No. 08-1402

IN THE

Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

v.

DIAPOLIS SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), THE NATIONAL URBAN LEAGUE, REPRESENTATIVE JOHN CONYERS, JR., MR. WAYNE J. BENTLEY, AND MR. RICHARD E. HILLARY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are a coalition of organizations and individuals that have united to ensure this Court considers the voices of jury-eligible African-Americans who are unlawfully excluded from jury venire panels. Although the central legal issue in this appeal involves a criminal defendant's Sixth Amendment right to a fair cross-section, the interpretation of that right has a clear and direct link to jurors' Fourteenth Amendment guarantee of equal protection under the law.

Amici include the Charles Hamilton Houston Institute for Race & Justice ("CHHIRJ"), the National Association for the Advancement of Colored People ("NAACP"), the National Urban League, Representative John Conyers, Jr. and individual prominent members of the community from Kent County, Michigan.

More detailed descriptions of the *amici* and their interest in this matter are contained *infra* in the Appendix.

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[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief. Letters of consent by the parties to the filing of this briefing have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The underrepresentation and unlawful exclusion of African-Americans from juries has been a systematic problem ever since the passage of the Fifteenth Amendment. *See e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880). Despite the tremendous progress that has been made, racial diversity within jury venire panels as well as on grand and petit juries is a goal that remains elusive in many jurisdictions throughout the United States. *See, e.g.*, Geri L. Dreling, *Churning Up the Jury Pool: Massachusetts Case Renews Debate About Minority Representation in Federal Juries*, 92 A.B.A.J. 12, 1 (Jan. 2006) (reporting that representation of racial minorities, particularly African-Americans, remains "a consistent problem" nationwide).

The underrepresentation of African-American and other minority groups from juries is problematic for a number of reasons. First, this Court has repeatedly recognized that such exclusion cannot be reconciled with fundamental, constitutional principles; specifically, it contravenes both the Sixth and Fourteenth Amendments. Second, jury service is one of the most meaningful activities through which citizens participate in our democracy; excluding African-Americans from that process is functionally equivalent to denying them full citizenship. And finally, recent social science research and legal scholarship establishes that racially diverse, heterogeneous juries are not only more likely to be effective in pursuing the jury's truth-seeking charge during the deliberation process, but they also increase the public's perception of legitimacy of the entire justice system.

Here, the record unequivocally establishes that the petit jury that heard and convicted the Respondent, Mr. Diapolis Smith, was selected from a jury venire panel that systematically excluded African-Americans. The Sixth Circuit's conclusion that Mr. Smith's Sixth Amendment right to an impartial jury drawn from a fair cross-section of his community was violated is not only consistent with this Court's clearly established Sixth Amendment jurisprudence, including *Duren v. Missouri*, 439 U.S. 357 (1979), but also with the rationale underlying a number of this Court's opinions that the systematic exclusion of African-Americans, or any other minority group, has no place in our democratic society.

ARGUMENT

I. THE SYSTEMATIC EXCLUSION OF AFRICAN-AMERICANS FROM JURY VENIRE PANELS INFLICTS GRAVE INJURIES ON THE EXCLUDED JURORS

Excluding African-Americans from jury venire panels not only violates those individuals' constitutional rights, but it also prevents them from participating in a fundamental aspect of American democratic life.

A. The Unlawful Exclusion of Jurors Violates Both the Fourteenth and Sixth Amendments

This Court has recognized that impermissibly denying individuals the right to participate in jury service on account of their race not only inflicts a constitutional harm on the litigants, *see Batson v.*

Kentucky, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."), but also on the excluded jurors. As this Court explained in *Carter v. Jury Commission of Greene County*:

> Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. 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.

396 U.S. 320, 329 (1970); *see also Georgia v. McCollum*, 505 U.S. 42, 48 (1992) ("[D]enying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror."). Specifically, this Court has held that such exclusion cannot be reconciled with the Fourteenth Amendment's Equal Protection clause, writing:

> We hold 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. An individual juror does not have a right to sit on any particular petit jury, but 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 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) ("We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.").

Underlying this recognition of jurors' equal protection right is the understanding that such unlawful exclusion is anathema to true democratic society. This Court wrote in *Taylor v. Louisiana*: "To exclude racial groups from jury service. . .[is]. . . 'at war with out basic concepts of a democratic society and a representative government.'" 419 U.S. 522, 527 (1975) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). Indeed, as long ago as the Reconstruction Era, the Court in *Strauder* had no difficulty concluding a statue that denied African-Americans citizens the opportunity to serve as jurors could not pass constitutional muster. The Court explained:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which

> is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. at 308. The Court echoed this sound conclusion in *J.E.B. v. Alabama ex rel. T.B.*, which held that the Fourteenth Amendment forbids peremptory challenges to potential jurors based solely on gender. Justice Blackmun, writing for the majority, recognized:

> Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

511 U.S. at 146 n.19 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946)). And while in recent years most of this Court's jurisprudence regarding excluded jurors' Fourteenth Amendment rights has focused on situations involving the unlawful exclusion from particular petit juries, *see, e.g., Powers,* 499 U.S. at 402; *J.E.B.*, 511 U.S. at 128-29, the same analysis applies to the systematic exclusion of entire groups of people from jury venire panels. *See Carter*, 396 U.S. at 329-30 (concluding that the jury selection laws in Greene County, Alabama, which prevented fully qualified African-American citizens from ever being called for jury service, could not survive constitutional scrutiny).

This Court's Sixth Amendment cases also reflect the same constitutional concerns about the unlawful exclusion of jurors from venires based on "immutable characteristics," such as race and gender. In *Duren*, for example, this Court held that a Missouri state statute that exempted women from jury service violated the criminal defendants' right to a petit jury selected from a fair cross-section as guaranteed by the Sixth Amendment. 439 U.S. at 367. Along with a concern for the defendant's rights, both the majority opinion and Justice Rehnquist's dissenting opinion reveal the Court's parallel concerns for the harm to the constitutional rights of the excluded female jurors. *Id.* at 371 ("That the majority is in truth concerned with the equal protection rights of women to participate in the judicial process...."). A similar concern is present in the opinion in *Taylor*, which was also a Sixth Amendment challenge to the systematic exclusion of women from venires. *See* 419 U.S. at 537.

While the holdings in these cases are based on a constitutional principle separate and distinct from the Fourteenth Amendment's Equal Protection Clause—i.e., the Sixth Amendment's fair cross section guarantee—the Court's underlying reasoning is resoundingly similar: there is no justification whatsoever for excluding otherwise qualified potential jurors from jury venires because such exclusion cannot be harmonized with the federal constitution.

B. Excluding Jurors from Venire Panels Prevents Them from Participating in a Fundamental Aspect of American Civic Life

The constitutional harm to the otherwise qualified potential jurors' rights is amplified because it prevents them from engaging and participating in one of the most fundamental aspects of American democratic society.

The centrality of jury service to American civic engagement cannot be understated. In the early years of our country, as Alexis de Tocqueville eloquently put in his seminal treatise *Democracy in America*:

> The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge toward society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.

Alexis de Tocqueville, *Democracy in America* 364 (Henry Reeve & Francis Bowen trans., Sever & Francis 3rd ed. 1863). He went on to praise the values and skills jury service instills into the populace:

> The jury contributes most powerfully to form the judgment and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties . . . . I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

Id.

De Tocqueville was not alone in having such a high estimation of the value and benefit of jury service. Many of the Founding Fathers and early leaders of the nation also stressed the importance of serving on a jury. For example, Thomas Jefferson, while serving as ambassador to France in 1789, speculated that jury service may be of a greater value to building a true democracy than even the right to vote, writing: "Were I called upon to decide whether the people had best be omitted in the

Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making of them." *Letter from Thomas Jefferson to the Abbé Arnoux* (July 19, 1789), *reprinted in* 15 The Papers of Thomas Jefferson, 282, 283 (J. Boyd ed. 1958). Similarly, legal scholar Akhil Reed Amar's research into the history and ratification of the Bill of Rights found that juries and jury service could serve as the "paradigmatic image underlying the Bill of Rights" because it "summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence" of those first ten amendments. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1190 (1991). Amar's research revealed that the Framers valued jury service in part because it provided a platform to educate the citizenry:

> Like the church and the militia, the jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct. Churches stressed religious and moral virtues; militias struck a proper balance between civilian and martial virtues; and juries instilled republican legal and political virtues.

Id. at 1186.

This principle, that jury service is a necessary part of our political and civic community, has also been recognized by this Court:

> Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.

Carter, 396 U.S. at 330. Similarly, the Court explained in *Powers*: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life," and invoking de Tocqueville, quoted his observation that "the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society." 499 U.S. at 402, 407.

Moreover, recent empirical research on jury service and political engagement supports the view that jury participation inculcates civic virtue by inducing political participation. One study exploring the impact of jury deliberation on electoral participation found a connective cognitive and behavioral link between jury service and voting: those participants who engaged in jury deliberations were more likely to vote in subsequent elections. John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 The J. of Pol. 1, 9, 13 (2008). In fact, those participants who had previously been less politically active experienced a far greater shift in perception and behavior toward increased civic

participation, than those jurors who were already politically active. *Id.* at 9.

In further exploring these results, researchers have discovered that "a subjectively satisfying deliberative experience during jury service can reinforce civic identity, trust in fellow citizens, and faith in public institutions." John Gastil et al., *From Group Member to Democratic Citizen: How Deliberating with Fellow Jurors Reshapes Civic Attitudes*, 34 Human Commc'n Res. 137, 139, 145 (2008) ("Positive changes in jurors' civic identity and trust in fellow citizens and public institutions flow from the deliberative quality of talk in the jury room and overall satisfaction with the jury deliberation and verdict.").

Jury service is not only a fundamental component of civic engagement, but it plays a significant and powerful role in promoting electoral participation, democracy and citizenship. Systematically excluding African-Americans or any distinctive group or other subsection of the population from jury service, can have a profound and widespread chilling effect on that community's civic and political engagement.

II. SYSTEMICALLY EXCLUDING AFRICAN-AMERICANS FROM THE JURY VENIRE PANELS DETRIMENTALLY IMPACTS THE EFFECTIVENESS AND LEGITIMACY OF THE JURY SYSTEM

In addition to the serious harm that excluded jurors suffer from such systematic exclusion, there is another compelling reason to ensure that jury venire panels are diverse and representative: such panels will lead to the creation of petit juries that operate

with greater efficacy and are likely to be perceived, by the public at large, as more legitimate.

A. A Jury's Racial Composition Can Influence the Nature and Quality of Its Deliberation Processes and the Verdict

Social science studies examining the influence of racial composition on group decision-making in a jury context suggest that diverse juries are better decision-makers than homogeneous ones. Racially diverse juries are more thorough, accurate, and open minded than homogenous juries. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. of Personality & Soc. Psychol. 597 (2006); *see also* Valerie P. Hans & Neil Vidmar, *Jury Selection, in The Psychology of the Courtroom* 42 (N.L. Kerr & R.M. Bray eds., 1982) (citing empirical evidence suggesting that ". . . a jury composed of members with a range of individual experiences, knowledge, and abilities will result in a variety of perspectives that will generate more ideas and more robust deliberations, resulting in better fact finding (problem solving).").

In one recent study, researchers found that by every deliberation measure examined, heterogeneous juries outperformed homogenous ones: diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements in discussing the evidence than did all-white juries. Sommers, *supra*, at 608. As Sommers observed: "The extent to which racial diversity facilitates information exchange and problem solving certainly indicates advantages for heterogeneous groups,

especially for complex decisions." *Id.* at 598. This finding is consistent with the conclusions of general social science research regarding diversity in group decision-making and task performance, which has identified enhanced information sharing and improved decision-making as among the positive effects of racial heterogeneity. *See, e.g.*, Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Moderating Effects of Work Group Perspectives on Diversity*, 46 Admin. Science Q. 229, 266 (2001).

Legal scholarship also supports the proposition that a jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to review the evidence in light of different perspectives, and thus, engage in a more thorough debate. *See* Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. Chi. Legal F. 161, 165 (1998). Ramirez observes that:

> [R]acially diverse juries bring to their deliberations a broader range of life experiences that allow them to use their common sense more effectively when they evaluate the facts presented at trial. . . . To the extent that a racially mixed jury facilitates the sharing of diverse perspectives, information, and experiences, that sharing may lead to a more thoughtful and informed verdict.

Id.; *see also* Joshua Wilkenfeld, *Newly Compelling: Reexaming Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 Colum. L.

Rev. 2291, 2308 (2004) (citing legal scholarship concluding that diversity may increase a jury's ability to interpret the significance of facts and law).

Another benefit to greater diversity is that heterogeneous juries can affirmatively reduce or eliminate any randomly distributed racial biases or prejudices that accompany jurors to the courtroom. Empirical studies have found that a jury's racial composition may trigger normative pressures regarding race by activating jurors' motivations to avoid prejudice. Hans & Vidmar, *supra*, at 42 ("[T]he presence of [minority jurors] may inhibit majority group members from expressing prejudice, especially if the defendant is from the same group as the minority group jurors"); *see also* Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 Law & Hum. Behav. 545 (1995) (finding that the mere expectation of deliberating on a racially heterogeneous jury affected mock jurors' perceptions of blameworthiness).[2]

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[2] Despite, the enormous progress that has been made, there is still considerable evidence that racial bias remains in jury deliberations. Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 85 (1993) ("[W]henever a connection exists...white jurors are harsher with black defendants and more lenient with those charged with crimes against black victims than black jurors."); *see also* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Racial Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201, 220 (2001) (finding that in studies with mock jurors "[w]hen race was made a salient...Whites demonstrated no signs of discrimination, apparently because the racial content of the trial activated a motivation to appear non-prejudiced. However, when race was not a salient issue, a motivation to avoid prejudice was not expected among jurors, and White

All of this research only confirms what this Court acknowledged several decades ago in *Peters v. Kiff*, 407 U.S. 493, 503 (1972): "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Diverse, racially heterogeneous juries lead to better and more just results.

B. The Failure To Empanel Diverse Juries Can Undermine the Public's Confidence in the Legal System

The systematic exclusion of African-Americans from jury venire panels should be alarming for another reason as well: the failure to empanel diverse juries has deleterious consequences on the perception of the legitimacy of the legal system as a whole.

Generally, the level of satisfaction that people feel with the decision of a trier of fact is strongly influenced by their perceptions of the fairness of the procedures used by the trier to reach that decision. *See, e.g.,* John W. Thibaut & Lauren S. Walker, *Procedural Justice: A Psychological Analysis* (1975); *see also* Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 L. & Soc'y Rev. 601, 603 (2005) (noting that "[s]ocial scientific research

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mock jurors did indeed demonstrate racial bias in their judgments.").

has amply demonstrated that perceived injustice in distribution systems leads to declines in perceptions of institutional legitimacy, respect for authority, and even law-abidingness"). As such, existing research confirms that jury composition can influence the perceived fairness of a trial and the perceived accuracy of a final verdict. "Regardless of any direct effects on the verdict, unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes." Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1038, 1049 (2003) (finding that when a jury is racially heterogeneous, the outcome does not influence the perceived fairness of the trial; however, when the jury is homogeneous (i.e., an all-white jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair); *see also*, Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 Am. Crim. L. Rev. 1177, 1181-84 (1994) ("Procedural fairness can persuade participants and observers to accept an outcome as fair even when that decision is not the one they would have preferred.").

Indeed, the empirical evidence confirms this Court's recognition that discriminatory jury selection "undermine[s] public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 88 (1986); *see also Johnson v. California*, 545 U.S. 162 (2005) ("[T]he overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from

making a significant contribution to governance on account of his race. Yet the 'harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.'"). A 1999 survey conducted by the American Bar Association found that the public's continued support for the justice system stems from its trust in the role of the jury. American Bar Association, *Perceptions of the U.S. Justice System* 6-7 (www.abanet.org/media/perception/home.html). In order to preserve the legitimacy of the jury and the justice systems, jurors must be selected from a panel that is representative of the community.

The empirical evidence demonstrates that a jury's racial composition has the potential to influence its decision-making process, its final verdict, and ultimately, the level of confidence the public has in the legal system, thus, reinforcing the importance of not only the final composition of the jury, but also of the make-up of jury venire panels and the processes by which jurors are selected.

III. THE SIXTH CIRCUIT'S CONCLUSION THAT THE MICHIGAN SUPREME COURT ERRED IN REJECTING MR. SMITH'S SIXTH AMENDMENT FAIR CROSS-SECTION CHALLENGE WAS PROPER AND SHOULD BE AFFIRMED

The Sixth Circuit properly concluded that Mr. Smith's Sixth Amendment right to an impartial jury drawn from a fair cross-section of his community was violated because his prima facie showing as required in *Duren* was not rebutted by the State. *Smith v. Berghuis*, 543 F.3d 326, 329 (6th Cir. 2008),

cert. granted, 130 S. Ct. 48 (2009). The Michigan Supreme Court's conclusion to the contrary was unreasonable and in violation of this Court's clearly established precedent.[3]

A. The Sixth Circuit Properly Concluded that the Representation of African-Americans on Kent County Venire Panels Was Not Fair and Reasonable[4]

Under the second prong of the *Duren* test, Mr. Smith was required to show "that the representation [of African-Americans] in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community . . . ." *Duren*, 439 U.S. at 364. In considering Mr. Smith's evidence, the Sixth Circuit used both the absolute and comparative disparity tests. 543 F.3d at 336-37. Under the former, which compares the number of jury eligible members of a distinctive group to the number of members from that group that actually appear on the venire panel, the court found a 1.28 percent disparity. *Id.* at 337.[5] While the Sixth Circuit acknowledged that federal courts nationwide

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[3] Amici respectfully refer the Court to pages 1-14 of Respondent's brief for a full description of the facts and procedural posture in this case.

[4] Both parties concede that the first *Duren* prong—i.e., "that the group alleged to be excluded is a 'distinctive' group in the community"—was satisfied here. *See* Pet. Mem. at 19-20; Respondent Mem. at 24-27.

[5] In reaching that calculation, the court took the percentage of jury eligible Kent County African-Americans (7.28 percent) and subtracted the percentage of African-Americans that appeared on venire panels around the time of Mr. Smith's trial (6.00 percent). 543 F.3d at 337.

have consistently held that "absolute disparities in this range are not constitutionally significant for purposes of *Duren's* underrepresentation requirement," *id.* (citations omitted), it proceeded to conduct an analysis using the comparative disparity test. With this metric, which "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service," *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3d Cir. 1992), the court found that African-Americans were underrepresented by 18 percent in the six months prior to Mr. Smith's trial, and 34 percent in the month that he was tried. 543 F.3d at 338. Based on these calculations, and after careful consideration of this Court and its sister circuits' precedent, the Sixth Circuit concluded that Mr. Smith satisfied his burden under the second *Duren* prong. *Id.* at 338-39.

Petitioner asserts that the Sixth Circuit's consideration of both tests was in error and not consistent with this Court's holdings in *Taylor* and *Duren*. Instead, Petitioner urges the adoption of a narrow rule under which a criminal defendant only makes a prima facie showing sufficient to satisfy *Duren's* underrepresentation prong where he has demonstrated at least a 10 percent disparity under the absolute disparity test. Pet. Mem. at 45-46. Such a rule, however, is not only inconsistent with this Court's clearly established precedent, but it would also trample potential jurors' Fourteenth Amendment right to equal protection under the law.

This Court, as the Sixth Circuit properly acknowledged, has never required a particular

metric for determining whether a group's representation was fair and reasonable. In *Duren*, this Court used the absolute disparity test to conclude that women were underrepresented by 35 percent in Missouri jury venire panels, 439 U.S. at 365-36. The Court has never, however, mandated that the absolute disparity test ***must*** be used. *See* Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 Yale L. J. 1568, 1595 (2007) (observing that "the Supreme Court has not prescribed a specific metric for group representation"). In fact, courts have consistently used a variety of tests, including the comparative disparity test, when analyzing underrepresentation in jury venire panels. *See, e.g.*, *Ramseur*, 983 F.2d at 1231 ("In proceeding to determine whether a non-random disparity existed, we examine evidence of absolute disparity, comparative disparity, and deviation from expected random selection."); *United States v. Orange*, 447 F.3d 792, 798 (10th Cir. 2006) (acknowledging reliance within that circuit on both the absolute and comparative disparity tests); *Re-Justifying*, 116 Yale L. J. at 1596 (noting that several tests have been used by federal courts to judge claims of underrepresentation).

Moreover, the current standard protects potential jurors' equal protection rights because it provides federal courts with the necessary flexibility to determine whether jury venire panels are in fact fair and representative. As courts have repeatedly recognized, relying on the absolute disparity test alone is insufficient because it is not always capable of measuring if a particular subsection of the

community has been excluded from the venire. This is particularly true when examining relatively small groups. *See United States v. Weaver*, 267 F.3d 231, 242-3 (3d Cir. 2001) (noting that "[s]ome courts have found that the absolute disparity calculation 'understates the systematic representative deficiencies' in cases . . . [where] the groups at issue comprise small percentages of the general population"); *see also United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) (same). For example, as the Sixth Circuit noted, even if no African-Americans were ever called for jury service in Kent County the absolute disparity would never exceed 10 percent. 543 F.3d at 338.

Of course, the comparative disparity test is also not without its own shortcomings. As one court has observed, that test often "distorts the proportional representation," especially when the allegedly underrepresented group makes up only a small percentage of the total population. *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984); *see also Orange*, 447 F.3d at 799 (same). Given the unfortunate reality of there being no current metric that can fully ensure that jury venire panels are fair and representative, the current method of using a variety of tests is consistent with not only this Court's jurisprudence, but also with common sense. As this Court wrote in *Taylor v. Louisiana*: "Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place." 419 U.S. 522, 537 (1975). Accordingly, any standard that measures representation must be flexible enough to account

for this country's ever-shifting demographic landscape.

It is true, as Petitioner contends, that some circuits have adopted the absolute disparity test to the exclusion of all others. *See, e.g., United States v. Royal*, 174 F.3d 1, 7 (1st Cir. 1999) (reaffirming the court's decision to use the absolute disparity test only); *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989) ("[W]e have consistently favored an absolute disparity analysis and have rejected a comparative disparity analysis."); *but see also United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) (urging the *en banc* 8th Circuit to overturn precedent preventing the panel from using the comparative disparity test). However, those courts have failed to faithfully apply this Court's Sixth and Fourteenth Amendment jurisprudence. As the Third Circuit has persuasively explained:

> The imbalance necessary to establish an equal protection or Sixth Amendment violation in the composition of a jury venire is not determined by a bright line test. The Supreme Court has never announced mathematical standards that would apply to all such challenges. The Court has, however, recognized that it may be possible to infer that unconstitutional exclusion of cognizable groups exists when there is a disparity between a group's population figures and its representation in the jury venire sufficiently large that it is extremely

> unlikely that the disparity results from random chance.

Ramseur, 983 F.2d at 1231 (quotation marks and citations omitted). *Amici* urge the Court to use this case as an opportunity to clarify and restate its earlier rulings and ensure that federal courts have the flexibility and discretion to ensure that jury venire panels are fair and representative.

B. The Record Clearly Supports the Conclusion that African-Americans were Systematically Excluded from the Kent County Jury System

The Sixth Circuit was also correct in concluding that Mr. Smith satisfied the third *Duren* prong: namely, that the underrepresentation in the Kent County jury venire panels is due to systematic exclusion of African-Americans in the jury selection process. *See Duren*, 439 U.S. at 364.

Mr. Smith advanced three arguments to support his claim of systematic exclusion: (i) the practice, which was in effect at the time of his trial, of first assigning jurors to local Grand Rapids district court panels and then to Kent County circuit courts led to an underrepresentation of African-Americans in the circuit court panels; (ii) Kent County's grant of excused absences from jury duty for, *inter alia*, lack of child care or transportation, resulted in the disproportionate exclusion of African-Americans; and (iii) the failure to send additional follow-up letters to areas within Kent County with high concentrations of non-responding African-Americans. 543 F.3d at 339. The Sixth Circuit found that Mr. Smith's arguments were sufficient to make a prima facie violation, writing:

> [T]aken together, [Mr. Smith's] proof with respect to the juror excuses and the diversion of jurors to the Grand Rapids district court under the pre-1993 assignment plan satisfied *Duren's* third prong. Given the small percentages of African American jurors and the impact that just one or two can have on the overall percentage of African Americans represented on venire panels, we find that this evidence establishes that the underrepresentation of African Americans was caused by systematic exclusion inasmuch as this selection process resulted in fewer African Americans being eligible for service on circuit county juries.

Id. at 344 (footnote omitted). While the court concluded that the State demonstrated "a significant state interest" in granting excusals for economic hardship, the record precluded it from reaching that same determination regarding the district court/circuit court assignment process. *Id.* at 345. ("Indeed, Kent County has eliminated the priority assignment policy based precisely on the grounds highlighted by Petitioner in this case.").

Petitioner's assertion that the Sixth Circuit erred cannot be reconciled with the evidence that Mr. Smith presented. Witnesses, including the Kent County court administration, acknowledged that the priority assignment policy siphoned African-American jurors away from the circuit courts. 543

F.3d at 342-3. And while neither those witnesses nor Mr. Smith provided precise percentages of African-Americans siphoned away, courts have routinely held that defendants have established a prima facie case under the third *Duren* prong where presented with similar evidence. *See generally Jackman*, 46 F.3d at 1248. Admittedly, there is no evidence that Kent County jury administrators adopted the assignment plan with the intention of systematically excluding African-Americans, however, this Court has never focused on intentionality for Sixth Amendment fair cross-section challenges. *See Duren,* 439 U.S. at 367 (focusing on the "system" that led to the underrepresentation of women in the Missouri venire); *see also Randolph v. People of the State of California*, 380 F.3d 1133, 1141 (9th Cir. 2004) (observing that under *Duren* "disproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional . . . .").

Moreover, a broader review of Kent County jury selection processes reveals that the systematic exclusion of African-Americans is a longstanding and continuing problem. An informal study conducted by a member of the County's jury commission, Wayne J. Bentley, from 2001 to 2002, found that juries in Kent County were not comprised of a fair cross section of the community. Among Mr. Bentley's key findings are: (i) the addresses from which undeliverable jury questionnaires were returned were concentrated in census tracts made up primarily of African-Americans; (ii) the granting of hardship excuses led to the systematic exclusion of a significant number of prospective minority jurors; (iii) the County had a practice of pulling out minority jurors to serve on

district court juries first, thus, resulting in fewer, if any, minority jurors serving on circuit court juries; and (iv) a technical glitch that was present in the Kent County jury selection system from 2001 to 2002, resulted in the systematic exclusion of a significant portion of the African-American community. Wayne J. Bentley Test. 19: 7-12; 20:12-19; 21: 6-15; 32:2-6, Oct. 26, 2009.[6] It is telling that nearly a decade after Mr. Smith's trial, the same problems that contributed to minority underrepresentation in his jury venire panel were still not cured.

C. Reversing the Sixth Circuit's Decision Would Make it More Difficult to Prevent the Systematic Exclusion of Distinctive Groups in Jury Venire Panels and Result in Undercutting Excluded Jurors' Equal Protection Rights

The practical implications of adopting the holding urged by Petitioner cannot be overstated: it would have a profound chilling effect on criminal defendants' assertion of their Sixth Amendment right to a fair cross-section, making the enforcement of that constitutional guarantee extremely difficult in all but the most severe circumstances. Criminal defendants, however, would not, be the only victims of constitutionally injustice under that rule. The constitutional rights of excluded jurors would suffer serious harm as well. The fact that there is such a strong connection between these two populations is consistent with this Court's jurisprudence; in fact, in

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[6] Mr. Bentley provided testimony in support of a petition for a writ of habeas corpus in *Parks v. Warren*, 05-10036 (E.D. Mich. Oct. 26, 2009).

holding that both criminal defendants and civil litigants have third-party standing to assert the rights of prospective petit jurors who are excluded from a jury based on race, this Court has recognized the "close relation" that criminal defendants and civil litigants have to potential jurors. *See Powers*, 499 U.S. at 427 ("Voir dire permits a party to establish a relation, if not a bond of trust, with the jurors."); *see also Edmonson v. Leesvile Concrete Co., Inc.*, 500 U.S. 614, 629 (1991) ("Exclusion of a juror on the basis of race severs th[e] relation [between a civil litigant and juror] in an invidious way.").

As discussed above, excluded jurors' Fourteenth Amendment rights are intrinsically tied to the Sixth Amendment's promise of a fair cross-section; narrowly restricting the latter will result in doing the same to the former. As this Court has recognized, there exist substantial hurdles that prevent excluded jurors from vigorously enforcing their equal protection rights. *See Powers*, 499 U.S. at 415 ("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.") (citing *Barrows v. Jackson*, 346 U.S. 249, 257 (1953)). These hurdles still exist today, thus, exclusive reliance on excluded jurors themselves to ensure that their constitutional protections are not disregarded is not likely to be effective.

While defendants do have third party standing to assert the equal protection rights of excluded jurors, the Fourteenth Amendment's stringent intentionality requirements make that constitutional provision an insufficient vehicle—by itself—for enforcing the rights of excluded jurors.

Accordingly, the Sixth Amendment, as this Court duly recognized in *Taylor* and *Duren*, can play a vital role in guaranteeing that jury venires are diverse and representative, and that all eligible individuals, regardless of their race or gender, can fully participate in the democratic process. *See Re-justifying*, 116 Yale L. J. at 1589 (explaining that the Sixth Amendment's fair cross section requirement is best understood "as a mechanism for democratic inclusion").

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the Sixth Circuit's finding that Mr. Smith was denied an impartial jury drawn from a fair cross-section of the community in violation of the Sixth Amendment.

Respectfully Submitted,

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APPENDIX

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APPENDIX

AMICI CURIAE

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School ("CHHIRJ") was founded in September 2005 to continue the work of renowned legal scholar and civil rights litigator, Charles Hamilton Houston (1895-1950), and his dream of a more equitable and just society.

CHHIRJ brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers in a variety of forums, conferences and meetings. Scholarship that emerges from the Institute is incorporated into the teaching and training of the next generation of legal scholars and advocates. CHHIRJ's work is currently focused on the following issues that are central to the struggle for racial justice: closing the racial achievement gap, reforming criminal justice policies, and improving prospects for people of color and foreign-born residents to enjoy the full benefits of citizenship in this country.

National Association for the Advancement of Colored People ("NAACP") was founded in 1909 and is the nation's oldest, largest and most widely recognized grassroots-based civil rights organization. The mission of the NAACP is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The organization's more than

half-million members and supporters throughout the United States and the world have fought long and hard to ensure that the voices of African-Americans would be heard on issues ranging from the ballot box to the classroom.

The National Urban League is a historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National urban League spearheads the efforts of its local affiliates through the development of programs, public policy research and advocacy. Today, there are more than 100 local affiliates in 36 states and the District of Columbia, providing direct services that impact and improve the lives of more than two million people nationwide.

Representative John Conyers, Jr. (D-MI) is currently serving his 22nd term in the United States House of Representatives. Having entered the House of Representatives in 1965, Mr. Conyers is the second most senior member in the House of Representatives. He served as Chairman of the House Committee on Government Operations (now renamed Committee on Oversight and Government Reform) from 1989 until 1994. In 2006, Congressman Conyers was elected by his congressional colleagues to lead, as Chairman, the pivotal House Committee on the Judiciary. Congressman Conyers is also one of the 13 founding members of the Congressional Black Caucus, which was formed in 1969 to strengthen African-American lawmakers; ability to address the legislative concerns of Black and minority citizens.

Congressman Conyers supports this *amicus curaie* brief in his capacity as a member of the House of Representatives Judiciary Committee.

Wayne J. Bentley is a Grand Rapids City Middle/High School government teacher who has spent more than a decade researching the representation of minorities on Kent County juries. Through his work with his students and the Grand Rapids Bar Association, Mr. Bentley studies the jury selection process in Kent County and determined that the country's computer-operated system had routinely excluded a substantial portion of the sore neighborhoods in Grand Rapids. Mr. Bentley's research ultimately led court administrators to the discovery that a computer glitch had kept minorities from serving on local juries. In 2003, Mr. Bentley was chosen as the State Bar of Michigan's Liberty Bell Award winner. The Liberty Bell Award recognizes outstanding service performed by a non-lawyer who, in keeping with the spirit of the U.S. constitution, has given his or her time to strengthen the effectiveness of the American system of freedom under law. Currently, Mr. Bentley also serves as a Jury Commissioner for Kent County; he was appointed by the Board of Commissioners on recommendation of the Kent County Circuit Court Judges.

Richard E. Hillary is the director of the Kent County Public Defender's Office and Co-Chair Jury Minority Representation Committee of the Grand Rapids Bar Association. Mr. Hillary has practiced in Kent County Circuit Court exclusively for 18 years and has conducted over 130 felony jury trials in Circuit Court. The Grand Rapids Bar Association's Jury

Minority Representation Committee was formed in 1992-93, specifically as a result of concerns regarding minority representation in Kent County jury pools. In his capacity as a Co-Chair of the Committee, Mr. Hillary has provided testimony regarding the under-representation of African-Americans on Kent County juries. Based on research and recommendations by the Committee, the Kent County Circuit Court and District Court have implemented some changes to the jury selection process.