimination by prosecutors exercising peremptory challenges against Black venirepersons. (Doc. 143). Again, we disagree. There is no evidence, voir dire transcript, or deposition testimony from which we may conclude that prosecutors excused jurors because of their race during the jury selection process for Tucker's trial. Further, the Tucker Study upon which Plaintiffs rely is not of record here.

3. *State of Louisiana v. Lamondre Tucker* ("Tucker II")

Plaintiffs further argue that the District Attorney was again presented with the Tucker Study when Tucker moved to quash the jury during a second trial for conspiracy to commit jury tampering in Tucker I. State v. Tucker, No. 49,950, p. 1 (La. App. 2 Cir.

7/8/15); 17 So. 3d 394 ("Tucker II"); (Docs. 27-29). The reoccurrence of the Tucker Study argument in Tucker II adds nothing substantive to our ruling today, and we continue to disagree with the employment of these statistics to show the District Attorney had actual knowledge of a custom to dismiss venirepersons based on their race.

4. *State of Louisiana v. Robert Coleman*

On February 17, 2005, Robert Coleman was convicted of first degree murder and sentenced to death in Caddo Parish. State v. Coleman, No. 06-0518, pp.1-2 (La. 11/2/07); 970 So. 2d 511, 512. During jury selection, Coleman filed a timely Batson challenge citing that the State used six of its eight peremptory challenges against African American prospective jurors. Id. at 513. The trial court, however, found no prima facie showing of discrimination. accepted "race-neutral reasons for the exercise of each of its challenges" from prosecutors, and denied Coleman's Batson challenge. Id. at 514. The Louisiana Supreme Court reversed the conviction based on the State's explanation for excusing one juror-Mason Miller. Id. The State excused Miller because he previously "filed a lawsuit against the city[8] alleging institutional discrimination," which raised concerns because

[8] It is unclear from the opinion whether Miller filed suit against the city where he was employed as captain of the fire department, Bossier City, or if he filed suit against Shreveport, where the venire took place. Presumably since Mr. Miller was called for jury service in Caddo Parish, he resided and/or was registered to vote in Caddo Parish, and the District Attorney may have taken issue with an institutional discrimination suit against the City of Shreveport. Nevertheless, the import of this suit hinges on its nature not the locale of the governmental defendant.

Coleman, the defendant, was Black and the victims were White. Id. at 514. The majority opined that because "the prosecutor's statement explicitly place[d] race at issue" when referencing the race of the defendant and the victims, "the decision to strike [Miller] was not race-neutral, but was based specifically on [his] race, in violation of the fundamental precepts of Batson and its progeny." Id. at 514, 516. We agree with the Louisiana Supreme Court's reasoning here and believe that successful showing of discriminatory practices via race-based peremptory challenges merits this kind of thorough and thoughtful evidentiary support.

Unlike Coleman, here, we are not confronted with an equally thorough analysis of voir dire transcripts, attorneys' jury selection notes, or even extensive treatment of Batson challenges in factually analogous cases. Plaintiffs do not rely on the proffered reasons of the State to show that they were dismissed from jury service based on reasons given by the prosecution that "place[d] race at issue." See id. at 514-16. Instead, Plaintiffs wish to rely on inferences from statistical data, not contemporaneous evidence from the jury selection process at the trials in question, to show that the District Attorney systematically excluded Black people from jury service or failed to train his staff to prevent unconstitutional race-based challenges of Black prospective jurors.

To be clear, we are not satisfied that this case alone clearly establishes a *custom* of racial discrimination by Caddo Parish prosecutors exercising peremptory challenges, let alone actual or constructive knowledge of such practices. Additionally, Coleman's trial occurred in 2005, predating the trials from which

Plaintiffs were excused by ten years. See e.g., Hall, 618 F. App'x at 764.

5. *Trotter v. Warden La. State Penitentiary*

Edward Trotter was convicted in 2001 of possession of cocaine in Caddo Parish, and his conviction was affirmed on direct appeal. *State v. Trotter*, No. 37,325 (La. App. 2 Cir. 8/22/03); 852 So. 2d 1247, writ denied, No.03-2764 (La. 2/13/04); 867 So. 2d 689, denying reconsideration, No. 03-2764 (La. 4/23/04); 870 So. 2d 282. Trotter's conviction was eventually vacated through use of habeas corpus, based on Batson issues. Trotter v. Warden La. State Penitentiary, 718 F. Supp. 2d 746, 747 (W.D. La. 2010). In Trotter's federal habeas case, this court agreed the state trial court unreasonably determined that the State proffered race-neutral reasons for dismissal of two of three Black venirepersons, despite accepting White venirepersons who gave similar responses to the excused Black venirepersons. Id. at 752-53. We found this to be in violation of the principles announced by the Supreme Court in Miller-El v. Dretke, 545 U.S. 231 (2005). Like Coleman, though, this case predates the trials from which Plaintiffs were excused—this time, by fourteen years. See, e.g., Hall, 618 F. App'x at 764. As a result, we do not find Trotter, even if considered together with Coleman, sufficiently establishes actual or constructive knowledge of a custom of racial discrimination by prosecutors exercising peremptory challenges at the time Plaintiffs were excused from their respective venires.

6. *State of Louisiana v. Rodricus Crawford*

Rodricus Crawford was convicted of first degree murder and sentenced to death in Caddo Parish. State

v. Crawford, No. 14-2153, p. 1 (La. 11/16/16); 218 So. 3d 13, 15-16. During voir dire, the State exercised seven peremptory challenges, five of which were used to excuse prospective African American jurors. Crawford timely filed a Batson challenge with the court, and the trial court found that a *prima facie* case for racial discrimination was established in accordance with the first step of the Batson framework. Id. at 18, 30-32. However, instead of calling upon the State to provide race-neutral reasons for the exercise of peremptory challenges, the trial court articulated its own race-neutral reasons. Id. Because the trial judge failed to follow the proper Batson challenge inquiry, the Louisiana Supreme Court reversed Crawford's conviction. Id. at 35. Had the trial court properly handled the Batson issue, this case might have some probative value, but the fact is the State was preempted from providing its position on race neutrality. This leaves us completely unable to analyze the situation as it relates to Plaintiffs' claims. Thus, we do not find, on these facts, that the outcome is sufficient to establish a single instance of racial discrimination by prosecutors exercising peremptory challenges, let alone provide the District Attorney with actual or constructive knowledge of a custom of the same. We now turn to the cases involving Plaintiffs.

C. Without proof of a custom exercised by the District Attorney to systematically exclude Black prospective jurors or proof of knowledge thereof, there can be no "moving force" that gave rise to the constitutional violations alleged by Plaintiffs.

Plaintiffs argue that separate proof of causation, *i.e.*, Plaintiffs were excused because of their race, is not required because this is a "straightforward" case. Bryan Cnty., 520 U.S. at 404, 406. However, as we have discussed above, this is not a "straightforward" and "obvious" case. Id. Therefore, proof of causation is required. Instead of presenting evidence demonstrating causation, Plaintiffs raise a kind of spoliation claim, not for sanctions, but for an adverse inference to create a genuine issue of material fact regarding causation. (Doc. 143). Plaintiffs' spoliation claims rely on the absence of voir dire transcripts and prosecutors' notes from the trials where Plaintiffs were prospective jurors.

A party raising spoliation must demonstrate that: (1) the spoliating party must have controlled the evidence and been under an obligation to preserve it at the time of destruction; (2) the evidence must have been intentionally destroyed; and (3) the spoliating party acted in bad faith. See Coastal Bridge Co., L.L.C. v. Heatec, Inc., 833 F. App'x 565, 574 (5th Cir. 2020). We decline such an inference because the Plaintiffs provide no law that spoliation arguments, even if proven, can provide this kind of inference. They also fail to demonstrate the elements of a spoliation claim, and the evidence Plaintiffs seek to elicit is strongly refuted by the record.

1. *Plaintiffs Diane Johnson and Darryl Carter*

Plaintiffs Diane Johnson and Darryl Carter were prospective jurors in State v. Surcorey Odums, Docket No. 316,181, First Judicial District of Louisiana, Parish of Caddo (2015). Plaintiffs Johnson and Carter first claim that the absence of voir dire transcripts from the second day of the jury selection process for

the Odums trial—when they were examined—helps their cause. (Doc.143). However, according to the affidavit of Sharon Porter, Assistant to the Judicial Administrator of the First Judicial District Court of Caddo Parish: (1) the District Attorney does not control what is transcribed by the court reporter and lacks authority over court reporters, transcripts, and recordkeeping by the court; (2) the court reporter for Odums is possibly deceased and a transcript otherwise cannot be located; (3) and this information was reported to Plaintiffs by Porter before the instant motion for summary judgment was filed. (Doc. 117-5). There is no reason for this court to infer anything adverse to the District Attorney here since the District Attorney is not blameworthy for any allegedly missing transcripts and because there is no evidence of any tampering or malefaction as to court records from the Odums case.

Plaintiffs next argue that the second chair prosecutor in Odums, Chris Joffrion, failed to produce notes from voir dire for the Odums trial. (Doc. 143). In his deposition, Joffrion testified that he cannot recall what he did with his personal trial notes from Odums, which were notes made six years prior to his deposition. (Doc. 143-27). However, Plaintiffs are apparently unable to argue that Joffirion's voir dire notes (to the extent they ever existed) were intentionally destroyed in bad faith. The District Attorney requests that we ignore any adverse inference that could be taken from Joffrion's missing notes because (1) the trial judge, Judge John D. Mosley, Jr., who is African American,[9] denied a

[9] Although not dispositive of the issue, the fact that Judge Mosley, who was not deposed in this matter, is African American does suggest a degree of increased awareness with respect to

Batson challenge filed in Odums, and (2) the first chair prosecutor, Jason Brown, provided thorough notes and deposition testimony of race-neutral reasons proffered to the court during the Batson challenge.

In the context of Batson challenges, we provide significant deference to trial judges, who are present and attentive during jury selection processes and can holistically assess whether prosecutors are dismissing venirepersons based on their race. Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (citing Batson, 476 U.S. at 99 n.22; Synder v. Louisiana, 552 U.S. 472, 477 (2008)). Because Odums filed a Batson challenge and the trial court denied it, deference to Judge Mosley's ruling and comity between state and federal courts weigh against any adverse inference. Further, during his deposition, Brown referenced his voir dire notes and relayed four race-neutral reasons for striking Johnson and four race-neutral reasons for striking Carter. (Doc. 141-20). Plaintiffs Johnson and Carter's beliefs as to their dismissal amount to mere speculation and do not generate a genuine dispute of material fact.

1. *Theresa Hawthorne*

Plaintiff Theresa Hawthorne was a prospective juror in State v. Tommorea Shamichael Carter, Docket No. 316,082, First Judicial District Court, Parish of Caddo (2015) ("Carter"). Plaintiff argues that voir dire notes from both the first chair prosecutor Holly McGinness Pailet and second chair prosecutor Scott Brady were not provided in discovery. (Doc. 143). However, Plaintiff has provided

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racial discrimination against African Americans within his court.

nothing to show that either Pailet or Brady's voir dire notes (to the extent they ever existed) were intentionally destroyed in bad faith. Further, the voir dire transcript from Carter was available, (Docs. 143-34, 143-35), and contains sufficient information to justify the peremptory challenge against Hawthorne. Pailet pointed to voir dire statements of Hawthorne proclaiming that she had been a prospective juror several times but had never been picked for a trial. (Doc. 143-30). Additionally, during the depositions of both prosecutors Pailet and Brady, Plaintiffs' counsel asked about the following voir dire answers from Hawthorne: "He's here for a reason," and "Well, I feel like he's here for a reason. It's got to be something he done did [*sic*] or they got proof that he did it, so it's a reason." (Docs. 143-29, 143-30, 143-31). Both Pailet and Brady explained that Hawthorne's answers suggested presumed guilt, which could have also formed a sound basis for the peremptory challenge. (Docs. 143-30, 143-31). Whether Hawthorne was stricken for having been a prospective juror, but never selected for jury service, or for having made statements suggestive of presumed guilt, either reason would be facially race-neutral. Additionally, Carter did *not* file a Batson challenge in that case. (Doc. 132-20). Given this evidence, we cannot properly infer that Hawthorne was excused because of her race so to generate a genuine issue of material fact.[10]

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[10] We should also note that Plaintiffs' counsel also represented plaintiffs in a conceptually similar case before the Northern District of Mississippi and appealed that case's dismissal to the Fifth Circuit. In Attala County, Miss. Branch of the NAACP et al. v. Doug Evans, 37 F.4th 1038 (5th Cir. 2022), the Fifth Circuit held that the plaintiffs had no standing to sue due to lack of injury-in-fact. Relevant here, only one of the four individual plaintiffs had been actually dismissed from jury service, but that

As in our earlier ruling in this case, we continue to question the practicality of the right of a challenged juror to seek damages due to dismissal for racially discriminatory reasons. That said, the reasons we provide for granting summary judgment here are based largely on the factual analysis of the actual cases where Plaintiffs were prospective jurors. In this court's view, the records of factual evidence in the Odums and Carter cases alone are sufficient to convince us that there is no genuine dispute of material fact in the instant case and that the District Attorney is entitled to judgment as a matter of law.

V. CONCLUSION

This court does not take allegations of racial discrimination lightly, especially when those allegations are made against state actors charged with conducting fair and impartial trials for criminal defendants. Just as important is equal and unfettered access to jury service for all registered voters within a

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venireperson's dismissal was upheld by the Mississippi Supreme Court. Id. at 1043 (citing Flowers v. Mississippi, 04-DP-00738-SCT (¶ 12); 947 So. 2d 910, 919-21 (Miss. 2007)). Even still, Attala County differs from the present case in two material aspects. First, it had been well established previously that the Attala County district attorney had been documented time and time again to have engaged in prosecutorial misconduct, including racial discrimination in jury selection and particularly as observed by the U.S. Supreme Court, appearing "to proceed as if Batson had never been decided." Attala Cnty., 37 F.4th at 1041 (citing Flowers, 139 S. Ct. at 2246. Second, the Attala County plaintiffs included persons who had not been actually excused from jury service but were merely eligible as residents of the jurisdiction over which the district attorney holds prosecutorial power. See id. The fear of their rights being violated, therefore, were only prospective. In the case at bar, however, we do reach the merits of Plaintiffs' remaining claims, because each of them was on a jury panel, and each was actually excused.

particular jurisdiction. Impediments to such access are prohibited by the Equal Protection Clause of the Fourteenth Amendment. Actual service on the jury, however, may be limited to ensure, again, fair and impartial trials for criminal defendants. But that denial of jury service during the jury selection process cannot occur based on a prospective juror's race or other suspect classifications.

In all this discussion, what becomes clear is that the right the Supreme Court articulated in Powers cannot be characterized by or litigated in generalities. Each claim must be analyzed with reference to the record of a particular venireperson' s participation in a particular trial on a particular day. The analysis is fact-intensive. In the case of all three remaining Plaintiffs here, they cannot succeed on that analysis, nor on their general one. As the Supreme Court once opined, "Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." Abbott v. Perez, 138 S. Ct. 2302, 2324 (2018) (internal citation and quotation marks omitted). Peremptory challenges against prospective jurors remain a valid method under Louisiana law for dismissing jurors who may not provide a criminal defendant with a fair and impartial trial. Congruently, Batson challenges remain the most effective and systematic method for attacking covert and overt forms of racial discrimination skulking about jury selection. Trial judges are best positioned to determine, on the totality of the circumstances, whether reasons proffered by attorneys are discriminatory remarks masquerading as racially neutral ones.

The motion for summary judgment will therefore be **GRANTED**. A judgment in accordance with this ruling will follow.

THUS, DONE at Alexandria, Louisiana on this 23rd day of September 2022.

s/

DEE D. DRELL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

[filed Apr. 1, 2019]

RENEÉ PIPKINS, et al.	CIVIL ACT. NO. 5:15-cv-2722
-vs-	JUDGE DEE D. DRELL
JAMES E. STEWART, SR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF CADDO PARISH (FIRST JUDICIAL DISTRICT OF LOUISIANA) STATE OF LOUISIANA ex rel. JEFF LANDRY, LOUISIANA ATTORNEY GENERAL, Intervenor	MAG. JUDGE MARK L. HORNSBY

MEMORANDUM RULING

Before the Court is a Motion to Dismiss (Doc. 20) filed by defendant James E. Stewart, Sr., in his official capacity as District Attorney of Caddo Parish, First Judicial District of Louisiana ("District Attorney"), an Opposition (Doc. 37) filed by Plaintiffs,[1] a Reply (Doc. 46) filed by the District Attorney, a Supplemental Memorandum in Support of the Motion to Dismiss (Doc. 49) filed by Jeff

[1] Renee Pipkins, Everitt Pipkins, Theron Jackson, LaWhitney Johnson, Adriana Thomas, Reginald Autrey, Darryl Carter, Diane Johnson, Kimberly Horton, and Theresa Hawthorne, on behalf of themselves and all others similarly situated.

Landry, Attorney General for the State of Louisiana ("Attorney General"),[2] and an Opposition to the Attorney General's Supplemental Memorandum (Doc. 56) filed by Plaintiffs. For the following reasons, the Motion to Dismiss will be **GRANTED IN PART** and **DENIED IN PART.**

I. FACTS & PROCEDURAL HISTORY

This suit alleges that the District Attorney systematically exercises (and therefore still exercises) peremptory strikes against African-American prospective jurors on the basis of their race for the purpose of empaneling criminal trial juries that are predominately white.

Each Plaintiff is an adult resident citizen of Caddo Parish, Louisiana, and each is qualified to serve a juror in criminal cases under Article 401 of the Louisiana Code of Criminal Procedure.[3] Each is a registered voter and is (or has been) on the list of eligible jurors maintained by the Caddo Parish Jury Commission.[4] Plaintiffs Carter, Johnson, Horton, and Hawthorne were all excluded from jury service by the District Attorney's use of peremptory strikes within twelve months prior to the commencement of this suit.[5]

The centerpiece of this case is a statistical analysis conducted by Reprieve Australia ("Reprieve"), a non-profit organization not affiliated

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[2] The Attorney General was allowed to intervene and adopt the District Attorney's motion (Doc. 20). See Order (Doc. 47); Order (Doc. 48).

[3] Third Am. Compl. (Doc. 18) at ¶ 2.

[4] Id.

[5] Id. at ¶ 3.

with Plaintiffs or their counsel. Reprieve acquired the records of 332 non-sealed criminal trials[6] from January 28, 2003, through December 5, 2012,[7] pursuant to the Louisiana Public Records Act.[8] According to Reprieve's data, forty-five different Assistant District Attorneys were involved as counsel

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[6] Id. at 145. The District Attorney argues in a footnote that the statistics provided by Reprieve are "mathematically incorrect and overstated." Mot. to Dismiss (Doc. 20-1) at 12 n.4. During oral argument, counsel for the District Attorney suggested that the Court take judicial notice of Louisiana Supreme Court annual reports indicating that during the time period analyzed by Reprieve there were 487, not 332, jury trials. Oral Argument Tr. (Doc. 61) at 13. Such a discrepancy, if true, would call into question the validity of the evidence serving as the foundation for this case. Nonetheless, the Court declines to make any findings as to the validity of Reprieve's statistics at this stage of litigation.

[7]

Year	Cases
2003	25
2004	27
2005	35
2006	43
2007	41
2008	25
2009	38
2010	30
2011	40
2012	28

Id. at ¶¶ 44-46.

[8] Id. at ¶¶ 44-45.

for the prosecution of these 332 cases.[9] Thirty of those Assistant District Attorneys were white and fifteen were African- American.[10]

In these 332 trials, 8,318 potential jurors were tendered to the District Attorney for peremptory challenge or acceptance as trial jurors.[11] These potential jurors survived the initial process of eliminating non-qualified jurors through the Parish Jury Coordinator's review of jury questionnaires and any challenges for cause.[12] Of the 8,318 qualified jurors, 2,908 were identified as African-Americans.[13] The District Attorney exercised peremptory challenges against 1,338, or approximately 46%, of the qualified African-American jurors.[14] By contrast, the District Attorney only used peremptory challenges against 830, or approximately 15%, of the 5,410 qualified jurors who were identified as non-African-Americans.[15] The table below illustrates Reprieve's findings:[16]

Race	Accepted	Struck	Total
Black	1570	1338	2908
Not Black	4580	830	5410

[9] Id. at ¶¶ 47.

[10] Id.

[11] Id. at ¶ 49.

[12] Id.

[13] Id. at ¶ 50.

[14] Id. at ¶ 50.

[15] Id. at ¶ 51.

[16] Id. at ¶ 52.

Total	6150	2168	8318

Reprieve's statistical analysis of this ten-year history of peremptory strikes argues that, mainly through the various trial assistants,[17] the District Attorney struck African-American potential jurors at three (3) times the rate he struck non-African-American prospective jurors.[18] The statistics further show that, after controlling for various factors, the District Attorney struck African-American venirepersons from jury service at five (5) times the rate he struck potential jurors who were not African-American.[19] According to Reprieve's analysis, when a defendant was white the District Attorney was 2.6 times more likely to strike an African-American juror than a non-African-American juror.[20] When a defendant was African-American, however, Reprieve's calculations indicate that the District Attorney was 5.7 times more likely to strike an African- American juror than a non-African-American juror.[21] Interpreting these statistics, Plaintiffs conclude that the only plausible explanation for this disparity between the District Attorney's peremptory challenges against African-American jurors and those against non-African-American jurors is the race of the juror.[22] They

[17] For simplicity's sake, the Court will simply refer to any given Assistant District Attorney or the office of the District Attorney as the District Attorney going forward.

[18] Id. at ¶ 54.

[19] Id. at ¶ 55.

[20] Id. at ¶ 56.

[21] Id.

[22] Id. at ¶ 58.

further allege that this systemic use of peremptory strikes by the District Attorney has been "admitted by former members of the District Attorney's office," though they do not specifically identify any such former members.[23]

Plaintiffs filed their initial complaint on November 19, 2015.[24] The case was originally assigned to Judge Elizabeth Foote but she recused herself on December 4, 2015.[25] An order reassigning the case to the Court was filed on December 9, 2015.[26] Plaintiffs filed an amended complaint on December 30, 2015,[27] and a second amended complaint on April 14, 2016.[28] A third and final amended complaint was filed with the consent of the District Attorney on April 21, 2016.[29]

A motion to certify class[30] was filed on January 8, 2016, and dismissed as premature on June 2, 2016.[31] The District Attorney filed the instant motion to dismiss on May 5, 2016.[32] On October 10, 2016, the Attorney General filed a motion to intervene[33] and a motion to adopt the District Attorney's motion to dismiss and to file a supplemental memorandum,[34]

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[23] Id. at ¶ 43.

[24] Comp1. (Doc. 1).

[25] Order of Recusal (Doc. 3).

[26] Order Reassigning Case (Doc. 4).

[27] Amended Complaint (Doc. 6).

[28] Second Am. Compl. (Doc. 16).

[29] Third Am. Compl. (Doc. 18).

[30] Mot. to Certify Class (Doc. 7).

[31] Order (Doc. 24).

[32] Mot. to Dismiss (Doc. 20).

[33] Mot. to Intervene (Doc. 44).

[34] Mot. to Dismiss (Doc. 45). For brevity's sake, the Court will

both of which were granted.[35] Oral argument was held on February 16, 2017.[36]

In their third amended complaint, Plaintiffs seek the certification of a class of all African- American citizens of Caddo Parish who are eligible to serve as jurors in criminal trials.[37] They also plead for the entry of declaratory judgments stating that: (1) the District Attorney has, and continues to, systematically exercise peremptory strikes in a discriminatory fashion; and (2) several provisions of the Louisiana law providing for the use of peremptory strikes are unconstitutional.[38] Plaintiffs further request a variety of kinds of injunctive relief aimed at enjoining any discriminatory use, and likely eliminating any use, of peremptory strikes by the District Attorney.[39] Finally, Plaintiffs Carter, Johnson, Horton, and Hawthorne seek an award of nominal and compensatory damages for violations of their constitutional rights.[40]

II. LAW & ANALYSIS

The District Attorney counters that: (1) Plaintiffs lack standing; (2) Plaintiffs' claims are moot; (3) the Court should abstain from exercising jurisdiction; (4) Plaintiffs' claims are barred by res judicata and collateral estoppel; (5) Plaintiffs have failed to state a

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reference only the District Attorney when addressing the arguments raised in the original motion to dismiss.

[35] Order (Doc. 47); Order (Doc. 48).

[36] Mins. (Doc. 60).

[37] Third Am. Compl. (Doc. 18) at ¶ 125.

[38] Id.

[39] Id.

[40] Id.

claim under 18 U.S.C. § 243; (6) Plaintiffs' claims are barred by prosecutorial immunity; (7) Plaintiffs' claims are barred by qualified immunity; and (8) Plaintiffs' claims are barred by the Eleventh Amendment.[41] Additionally, the Attorney General argues that Plaintiffs have failed to state a claim under FED. R. CIV. P. 8(a)(2). The Court will address each of these arguments in turn. However, a brief overview of the case law regarding the rights of prospective jurors will provide much needed context.

A. PROSPECTIVE JUROR RIGHTS

1. Introduction

The Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." Powers v. Ohio, 499 U.S. 400,407 (1991). The Supreme Court has found that "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased person from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life." Id. at 409.

"An individual juror does not have a right to sit on any particular petit jury, but he or she does

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[41] The District Attorney initially asserted that Plaintiffs failed to comply with FED. R. CIV. P. 5.1 and FED. R. CIV. P. 19. Mot. to Dismiss (Doc. 20-1) at 7-9. Plaintiffs filed a notice of constitutional question (Doc. 32) on August 9, 2016, and the Attorney General was allowed to intervene on October 13, 2016. Order (Doc. 47).

possess the right not to be excluded from one on account of race." Id. However, as the Supreme Court explained in a previous case, "[d]efendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection." Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320, 329 (1970). "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." Id. Accordingly, the Powers Court found that "individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf." Powers, 499 U.S. 400 at 414 (citing Carter, 396 U.S. at 329-30).

To begin, we refer to an observation by Justice Scalia, who stated that "the existence of such a right [by a challenged juror] would call into question the continuing existence of [peremptory strikes,] a centuries-old system that has important beneficial effects." Powers, 499 U.S. at 426 (Scalia, J., dissenting). Truthfully, we have only begun to consider the possible, likely or probable consequences of a right which allows a challenged juror to claim damages. A few we can see clearly, however. Exactly how is such a claim or suit to be managed? Here, Plaintiffs want a class action in favor of all similarly situated persons. If a class were to be certified, how in the world would one determine the real reason why a particular juror was challenged on a particular day in a trial that is past? The question is especially poignant where the trial record does not reflect even a discussion of Batson v. Kentucky, 476 U.S. 79 (1986), or Powers as to a particular juror. Does it mean that the prosecutor, defense counsel or judge could be deposed in such a suit? Could they be

required to disclose internal memos, trial notes or the like to determine (maybe) if there is some extra notation about a particular juror?

Even if a system could be devised to allow for discovery and litigation of the claim, what is next? If, in the odd case, a plaintiff is able to make out such a claim, would it mean that a whole new method for collateral attack on a final conviction would be created thereby? At stake is the principle, at least given credence sometimes, that the public has a right to see that, at some point, a defendant in a criminal trial is fully and fairly convicted. See United States v. Frady, 456 U.S. 152, 175 (1982). And, what would be the remedy? A 28 U.S.C. § 2254 petition for inadequacy of counsel, or some other habeas corpus relief yet undeveloped or unheard of? In our view this is the most serious potential consequence, as it can mean that years later an otherwise sustainable prosecution may have to be completely redone because one juror convinced one jury, or judge in the event of a bench trial, that he/she was discriminated against.

Moreover, we suggest that the simple answer to the concerns expressed has already been determined by the existence of the Batson remedy itself. While we certainly cannot be said to have the collective wisdom of the Supreme Court, we certainly could have read Powers as providing a mere extension to Batson without creating the legal fiction of third-party representation and without the language suggesting that the challenged venireperson has a separate right for damages.

As we will discuss below, however, because of the Supreme Court's created rights language we believe

we are bound by precedent to adjudicate part of the claims made in this suit, at least for the four Plaintiffs who claim to have been racially discriminated against.

2. Batson, Powers, and the Equal Protection Clause

In Batson v. Kentucky, the Supreme Court held that a State's privilege to strike individual jurors through peremptory challenges is subject to the Equal Protection Clause. 476 U.S. at 89. Thus, the Supreme Court explained, in a trial with a black criminal defendant the Equal Protection Clause forbids prosecutors from challenging "potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Id. Batson left unresolved, however, whether a defendant could challenge the use of peremptory strikes exercised against venirepersons of another race.

In Holland v. Illinois, a white defendant argued that the prosecutor's exercise of peremptory challenges to exclude black venirepersons from his petit jury violated his Sixth Amendment right to trial by an impartial jury. 493 U.S. 474, 475-76 (1990). The Supreme Court found that "[a] prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury." Id. at 478. Nonetheless, several Justices made clear that such a claim may have merit under the Equal Protection Clause. Id. at 488.

The Supreme Court took up that very issue the next term in Powers. In that case, a defendant on trial for serious offenses in a state court raised an equal protection challenge to the State's use of peremptory strikes to remove a number of black jurors. Id. at 402-03. The majority was obviously troubled by the proposition that otherwise qualified venirepersons could be struck on the basis of race as long as they were a different race than the criminal defendant. Nonetheless, they had just foreclosed the Sixth Amendment as a bar to such conduct in Holland, and there was a manifest difficulty in allowing a white defendant to directly assert an equal protection claim challenging peremptory strikes against black venirepersons.

Writing for the majority, Justice Kennedy articulated a legal framework through which it could prohibit the discriminatory use of peremptory strikes regardless of the race of the criminal defendant: allow the criminal defendant himself to raise the equal protection rights of a juror excluded from service in violation of these principles. Id. at 410. The Powers Court determined that it was appropriate to allow the criminal defendant to raise the prospective juror's legal rights because "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom." Id. at 413. Thus, the Supreme Court held that "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life." Id. at 409.

A fundamental component of this analysis, of course, was the premise that "individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf." Id. at 414 (citation omitted). Again though, as Justice Scalia pointedly noted in his dissent, "we have *never* held, or even said, that a juror has an equal protection right not to be excluded from a particular case through peremptory challenge; and the existence of such a right would call into question the continuing existence of a centuries-old system that has important beneficial effects." Id. at 426 (Scalia, J., dissenting). Indeed, even the majority was quick to emphasize that "[a]s a practical matter, however, these challenges are rare." Id. at 414. Justice Kennedy cautioned that:

> The barriers to a suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges. Unlike a challenge to systematic practices of the jury clerk and commissioners such as we considered in *Carter,* it would be difficult for an individual juror to show a likelihood that discrimination against him at the *voir dire* stage will recur. See *Los Angeles v. Lyons,* 461 U.S. 95, 105-110, 103 S.Ct. 1660, 1666-1670, 75 L.Ed.2d 675 (1983). And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of

> litigation. See *Vasquez, supra,* 474 U.S., at 262, n. 5, 106 S.Ct., at 623, n. 5; *Rose v. Mitchell, supra,* 443 U.S., at 558, 99 S.Ct., at 3001. The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights. See *Barrows v. Jackson,* 346 U.S. 249, 257, 73 S.Ct. 1031, 1035, 97 L.Ed. 1586 (1953).

Id. at 414-15.

We question whether the Powers Court seriously intended to allow suits such as this one to proceed. Nonetheless, because we are bound by precedent, we must now adjudicate some of these "rare" and "daunting" claims. We remain wary, however, of exactly what consequences, intended or otherwise, will flow from the adjudication of these novel claims.

B. 12(B)(1) MOTION TO DISMISS

The District Attorney argues that the Court lacks jurisdiction for the following reasons: (1) Plaintiffs lack standing; (2) their claims are moot; and (3) the Younger doctrine mandates that the Court abstain from adjudication of these claims. We begin with an analysis of whether the Court should abstain from exercising jurisdiction in this case. See O'Hair v. White, 675 F.2d 680, 684 n.5 (5th Cir. 1982) ("Although as a general matter courts should decide standing issues first, ... if an issue is clearly nonjusticiable for reasons other than lack of standing a court may make its decision without reaching the standing question.").

Pursuant to FED. R. CIV. P. 12(b)(1), a party may obtain dismissal of a claim for lack of subject-matter jurisdiction. In deciding a 12(b)(1) motion, the court may consider evidence outside of the pleadings and the attachments thereto. Ambraco, Inc. v. Bossclip B.V., 570 F.3d 233, 238 (5th Cir. 2009). More specifically, "under Rule 12(b)(l), the court may find a plausible set of facts by considering any of the following: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Lane v. Halliburton, 529 F.3d 548, 557 (5th Cir. 2008) (internal quotations marks omitted) (citation omitted). However, "no presumptive truthfulness attaches to the plaintiff's allegations, and the court can decide disputed issues of material fact in order to determine whether or not it has jurisdiction to hear the case." Montez v. Dep't of Navy, 392 F.3d 147, 149 (5th Cir. 2004).

1. Abstention

The District Attorney argues that the Court should abstain from exercising jurisdiction over this action pursuant to Younger v. Harris, 401 U.S. 37 (1971). Plaintiffs dispute that the Younger doctrine applies to this case and assert that the Court is required to exercise jurisdiction. At this juncture, it is necessary to expressly delineate what injunctive and declaratory relief Plaintiffs seek as it will affect the analysis of whether, and to what degree, abstention is appropriate in this case.

a. Requested Injunctive and Declaratory Relief

In addition to any damages claims, Plaintiffs seek the following declaratory relief: (1) a declaratory judgment that the District Attorney has employed, and continues to employ, a custom, usage, and/or policy to exercise peremptory challenges against African-American citizens because of their race, in order to empanel criminal trial juries that are predominantly white; and (2) a declaratory judgment that Article 795 (C), (D), and (E) of the Louisiana Code of Criminal Procedure violate the rights of qualified African-Americans to be free from discrimination on the basis of race in jury selection in criminal trials, to the extent that those sections: (i) allow a peremptory challenge to be exercised against a qualified African-American juror, even if race is part of the motivation for the jury strike, so long as some "race-neutral" reason is given for the challenge; and (ii) allow a peremptory challenge to be exercised against a qualified African- American juror on account of race, if both the District Attorney and the defendant's attorney strike the same juror.

Plaintiffs seek the following injunctive relief as well: (1) a permanent injunction forbidding the District Attorney from exercising any peremptory challenges in criminal jury trials; (2) in the alternative, a preliminary injunction forbidding the District Attorney from exercising any peremptory challenges to strike otherwise qualified African-American jurors from jury service in criminal jury trials; (3) in the alternative, a permanent injunction forbidding the District Attorney to employ a custom, usage, and/or policy to exercise peremptory challenges against African-American citizens because of their race, in order to empanel criminal trial juries that are predominantly white; and

finally, (4) a permanent injunction requiring the District Attorney to provide training to all attorneys and investigators of the office to prevent the use of peremptory challenges to discriminate against qualified African-American jurors in future criminal jury trials.

b. Younger Abstention

"In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction." Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013). An exception to this general principle was articulated in Younger, in which Supreme Court enshrined a longstanding federal policy against a federal court enjoining pending state criminal proceedings absent extraordinary circumstances. 401 U.S. 37. The Supreme Court "has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, see *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), or that implicate a State's interest in enforcing the orders and judgments of its courts, *see Pennzoil Co. v. Texaco Inc.,* 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)." Id. at 72-73. "Circumstances fitting within the *Younger* doctrine, we have stressed, are 'exceptional'; they include, as catalogued in *[New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350 (1989)], 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" Id. at 73.

Both parties agree that abstention pursuant to Younger is only appropriate if three conditions are met: "(1) the federal proceeding would interfere with

an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" Bice v. Louisiana Pub. Def. Bd., 677 F.3d 712, 716 (5th Cir. 2012) (quoting Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)). Plaintiffs argue that neither the first element nor the third element has been satisfied in this case.

The Court is aware of no ongoing state judicial proceedings in which any Plaintiff is a party. The District Attorney notes that the case in which Plaintiffs Carter and Johnson were discharged by his use of peremptory strikes was on appeal sometime during the pendency of this suit.[42] Even if that case remains on appeal, no Plaintiff is a party to that case.

The District Attorney argues that the first element requiring a pending state judicial proceeding is nevertheless satisfied because the injunctive relief "would affect Defendant Stewart's ability to prosecute criminal cases."[43] In support of this position he cites Bice v. Louisiana Public Defender Board, 677 F.3d 712 (5th Cir. 2012), a case in which the Fifth Circuit affirmed the district court's decision to abstain under the Younger doctrine from a suit filed by a plaintiff challenging fees assessed to fund the Louisiana Public Defenders while he was being defended by a public defender in a municipal court proceeding. 677 F.3d at 715-16. The panel in Bice stated that:

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[42] Reply (Doc. 46) at 14.

[43] Id. at 13.

> The interference with ongoing state proceedings need not be direct to invoke *Younger* abstention. The *Younger* doctrine prevents federal courts from exercising jurisdiction when the relief requested "would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent." *O'Shea v. Littleton,* 414 U.S. 488, 500, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (internal citation omitted). Interference is established "whenever the requested relief would interfere with the state court's ability to conduct proceedings, regardless of whether the relief targets the conduct of a proceeding directly." *Joseph A. ex rel. Wolfe v. Ingram,* 275 F.3d 1253, 1272 (10th Cir.2002).

Id. at 717. The District Attorney further asserts that any such prospective relief "would constitute a major continuing intrusion of the equitable power of the federal courts into state criminal proceedings and would sharply conflict with the recognized principles of equitable restraint"[44] articulated by the Supreme Court in O'Shea v. Littleton, 414 U.S. 488 (1974).

Arguments as to indirect interference do not change the simple fact that there is no evidence before the Court that any Plaintiff is a party to an ongoing state judicial proceeding, or that any Plaintiff anticipates being a party in a future state judicial proceeding for that matter. By way of contrast, the respondent in Younger was facing state criminal charges. In Middlesex County, the case that formulated the three-part Younger abstention test cited by both parties, the respondent was the subject

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[44] Id. at 14.

of pending state disciplinary proceedings. In Bice, notwithstanding any discussion of indirect interference, there was no dispute that the petitioner was a party to an ongoing municipal court proceeding. These cases do not envision a federal court declining to exercise its jurisdiction on the basis of an ongoing state judicial proceeding to which the plaintiff seeking relief in federal court is not even a party. Finally, no Batson challenges were ever raised in regard to the dismissal of Plaintiffs Carter, Johnson, Horton, and Hawthorne, and because they were never parties in the state criminal proceedings from which they were struck as jurors they never had an opportunity to challenge the District Attorney's peremptory strikes. Accordingly, Plaintiffs are correct that neither the first nor third elements are met.

Even though Younger is inapplicable to these facts, the District Attorney raises valid concerns regarding the principles articulated in O'Shea which demand further analysis.

c. O'Shea Abstention

Younger and O'Shea are often conflated, for very understandable reasons. O'Shea extensively cites Younger, and both decisions are deeply concerned with issues such as federalism, comity, and equitable restraint. Not surprisingly, there is often significant overlap in the relevance of these landmark cases. In some circumstances, however, it may be necessary to treat them as closely related but distinct sources for abstention.

In O'Shea, the respondents sought to enjoin prospective criminal prosecutions brought under seemingly valid state laws on the basis of allegedly

discriminatory enforcement. 414 U.S. at 500. The Supreme Court framed the requested injunctive relief as "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that Younger v. Harris, supra, and related cases sought to prevent." Id. "A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable." Id. The O'Shea Court explained that even a "periodic reporting" system would "constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." Id. at 501. It further opined that such a scheme would offend principles of federalism and equitable restraint. Id. at 500-01. The availability of non-injunctive relief to respondents also weighed in favor of denying equitable relief. Id. at 504.

Other courts have distinguished abstention under Younger and O'Shea. "[A]lthough Younger does not apply in the absence of pending proceedings, ... the considerations underlying Younger [may still be] very much at play." Disability Rights New York v. New York, No. 17- 2812-CV, 2019 WL 637972, at *3 (2d Cir. Feb. 15, 2019) (citations omitted). *"O'Shea* is an extension of the principles set forth in *Younger."* Id. Accordingly, several circuit courts have abstained under O'Shea in certain civil contexts involving the operations of state courts. Id. at *4 (collecting cases).

Although the Fifth Circuit has never explicitly endorsed abstention solely under O'Shea, its analysis and application of O'Shea indicate that such an abstention is permissible. For example, in Ballard v. Wilson the Fifth Circuit found that the Younger doctrine required that the district court abstain from

adjudicating claims for injunctive and declaratory relief in regard to a municipal overtime parking ordinance. 856 F.2d 1568, 1569 (5th Cir. 1988). That panel was nonetheless careful to note that:

> a federal court ruling on the practices and procedures of the municipal court system, as is requested by [the plaintiff], would require supervisory enforcement of the ruling by the federal courts. This type of monitoring of state court procedures also offends principles of federalism and was condemned by the Supreme Court in *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). *See also Parker v. Turner,* 626 F.2d 1, 9 (6th Cir.1980), holding that where the complaint alleges failure of some state judges properly to follow the law, a federal court will not enjoin the alleged [unconstitutional] practices even in the absence of a pending state proceeding, since the relief sought would require monitoring of the judges' conduct.

Id. at 1570; see also Tarterv. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (finding that O'Shea was "conclusive" as to the plaintiffs claim for equitable relief regarding allegedly excessive bail); Gardner v. Luckey, 500 F.2d 712, 715 (5th Cir. 1974) ("It is clear from the face of their complaint that our appellants contemplate exactly the sort of intrusive and unworkable supervision of state judicial processes condemned in O'Shea. We hold that the District Court properly dismissed their suit."). Accordingly, the Court believes it is appropriate to determine whether O'Shea mandates abstention even though the Younger doctrine is inapplicable.

In Hall v. Valeska, a case particularly apposite to this suit, a group of African-Americans who had been excluded from jury service by the use of a District Attorney's peremptory strikes alleged a practice of discrimination in peremptory challenges and brought suit against the District Attorney. 849 F. Supp. 2d 1332, 1334-35 (M.D. Ala.), aff'd, 509 F. App'x 834 (11th Cir. 2012). The plaintiffs sought a declaratory judgment that such practices were unconstitutional and violated state and federal law. Id. at 1335. They also sought injunctive relief, which included the following: (1) a permanent injunction against the defendants from engaging in the allegedly discriminatory practices; (2) appointment of a court monitor to ensure that the defendants complied with certain record collections requirements; and (3) an order mandating that the plaintiffs have meaningful access to and monitoring of jury selection. Id. at 1335-36.

After discussing O'Shea at length, the Hall district court concluded that "the Plaintiffs seek a declaration and injunction which fall within the reasoning of *O'Shea."* Id. at 1337-38. The district court explained that "[a]lthough the Plaintiffs, like those in *O'Shea,* state that they do not seek to enjoin any current or future criminal proceedings, the requested 'intervention,' which allows beneficiaries of the injunction to interfere with state criminal proceedings if there is discrimination injury selection, is like the prohibited injunctive relief in *O'Shea."* Id. at 1338. It went on to state that the "relief sought by the Plaintiffs could also allow any member of the class subjected to a peremptory strike to promptly seek a contempt citation in federal court, so that resort to the federal courts by beneficiaries of

the injunction to enforce the injunction would interrupt that process." Id. The district court also admonished that even though "counsel for the Plaintiffs stated that it was the Plaintiffs' prediction that an injunction by this court would be followed, under *O'Shea* this court must consider the 'hypothesized recalcitrance,' and must 'focus on the likely result of an attempt to enforce an order of the nature sought here.'" Id. at 1339.

The Court will now determine whether it is necessary to abstain from consideration of Plaintiffs' requests for injunctive and declaratory relief under O'Shea.[45]

i. Injunctive Relief

Plaintiffs' first proposal for injunctive relief, a permanent injunction forbidding the District Attorney from exercising any peremptory challenges in criminal jury trials, is draconian. It goes far beyond the type of relief requested in O'Shea or Hall. To unilaterally disarm the District Attorney of the use of peremptory strikes, a right rooted in both statute and common law, while allowing opposing defense counsel to exercise peremptory strikes offends notions of federalism, comity, and equitable restraint even more than the ongoing federal audit of state criminal proceedings decried by the O'Shea Court. Plaintiffs offer no case law in support of such an unprecedented measure. O'Shea a fortiori prohibits the Court from issuing such an injunction.

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[45] The Court assumes without deciding that abstention under O'Shea is not suitable for damages claims. See Boyd v. Farrin, 575 F. App'x 517, 519 (5th Cir. 2014) (finding Younger doctrine is not applicable to claims for damages).

Plaintiffs' second and third in-the-alternative requests for injunctive relief are more reminiscent of the type of relief sought in other cases. Again, they seek either a preliminary injunction forbidding the District Attorney from exercising any peremptory challenges to strike otherwise qualified African-American jurors from jury service in criminal jury trials, or a permanent injunction forbidding the District Attorney to employ a custom, usage, and/or policy to exercise peremptory challenges against African-American citizens because of their race in order to empanel criminal trial juries that are predominantly white. In particular, these proposed injunctions closely mirror the request in Hall for a permanent injunction against the defendants from engaging the discriminatory use of peremptory strikes.

Inherent in these alternative injunctions is the ability of African-American potential jurors in criminal trials who are subjected to a District Attorney's peremptory challenge to seek federal review before the Court. During oral argument, Plaintiffs' counsel attempted to sidestep addressing this inevitability by referring to them as "entirely salutary, prophylactic measure[s] for those prosecutors to follow the Constitution."[46] It is not the practice of the Court, however, to issue injunctions for which it has no intent or means to enforce. Moreover, the Court cannot waive away such concerns simply by assuming that the District Attorney would abide by any such injunctions. As discussed in Hall, the Court is required under O'Shea "to consider the 'hypothesized recalcitrance,'

[46] Oral Argument Tr. (Doc. 61) at 48.

and must 'focus on the likely result of an attempt to enforce an order of the nature sought here.'" 849 F. Supp. 2d at 1339. Both of Plaintiffs' in-the-alternative requests for equitable relief would open the door to ongoing federal court intrusion into the operation of state criminal proceedings.

Similarly, a permanent injunction requiring the District Attorney to provide training to all attorneys and investigators of the office to prevent the use of peremptory challenges to discriminate against qualified African-American jurors in future criminal jury trials would require long-term involvement of the Court. Such a training program would necessarily be ongoing as it would need to continuously provide training to new attorneys and investigators. Further, the Court would have to periodically ensure that the District Attorney was adequately complying with the injunction. It is not the place of a federal court to administer training materials and practices to a District Attorney's office.

ii. Declaratory Relief

As discussed above, Plaintiffs seek the following declaratory relief: (1) a declaratory judgment stating that the District Attorney has employed, and continues to employ, a custom, usage, and/or policy to exercise peremptory challenges against African-American citizens because of their race, in order to empanel criminal trial juries that are predominantly white; and (2) a declaratory judgment that Article 795(C), (D), and (E) of the Louisiana Code of Criminal Procedure violate the rights of qualified African-Americans to be free from discrimination on the basis of race injury selection in criminal trials.

"The Declaratory Judgment Act, 28 U.S.C. § 220l(a), 'is an enabling act, which confers discretion on the courts rather than an absolute right on a litigant.'" Sherwin-Williams Co. v. Holmes Cty., 343 F.3d 383,389 (5th Cir. 2003). "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." Id. "It is well-settled that a district court has broad discretion over whether to decide or dismiss a declaratory judgment action." Montpelier US Ins. Co. v. Remy, No. 6:13-CV-00773, 2014 WL 1713407, at *3 (W.D. La. Apr. 29, 2014) (citations omitted).

It is difficult to overstate the magnitude of chaos that would ripple out from a federal declaratory judgment that the District Attorney has, and continues to, systematically exercise peremptory strikes in a discriminatory manner on the basis of race. Such a judgment would conceivably call into question most criminal conviction in Caddo Parish dating back to at least the time from which Plaintiffs collected data on juries, but perhaps even further. Every single person convicted in Caddo Parish in a criminal jury trial in which the District Attorney exercised a peremptory strike against an African-American prospective juror would have a potentially colorable argument that his/her jury was empaneled in violation of the Equal Protection Clause and Batson/Powers. The creation of this novel avenue for the collateral attack of criminal convictions going back potentially decades may not be Plaintiffs' intent, but it is undoubtedly the end result. Hundreds, if not thousands, of criminal convictions could be challenged in federal courts throughout the

country through 28 U.S.C. § 2254 motions for writ of habeas corpus. The principles of federalism, comity, and equitable restraint exist in large part to prevent exactly such an outcome.

Given the disposition of this matter, the Court finds it appropriate to dismiss Plaintiffs' request for a declaratory judgment finding Article 795(C), (D), and (E) unconstitutional as well. Plaintiffs acknowledge that none of them have been the subject of an Article 795 challenge. Notwithstanding any theories about the chilling effects of Article 795 in terms of the hesitancy of defense attorneys to challenge peremptory strikes, there is an insufficient factual basis for the Court to resolve this issue. The novel nature of this suit also weighs against retaining jurisdiction. Criminal defendants who have unsuccessfully raised Batson challenges subject to Article 795 are far better positioned to provide a court with the factual framework necessary to appropriately determine the constitutionality of Article 795. It would not serve the purposes of judicial economy for the Court to retain jurisdiction over this request for declaratory relief.

The Court concludes that the requested injunctive and declaratory relief falls within the type of relief condemned in O'Shea. For reasons of federalism, comity, and equitable restraint, the Court must therefore abstain from adjudication of these claims for injunctive and declaratory relief.[47] Moreover, the

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[47] This finding is in harmony with the Fifth Circuit's decision to exercise jurisdiction in ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018). In that case, plaintiffs sought injunctive relief against Harris County, Texas, concerning issues such as the right to a timely bail hearing and a case-by-case bail evaluation. Id. at 163-64. The Fifth Circuit explained that

Court exercises its broad discretion in dismissing the claim that Article 795 is unconstitutional.

2. Standing

The only remaining claims are those for damages raised by Plaintiffs Carter, Johnson, Horton, and Hawthorne.

The United States Constitution limits the authority of the Federal Judiciary to "Cases" and "Controversies." U.S. CONST. art. III, § 2. "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defs. of Wildlife, 504 U.S. 555,560 (1992). "In this way, '[t]he law of Article III standing ... serves to prevent the judicial process from being used to usurp the powers of the political branches,' and confines the federal courts to a properly judicial role." Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1547 (2016) (internal citations omitted).

O'Shea policy concerns were not implicated because the requested relief would "impose 'nondiscretionary procedural safeguard[s],' which will not require federal intrusion into pre-trial decisions on a case-by-case basis." Id. at 156-57. This is unlike the relief sought in this case, which would invite ongoing intrusion into state criminal proceedings for the reasons discussed above.

It is also worth briefly highlighting the ODonnell panel's treatment of abstention. After determining that the Younger doctrine did not apply, the court made a point of emphasizing that "the policy concerns underlying this doctrine are not applicable here" and cited O'Shea. Id. This lends further support to the notion that the "policy concerns" as embodied in O'Shea may independently form a basis for abstention.

The Supreme Court has established that "the irreducible constitutional minimum of standing contains three elements." Lujan, 504 U.S. at 560.

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (internal citations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561.

Carter, Johnson, Horton, and Hawthorne have satisfied all three standing criteria in regard to their damages claims. First, they have sufficiently stated a concrete and particularized injury by alleging that the District Attorney exercised peremptory challenges to exclude them, even though they were qualified and unbiased, from the petit jury solely by reason of their race. As alleged, this practice foreclosed a significant opportunity to participate in civic life. Second, the allegations directly attribute this injury to the alleged policy of the District Attorney to systematically exercise peremptory strikes against African-American prospective jurors on the basis of their race. Third, this asserted

constitutional violation is redressable through damages. Thus, the Court finds that Carter, Johnson, Horton, and Hawthorne have standing to seek damages relief, if such relief is actually available and provable in fact.

3. Mootness

Again, the only remaining claims before the Court are the damages claims. The District Attorney concedes that the doctrine of mootness does not apply to these claims.[48] Accordingly, the Court need not address the issue of mootness.

C. 12(B)(6) MOTION TO DISMISS

The District Attorney argues that Plaintiffs have failed to state a claim for the following reasons: (1) their claims are barred by res judicata and collateral estoppel; (2) they have failed to state a claim under 18 U.S.C. § 243; (3) their federal and state claims are barred by prosecutorial immunity; (4) their federal claims are barred by qualified immunity; and (5) their federal claims are barred by the Eleventh Amendment. Additionally, the Attorney General argues that the Court should dismiss all claims pursuant to FED. R. CIV. P. 8(a)(2).[49]

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[48] Reply (Doc. 46), at 11 n.4.

[49] In his Reply, the District Attorney also argues that Plaintiffs failed to adequately plead under FED. R. CIV. P. 8(c). Reply (Doc. 46) at 16. This argument is not timely raised, and the Court will not address it. See Cavazos v. JP Morgan Chase Bank Nat'l Ass'n, 388 F. App'x 398, 399 (5th Cir. 2010) (quoting United States v. Jackson, 426 F.3d 301, 304 n.2 (5th Cir. 2005) ("Arguments raised for the first time in a reply brief, even by prose litigants ... are waived.").

To survive a 12(b)(6) motion to dismiss the plaintiff must plead enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. All well pleaded facts shall be deemed as true and all reasonable inferences must be drawn in the plaintiffs' favor. Lormand v. US Unwired, Inc., 565 F.3d 228, 232 (5th Cir. 2009) (citations omitted). Nonetheless, 12(b)(6) motions to dismiss are viewed with disfavor and rarely granted. Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 570 (5th Cir. 2005).

1. Res Judicata

The District Attorney asserts that Plaintiffs' claims are barred by res judicata and collateral estoppel. The crux of his argument is that if a criminal defendant can raise an equal protection claim on behalf of a prospective juror, then the criminal defendant's Batson challenge, or even lack thereof, precludes a prospective juror from ever bringing his/her own equal protection claim. The District Attorney reasons that if the criminal defendant challenges a peremptory strike under Batson and a court makes a ruling, then the claim of whether the peremptory strike violated the equal protection rights of the prospective juror has been fully litigated and cannot be raised again by anyone, including the prospective juror.[50] He also goes one

[50] In the context of federal res judicata law, the Court agrees with this argument. We are not persuaded by the argument

step farther, arguing that if the criminal defendant declines to pursue a Batson challenge, then the equal protection claim is waived for both the criminal defendant and the prospective juror.

"The rule of res judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion." Test Masters, 428 F.3d at 571 (citing St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 436 (5th Cir. 2000)). Res judicata is an affirmative defense that must generally be pleaded in an answer, not raised in a 12(b)(6) motion to dismiss. Id. at 570 n.2. However, the Fifth Circuit has explained that a 12(b)(6) motion to dismiss properly raises res judicata when "the facts are admitted or not controverted or are conclusively established." Meyers v. Textron, Inc., 540 F. App'x 408, 410 (5th Cir. 2013) (quoting Clifton v. Warnaco, Inc., 53 F.3d 1280, 1995 WL 295863, at *6 n.13 (5th Cir. 1995) (per curiam)). "When all relevant facts are shown by the court's own records, of which the court takes notice, the defense [of res judicata] may be upheld on a Rule 12(b)(6) motion without requiring an answer." Id. (citation omitted). Any facts necessary for the Court to decide the applicability of res judicata are agreed upon by the parties, and thus it is appropriate for the Court to rule on this matter.

"In determining the preclusive effect of an earlier state court judgment, federal courts apply the preclusion law of the state that rendered the judgment." Wills v. Arizon Structures Worldwide,

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that the lack of a Batson challenge would also have a preclusive effect.

L.L.C., 824 F.3d 541, 545 (5th Cir. 2016) (quoting Weaver v. Tex. Capital Bank N.A., 660 F.3d 900, 906 (5th Cir. 2011)). Any relevant Batson challenges would have been determined (or waived) in a Caddo Parish court, and thus Louisiana preclusion law applies. In Louisiana, "[t]he doctrine of res judicata is *stricti juris;* that is, any doubt concerning application of the principle of res judicata must be resolved against its application." Webb, 560 F. App'x at 366 (citations omitted). "[T]he party urging res judicata has the burden of proving each essential element by a preponderance of the evidence." St. Paul Mercury, 224 F.3d at 437 (citation omitted).

a. Claim Preclusion

The Fifth Circuit has interpreted claim preclusion, or res judicata, under Louisiana law as containing five requirements:

> (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.

Webb, 560 F. App'x at 365-66 (citations omitted); see LA. STAT. ANN. § 13:4231. "Under Louisiana law, identity of the parties does not mean that the parties must be the same physical or material parties, but they must appear in the suit in the same quality or capacity." St. Paul Mercury, 224 F.3d at 437. Specifically, Louisiana law defines privity as "one who ... has acquired an interest in the subject matter

affected by the judgment through or under one of the parties, as by inheritance, succession, purchase or assignment." OneBeacon Am. Ins. Co. v. Barnett, No. 18-60224, 2019 WL 993098, at *4 (5th Cir. Feb. 27, 2019) (citations omitted).

The District Attorney has failed to meet his burden of proving that both the third and fifth requirements have been met. There is no indication that the parties appear in the same quality or capacity as in the original suits. Plaintiffs have not acquired any interest from criminal defendants by inheritance, succession, purchase, or assignment. Furthermore, the District Attorney has not shown that this suit arises out of the transaction or occurrence that was the subject matter of the first litigation. For any given Plaintiff, the relevant prior action was a state criminal prosecution. The subject of that criminal prosecution would have been the alleged criminal conduct of the defendant, not a procedural issue concerning the selection of a venireperson for that action. Thus, the Court finds that res judicata does not bar Plaintiffs' remaining claims.

b. Issue Preclusion

Under Louisiana law, a party is collaterally estopped if"[a] judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment." LA. STAT. ANN. § 13:4231. For collateral estoppel to apply, Plaintiffs must have an "identity" with one of the original parties. See OneBeacon, 2019 WL 993098, at *4. As discussed above, no such identity

exists because no Plaintiff has acquired an interest from any criminal defendants as a result of inheritance, succession, purchase or assignment.

Keeping in mind that any doubt concerning the application of res judicata nor collateral estoppel bar be resolved in favor of maintaining the second action, the Court finds that neither doctrine bars Plaintiffs from raising the remaining claims.

2. 18 U.S.C. § 243

Plaintiffs acknowledge that they are not raising any claims under 18 U.S.C. § 243.

3. Prosecutorial Immunity

The District Attorney argues that Plaintiffs' state and federal claims are barred by common law prosecutorial immunity. Plaintiffs are suing the District Attorney in his official capacity; substantively, these are Monell claims against the District Attorney as a municipal entity. See Williamson v. City of Morgan City, No. CIV.A. 08-0441, 2009 WL 2176002, at *5 (W.D. La. July 21, 2009) (collecting cases). Prosecutorial immunity is inapplicable to Monell claims. Johnson v. Louisiana, No. CIV.A. 09-55, 2010 WL 996475, at *11-13 (W.D. La. Mar. 16, 2010). Accordingly, the District Attorney is not shielded by prosecutorial immunity in this case.

4. Qualified Immunity

"Unlike government officials sued in their individual capacities, municipal entities and local governing bodies do not enjoy immunity from suit, either absolute or qualified, under § 1983." Allen v. Hart, No. 2:09 CV 02011, 2010 WL 2505607, at *2 (W.D. La. June 14, 2010) (quoting Burge v. Parish of

St. Tammany, 187 F.3d 452,466 (5th Cir. 1999)). As discussed above, the damages claims are raised against the District Attorney as a municipal entity. Thus, he is not entitled to qualified immunity in this matter.

5. Sovereign Immunity

Finally, the District Attorney argues that he enjoys sovereign immunity in his official capacity under the Eleventh Amendment. However, "it is now well-established that Louisiana district attorneys are considered representatives of the state's political subdivisions rather than of the state itself and are not entitled to Eleventh Amendment immunity." Johnson, 2010 WL 996475, at *10 (citing Burge, 187 F.3d at 466). The Court finds that the District Attorney is not entitled to sovereign immunity in this suit.

6. FED. R. CIV. P. 8(a)(2)

The Attorney General contends that FED. R. CIV. P. 8(a)(2) requires dismissal of this matter because (1) the claims are implausible because of changes in membership of the District Attorney's office and (2) the claims fail to sufficiently allege causation. The first argument regarding change of staff in the District Attorney's office is in essence a mootness argument, which is irrelevant to the remaining damages claims. The Court will address the Attorney General's second argument.

"Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft, 556 U.S. at 679. "[U]nder the Federal Rules of Civil

Procedure's requirement of notice pleading, defendants in all lawsuits must be given notice of the specific claims against them." Anderson v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d 525, 528 (5th Cir. 2008) (citing FED. R. CIV. P. 8(a)(2)). "Although this notice does not require pleading specific facts, the complaint must 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" Id. (quoting Twombly, 550 U.S. at 544).

Plaintiffs Carter, Johnson, Horton, and Hawthorne allege that they were struck as a result of the District Attorney's systemic use of discriminatory peremptory strikes. When accepted at face value, which the Court is obligated to do for the limited purpose of this analysis, Reprieve's statistics indicate that after controlling for relevant factors African-American jurors are subject to the District Attorney's peremptory strikes at five times the rate as non-African-American jurors. Carter, Johnson, Horton, and Hawthorne have specified the exact trials from which they were excused. Interestingly, Carter and Johnson were excused as jurors from the same trial, and Horton and Hawthorne were also struck as jurors in the same trial. Finally, Carter, Johnson, Horton, and Hawthorne assert that former members of the District Attorney's office have admitted to the intentional use of peremptory challenges to strike African-Americans because of their race. Together these allegations sufficiently put all parties to the suit on notice of what their claims are and the grounds upon which they rest.

Carter, Johnson, Horton, and Hawthorne have cleared the relatively low threshold of surviving a 12(b)(6) failure to state a claim challenge, the granting of which is generally disfavored. To prevail

on the merits, or for that matter to survive a motion for summary judgment, is a significantly higher bar. Evidence specific to Carter, Johnson, Horton, and Hawthorne showing that the District Attorney exercised peremptory challenges against each of them because of their race will be needed. Statistics appearing to show general trends will not suffice.[51] Accordingly, discovery will be limited to the cases from which Carter, Johnson, Horton, and Hawthorne were excused.

III. CONCLUSION

IT WILL BE ORDERED that the Motion to Dismiss (Doc. 20) be **GRANTED IN PART** and **DENIED IN PART.**

IT WILL FURTHER BE ORDERED that Plaintiffs' request for certification of a class be **DENIED.**

IT WILL FURTHER BE ORDERED that the request for a permanent injunction forbidding the District Attorney from exercising any peremptory challenges in criminal jury trials be **DISMISSED WITHOUT PREJUDICE.**

IT WILL FURTHER BE ORDERED that the request for a preliminary injunction forbidding the District Attorney from exercising any peremptory challenges to strike otherwise qualified African-American jurors from jury service in criminal jury trials be **DISMISSED WITHOUT PREJUDICE.**

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[51] Notably, Plaintiffs do not allege that every single peremptory strike exercised by the District Attorney against African-American prospective jurors was done because of race.

IT WILL FURTHER BE ORDERED that the request for a permanent injunction forbidding the District Attorney to employ a custom, usage, and/or policy to exercise peremptory challenges against African-American citizens because of their race, in order to empanel criminal trial juries that are predominantly white be **DISMISSED WITHOUT PREJUDICE.**

IT WILL FURTHER BE ORDERED that the request for a permanent injunction requiring the District Attorney to provide training to all attorneys and investigators of the office to prevent the use of peremptory challenges to discriminate against qualified African-American jurors in future criminal jury trials be **DISMISSED WITHOUT PREJUDICE.**

IT WILL FURTHER BE ORDERED that the request for a declaratory judgment that the District Attorney has employed, and continues to employ, a custom, usage, and/or policy to exercise peremptory challenges against African-American citizens because of their race, in order to empanel criminal trial juries that are predominantly white be **DISMISSED WITHOUT PREJUDICE.**

IT WILL FURTHER BE ORDERED that the request for a declaratory judgment that Article 795(C), (D), and (E) of the Louisiana Code of Criminal Procedure violate the rights of qualified African-Americans to be free from discrimination on the basis of race in jury selection in criminal trials be **DISMISSED WITHOUT PREJUDICE.**

IT WILL FURTHER BE ORDERED that Renee Pipkins, Everitt Pipkins, Theron Jackson, LaWhitney Johnson, Adriana Thomas, and Reginald

Autrey be **DISMISSED** as Plaintiffs in this matter because all of their claims have been dismissed.

IT WILL FURTHER BE ORDERED that the Motion to Dismiss (Doc. 20) be **DENIED** inasmuch as it seeks dismissal of the request for an award of nominal and/or compensatory damages to Plaintiffs Darryl Carter, Diane Johnson, Kimberly Horton, and Theresa Hawthorne.

A separate judgment memorializing this ruling will follow.

SIGNED on this 1st day of April 2019, at Alexandria, Louisiana.

s/
JUDGE DEE D. DRELL
UNITED STATES DISTRICT COURT