Durie Tangri

Sonali D. Maitra
415-362-6666 (main)
smaitra@durietangri.com

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Court of Appeal, Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

Re: *The People v. Brady Dee Douglas*
Case No. C072881, Court of Appeal, Third District, California

Honorable Justices:

Identification and Interest of *Amici Curiae*

Equality California, Lambda Legal, and the National Center for Lesbian Rights (collectively, "*Amici*") submit this letter as *Amici Curiae* in support of the petition for review submitted by Appellant Brady Dee Douglas. *Amici* urge the panel to revisit the analysis in the now-vacated opinion filed on April 11, 2017, regarding the permissibility of peremptory jury strikes that were motivated, in part, by unconstitutional group bias. In particular, *Amici* urge the panel to hold that the prosecutor's peremptory strikes of the only two openly gay jurors in the venire—strikes that the panel correctly concluded were improperly based on their sexual orientation—cannot be rectified on remand by accepting the prosecutor's assertion that he would have made the same decision for other reasons.

All three *Amici Curiae* organizations are advocates for civil rights and have a strong interest in prohibiting discrimination from infecting the criminal justice system.

Equality California is the nation's largest statewide lesbian, gay, bisexual, and transgender civil rights organization. It is dedicated to creating a fair and just society for diverse lesbian, gay, bisexual, and transgender ("LGBT") communities, inside and outside of California. Equality California's mission is to combat discrimination against the LGBT community in all forms, and it was a sponsor of recent legislation which expanded the statutory prohibition of discrimination in jury selection based on sexual orientation to protect all groups listed in Government Code section 11135. (See Assem. Bill. 87 (2015–2016 Reg. Sess.) § 1.)

Founded in 1973, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of LGBT people and everyone living with HIV through impact litigation, education, and public policy. In 2005, Lambda Legal established its Fair Courts Project to expand access to justice in the courts for LGBT and HIV-affected communities. The communities Lambda Legal represents depend upon a fair and impartial judicial system to enforce their constitutional and other rights.

217 Leidesdorff Street
San Francisco, California 94111
P (415) 362-6666 F (415) 236-6300
www.durietangri.com

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a strong interest in ensuring that the communities it represents are not arbitrarily excluded from the civic right of jury service.

I. SUMMARY OF ARGUMENT

The prosecutor in this case used his peremptory challenges to strike two openly gay men from participating on the jury. When challenged, he admitted on the record that one of the reasons for the strike was that he felt that openly gay men might be biased against the victim because he was "not out of the closet"—an unsupported stereotype about a subclass of gay people.

The panel, in its now-vacated opinion, rightly recognized that striking any juror on this basis is impermissible. But instead of finding the strike improper on its face, it held that the district court should use a "mixed-motive" approach to determine the propriety of the strike. This means that if a prosecutor can justify the strike with other, permissible reasons, the strike will stand—regardless of whether it was also motivated by an unlawful reason (such as on the basis of race, gender, or sexual orientation).

Amici write now to urge the Court to reject this "mixed-motive" approach and instead apply a "*per se*" approach to cases where an unlawful motivation has anything to do with striking a juror. A mixed-motive rule is unworkable in practice, forcing courts to divine a prosecutor's actions in a counterfactual world, where the only evidence is from a clearly biased source: the prosecutor himself. Even more worrisome, the narrow focus of a mixed-motive analysis would leave no remedy for the aggregate effects that flow from permitting group bias to infect the process of jury selection.

In the sections that follow, we explain why a mixed-motive approach is inconsistent with the protections guaranteed by the California Constitution and the Federal Constitution, as well as with general principles of fairness and equity.

II. ARGUMENT

A. Discrimination In Jury Selection Undermines The Foundations Of The Justice System

The United States Constitution embodies an imperative to "purge . . . prejudice from the administration of justice." (*Pena-Rodriguez v. Colorado* (2017) ___ U.S. ___, 137 S.Ct. 855, 867 (*Pena-Rodriguez*).) This task is particularly important in the protection of the jury right, because the jury "is a central foundation of our justice system and our democracy." (*Id.* at p. 860.) Although prohibiting discrimination in jury selection protects the litigants, it also serves a profound public purpose: it is "not only litigants who are harmed when the right to trial by impartial jury is abridged. Taints of discriminatory bias in jury selection—actual or perceived—erode confidence in the adjudicative process,

undermining the public's trust in courts." (*People v. Gutierrez* (Cal. No. S224724, June 1, 2017) ___ Cal.5th ___ [2017 WL 2375542 at *1] (*Gutierrez*).)

Both federal and California state courts have long understood the corrosive effects of discrimination in jury selection. When peremptory strikes are turned into an instrument of exclusion, the first casualty is "the dignity of persons and the integrity of the courts." (*Powers v. Ohio* (1991) 499 U.S. 400, 402 (*Powers*).) Both litigants and potential jurors are entitled to a "jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 128 (*J.E.B.*).) *Amici* submit this brief because the standard endorsed by the vacated panel opinion presents too great a risk of allowing attorneys to strike lesbian, gay, and bisexual jurors (and those of other protected groups) without repercussion. Allowing admitted discrimination to proceed without consequence has harms that extend well beyond an individual case.

In a recent national survey of LGBT people, respondents reported experiencing a range of negative courthouse encounters, ranging from overhearing negative comments about sexual orientation to having their own sexual orientation disclosed in court against their will.[1] Empirical studies by judicial commissions and bar associations have also found that bias related to sexual orientation significantly and negatively impacted court users' court system experiences in California and New Jersey.[2] Lesbian, gay, and bisexual individuals' most common court contact is through jury service,[3] and data indicate a substantial number of non-heterosexual prospective jurors encounter bias in some form.[4] For example, in the California study, respondents indicated that when sexual orientation became an issue in a lesbian or gay court users' contact, 30% believed those who knew their sexual orientation did not treat them with respect, and 39% believed their sexual orientation was used to lessen their credibility.[5] The rule

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[1] Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), *available at* http://www.lambdalegal.org/protected-and-served.

[2] *See* Todd Brower, *Twelve Angry—And Sometimes Alienated—Men: the Experiences and Treatment of Lesbians and Gay Men During Jury Service* (2011) 59 Drake L.Rev. 669, 674 (*Brower*) (examining empirical studies in California and New Jersey that evaluated the experiences of lesbians and gay men with the court system).

[3] Brower, *supra* note 2, at p. 670.

[4] *See* Vanessa H. Eisemann (2001) *Striking A Balance of Fairness: Sexual Orientation and Voir Dire*, 13 Yale J.L. & Feminism 1, 7 (citing an empirical study in California courts, which noted that twenty-two percent of gay and lesbian court users felt threatened because of their sexual orientation in general, and thirty-eight percent felt threatened when sexual orientation became an issue).

[5] Judicial Council of the State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee* (2001) at 13, available at http://www.courts.ca.gov/documents/sexualorient_report.pdf.

adopted by the panel—which will allow even openly professed discrimination to proceed without sanction—will serve to further erode trust in the judicial system by historically disfavored groups.

It would also undermine the very foundation of jury service in this country. "Competence to serve as a juror ultimately depends on . . . individual qualifications and ability impartially to consider evidence presented at a trial." (*Batson v. Kentucky* (1986) 476 U.S. 79, 87 (*Batson*), *citing Thiel v. S. Pac. Co.* (1946) 328 U.S. 217, 223–24 (*Thiel*).) The use of a juror's membership in a racial or gender group as a proxy for competence or impartiality "'open[s] the door to . . . discriminations which are abhorrent to the democratic ideals of trial by jury."' (*J.E.B.*, *supra*, 511 U.S. at 145, fn. 19, quoting *Thiel*, *supra*, 328 U.S. at 220). The United States Supreme Court recognizes the "honor and privilege of jury duty" as one of the most significant individual responsibilities and "opportunit[ies] to participate in the democratic process." (*Powers*, 499 U.S. at 407.) These foundational principles directly impact any analysis of the standard of proof governing *Batson*/*Wheeler* claims, a standard that is "not designed to elicit a definitive finding of deceit or racism. Instead, it defines a *level of risk that courts cannot tolerate* in light of the serious harms that [] discrimination in jury selection causes to the defendant, to the excluded juror, and to 'public confidence in the fairness of our system of justice.' [citation.]" (*Gutierrez*, *supra*, 2017 WL 2375542 at *20 (conc. opn. of Liu, J.), italics added.) By permitting any amount of discrimination against LGBT individuals by prosecutors, the panel opinion undermines the dignity and full participation of individuals based on their sexual orientation or other intrinsic characteristics.

B. A Mixed-Motive Approach Cannot Be Reconciled With The California Constitution's Independent Guarantee Of Bias-Free Jury Selection

In reaching the conclusion that strikes partly reliant on impermissible motives were not *per se* flawed, the panel decision relied on "equal protection case law," referencing both the federal and California-related precedent. (*People v. Douglas* (2017) 10 Cal.App.5th 834, 217 Cal.Rptr.3d 1, 15.). It did not analyze whether California's separate and independent fair cross-section right might require a different result. We submit that it should.

The California fair cross-section right is separate and independent from the Federal Constitution's—and from equal protection case law. California courts banned peremptory challenges based on discriminatory reasons well before the United States Supreme Court's decision in *Batson v. Kentucky* (1986) 476 U.S. 79. (*People v. Wheeler* (1978) 22 Cal.3d 258, 287 (*Wheeler*) [refusing to follow the federal rule of *Swain v. Alabama* (1965) 380 U.S. 202, *overruled by Batson*, *supra*, 476 U.S. 79].) *Wheeler* was not based on article I, section 7—the California counterpart to the federal Equal Protection Clause—but instead on the right to a jury drawn from a representative cross-section of the community guaranteed by article I, section 16 of the California Constitution. (*Wheeler*, 22 Cal.3d at p. 272.)[6] The Federal Courts of Appeals decisions adopting mixed-motive analysis drew on equal-protection case law,

[6] The *Wheeler* rule has also been statutorily codified at California Code of Civil Procedure Section 231.5.

including cases governing the adjudication of claims under Title VII of the Civil Rights Act of 1964, and the employment case of *Mt. Healthy City School District Board of Education v. Doyle* (1977) 429 U.S. 274, 286. *Wheeler*, on the other hand, imported its framework from a series of law review articles and scholarly publications, none of which endorsed mixed-motive analysis. (*Wheeler*, *supra*, 22 Cal.3d at p. 280, fn. 25; Van Dyke, Jury Selection Procedures (1977) 166–67; Kuhn, *Jury Discrimination: The Next Phase* (1968) 41 So. Cal. L.Rev. 235, 293–95; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries* (1977) 86 Yale L.J. 1715, 1738–41; Note, *The Jury: A Reflection of the Prejudices of the Community* (1969) 20 Hastings L.J. 1417, 1430–33.)

In light of their different geneses, the *Wheeler* and *Batson* tests have been held to diverge in multiple respects. (See, e.g., *Johnson v. California* (2005) 545 U.S. 162, 173; *People v. Johnson* (2006) 38 Cal.4th 1096, 1105 (conc. opn. of Werdegar, J.) [explaining that *Wheeler* and *Batson* have "a different origin" and therefore decisions under *Batson* do not necessarily implicate *Wheeler* law].) Most principally here, the United States Supreme Court has "never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." (*Lockhart v. McCree* (1986) 476 U.S. 162, 173–74.) By direct contrast, in *Wheeler*, this state's high court held that the state fair cross-section right does apply to the selection of petit juries, necessitating a focus on the aggregate effects of a prosecutor's bias. Thus, in charting the constitutional limits on peremptory challenges, the analysis cannot begin and end with a survey of federal law. To the contrary, in this area more than most, "good reasons exist to rely on our state Constitution even before [the Court] considers whether the federal Constitution applies." (*People v. Monge* (1997) 16 Cal.4th 826, 871 (dis. opn. of Werdegar, J.).)

Amici thus respectfully submit that Mr. Douglas's *Wheeler* challenge cannot be evaluated solely based on federal constitutional law. This Court retains the obligation to determine on its own the rule most consistent with the principles animating *Wheeler*.

California's fair cross-section right is aimed at ensuring the presence of groups in the *aggregate*, across cases. (Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection* (2012) 64 Hastings L.J. 141, 200 ["the fair cross-section right deals with the aggregate representation of groups in the jury system, not the presence of individual group members on the jury"]; *Duren v. Missouri* (1979) 439 U.S. 357, 368, fn. 26 ["in Sixth Amendment fair cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section"].). The mixed-motive analysis endorsed by the panel's vacated opinion, however, would focus solely on whether the prosecutor's improper motive caused *the particular strike at issue*, without turning the lens to the representation of groups on juries in the aggregate. (*Douglas*, *supra*, 217 Cal.Rptr.3d at pp. 14–15.) Under the vacated opinion's rule, as long as the prosecutor can convince the trial court that he would have made the same decision even absent the improper motive, the prosecutor's bias will be overlooked.

Attorneys rarely admit on the record that they are striking jurors due to group bias. For every time that a party openly admits to using impermissible stereotypes, there are undoubtedly countless other occasions

when the same attorney has stayed silent. By condoning the use of biased stereotypes on one occasion, a court puts a silent stamp of imprimatur not only on the ugly tip of the iceberg, but the more dangerous mass of discrimination floating beneath the surface. It is for this reason that a court, when determining what test to apply, must analyze *Wheeler's* "representative cross-section rule [which] serves other essential functions in our society, such as legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups.' [Citation]." (*People v. Mata* (2013) 57 Cal.4th 178, 195 (conc. opn. of Werdegar, J).) A mixed-motive approach fails to appropriately serve these important purposes. Allowing even one juror to be stricken on an improper basis is therefore unconstitutional, violating a defendant's right to a jury composed of a fair cross section of the community. Permitting bias to survive in any form in the jury selection process undermines these core constitutional principles.

Indeed, California courts have already adopted a *per se* approach when evaluating a strike made for both discriminatory and neutral reasons. (See *People v. Turner* (2001) 90 Cal.App.4th 413 (*Turner*); *People v. Gonzales* (2008) 165 Cal.App.4th 620 (*Gonzales*).)[7] In *Gonzales*, the court first explained the constitutional underpinnings for challenging a strike: *Batson's* equal protection right under the Fourteenth Amendment of the federal constitution and *Wheeler*'s representative cross-section right under article I, section 16 of the state constitution. (*Gonzales*, *supra*, 165 Cal.App.4th at p. 627.) The prosecutor in *Gonzales* struck the juror both because he "spoke Spanish" and for "other non-discriminatory reasons." (*Id.* at pp. 629–30.) The court held this strike *per se* impermissible under both *Batson* and *Wheeler*. (*Id.* at p. 628.) In *Turner*, the prosecutor explained that it struck the juror for two reasons: because the juror was from a predominantly black neighborhood and because the juror had no children. (*Turner*, *supra*, 90 Cal.App.4th at p. 418.) The court held that the second was permissible, but the first was not—and concluded that the strike was improper under *Wheeler*. (*Id.* at pp. 420–21.)

As these courts recognized, where a prosecutor strikes a juror for a discriminatory reason, the constitutional protections outlined in *Wheeler* and other cases are violated, and no purportedly "neutral" explanation can justify that discrimination. To the contrary, if courts condone impermissible and discriminatory strikes of jurors, they will all but guarantee that fewer of the protected groups will end up on juries. *Wheeler* does not permit that result. Indeed, by condoning discriminatory strikes, courts will be forced to put their imprimatur on overtly biased actions.

C. The Federal Constitution Also Does Not Mandate A "Mixed-Motive" Analysis

Amici also urge that, properly interpreted, the federal *Batson* test does not require "mixed-motive" analysis, as courts in several other states have concluded. (*See, e.g., McCormick v. State* (Ind. 2004) 803 N.E.2d 1108, 1113 ["In simple terms, '[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process.'"]; *Arizona v. Lucas* (Ariz.Ct.App. 2001) 199 Ariz. 366, 18 P.3d 160, 163 [same]; *Rector v. Georgia* (1994) 213 Ga.App. 450, 444 S.E.2d 862, 865 ["[T]he trial

[7] The lower court's now-vacated opinion filed on April 11, 2017 does not cite either of these cases.

court erred in ruling that other purportedly race neutral explanations cured the element of the stereotypical reasoning employed by the State's attorney in exercising a peremptory strike."]; *South Carolina v. Shuler* (2001) 344 S.C. 604, 545 S.E.2d 805, 811 ["[A] racially discriminatory peremptory challenge in violation of Batson cannot be saved because the proponent of the strike puts forth a non-discriminatory reason."]; *Moore v. Texas* (Tex.Ct.App. 1991) 811 S.W.2d 197, 200 [finding a *Batson* violation where a juror would have a problem assessing punishment (valid) and was member of a minority club (invalid)]; *Wisconsin v. King* (Wis.Ct.App. 1997) 215 Wis.2d 295, 572 N.W.2d 530, 535 ["[W]here the challenged party admits reliance on a prohibited discriminatory characteristic, we do not see how a response that other factors were also used is sufficient rebuttal under the second prong of *Batson*."].)

Batson itself held that "[i]f the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." (*Batson*, *supra*, 476 U.S. at p. 100.) It is hardly a stretch to conclude that when a prosecutor's explanation for a strike includes improper, discriminatory reasons, the prosecutor has failed to come up with a "neutral explanation." (*Powers v. Palacios* (Tex. 1991) 813 S.W.2d 489, 490 (*per curiam*); *McCormick*, *supra*, 803 N.E.2d at pp. 1112–13; *State v. Lucas* (Ariz.Ct.App. 2001) 18 P.3d 160, 163; *Rector v. State* (Ga.Ct.App. 1994) 444 S.E.2d 862, 865; *State v. Shuler* (S.C. 2001) 545 S.E.2d 805, 811; *State v. King* (Wis.Ct.App. 1997) 572 N.W.2d 530, 535–36.)

The panel opinion concluded that the United States Supreme Court's decision in *Rice v. Collins* (2006) 546 U.S. 333, 336 (*Rice*), required the adoption of mixed-motive analysis. But *Rice* could not have implicitly decided that question, since two years later in *Snyder*, the same Court explained that it had not yet decided what standard should apply in the case of a peremptory strike motivated in part by impermissible motives. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 485 (*Snyder*).)

In fact, *Rice* did not silently adopt a "mixed-motive" analysis. Although the prosecutor in *Rice* gave "a somewhat confusing colloquy" that could "be read as indicating that one of the prosecutor's aims in striking [one of the jurors] was achieving gender balance on the jury," the petitioner did *not* claim that the strike in question was impermissible by reason of being motivated by gender. (*Rice*, *supra*, 546 U.S. at p. 340.) Rather, the only "question at issue" in *Rice* was the petitioner's "argument that the prosecutor struck [the juror] from the panel on account of her *race*." (*Id.* at p. 336, italics added.) The Supreme Court merely rejected the notion that because of the gender-related comments, "a reasonable fact-finder must conclude the prosecutor lied about the eye rolling and struck [the juror] based on her race." (*Id.* at p. 341.) In other words, the possibility of gender discrimination (which was not before the Court) did not conclusively prove race discrimination.

Nor is federal equal-protection jurisprudence as univocal as the panel opinion suggested. Indeed, the United States Supreme Court has held in other discrimination contexts that an impermissible motive is not canceled out by other, potentially allowable, motives. (*Arlington Heights v. Metropolitan Housing Development* (1977) 429 U.S. 252, 265 [in seeking to establish that zoning decision was motivated by racial bias in violation of the Equal Protection Clause, challenger need not establish "that the challenged

action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body . . . made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."]; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 241–42 [in action under title VII of the federal Civil Rights Act of 1964, plaintiff need not prove that unlawful discrimination was the sole factor motivating an employment decision in order to establish a violation of the act].)[8] Thus, nothing in federal *Batson* precedent requires the rule the panel opinion adopted.

D. "Mixed-Motive" Analyses Would Force Courts Into The Impossible Position Of Speculating On Counterfactuals

As a final note, *Amici* submit that a mixed-motive test will force trial courts to determine whether prosecutors' putatively legitimate bases for the strikes—in this case one juror's friendship with a public defender and another juror's demeanor—would have resulted in the prosecutor making the strike even absent his belief that openly gay jurors would not be fair to the prosecution's main witness. The panel was aware that this inquiry would not be an easy one, noting in passing that "admittedly there may be some difficulty in determining the 'subtle question of causation.'" (*Douglas*, *supra*, 10 Cal.App.5th at p. 15 (quoting *Snyder*, *supra*, 552 U.S. at p. 486).) Nevertheless, *Amici* respectfully suggest that the panel was too optimistic. Determining whether a particular strike was or was not a "but-for" cause of the strike would force trial courts to embark on a journey of fact-finding in a counterfactual universe, guided only by the very prosecutor who had admitted to exercising an improper motive in the first place. And this task must be undertaken without the tools of extensive civil discovery that underlie the examination of mixed motives in the equal protection and Title VII cases on which the doctrine draws.

Take this case, for example. The Appellant, Brady Dee Douglas, is an openly gay man. As previously noted, at Douglas's trial the prosecutor struck both openly gay men in the venire, giving both putatively non-discriminatory reasons (friendship with the public defender and demeanor, respectively) and a discriminatory one (i.e., that an openly gay man would *ipso facto* likely be unfair to a prosecution witness who was in the closet) that would have resulted in striking *any* openly gay juror. The prosecutor relied on a stereotype that is particularly invidious: a biased (and unfounded) belief that openly gay jurors are hostile to closeted gay witnesses. The idea that openly gay jurors feel superior to closeted witnesses, or that they find their failure to publicize their sexual orientation so distasteful that it taints

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[8] After this *Price Waterhouse* decision, Congress amended Title VII to establish liability whenever discrimination was a "motivating factor" in employment actions. (See, e.g., *Estate of Reynolds v. Martin* (9th Cir. 1993) 985 F.2d 470, 475, fn. 2 ["Section 107 [of Title VII] modifies the Supreme Court's holding in *Price Waterhouse* [ ] which held that an employer could avoid liability for intentional discrimination in 'mixed motive' cases if the employer could demonstrate that the same action would have been taken in the absence of the discriminatory motive. Section 107 states that 'an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.'"].)

the credibility of their entire testimony, reeks of implicit and unfair assumptions about gay men and women.[9]

Although the panel's vacated opinion agreed that such stereotyping was impermissible, it would have allowed the prosecutor to save the strikes by simply claiming that he would have stricken the two prospective jurors even if their sexual orientation had never crossed his mind. The defense would be put in the unenviable position of attempting to contradict the prosecutor's claims about what he himself would have done.

As this shows, the panel opinion's rule doesn't just implicate imponderables, it is also fundamentally unfair to the challenging party. Put aside the question of whether the prosecutor in this case would be able to summon the vast level of self-knowledge necessary to determine what he would have done had he not believed the stereotypes that, in fact, he did believe. The deeper problem is that in determining whether the strike would have taken place anyway, "[t]he only avenue of inquiry is to ask the prosecutor himself." (*Wilkerson v. Texas* (1989) 493 U.S. 924, 927 (Marshall, J., dissenting from the denial of certiorari).) Rarely, if ever, will any other source of information as to the prosecutor's decision exist. To some extent, of course, these problems already face courts evaluating *Wheeler*/*Batson* challenges. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 267–68 (conc. opn. of Breyer, J.) ["*Batson* asks judges to engage in the awkward, sometimes hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge."].) But at least there are a number of tools available to analyze the credibility of the prosecutor's purported justifications for striking a juror—comparative juror analysis, defects in the prosecutor's stated justifications, desultory or disparate voir dire, etc. None of these are available to assess a mixed-motive analysis, which presumes that group bias has been demonstrated, but that legitimate, non-pretextual justifications remain. As Justice Marshall pointed out, when *Batson* is supplemented by "mixed-motive" analysis, the problems of proof rise from difficult to insuperable:

> [T]he "but for" test transforms a difficult credibility assessment—whether the prosecutor acted for the reasons he claims to have acted—into an impossible one—whether a prosecutor's nonracial ground for striking an Afro-American juror, taken alone, would have outweighed the prosecutor's possible grounds for objecting to unchallenged white jurors. The only choice, an untenable one at best, would be to accept at face value a prosecutor's claim that he "would have struck the Afro-American jurors anyway." A judicial inquiry designed to safeguard a criminal defendant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias,

[9] In adopting a *per se* test, there is no risk that prosecutors will be prohibited in any way from striking jurors for valid reasons. Prosecutors are always free to use for-cause strikes if a particular juror is unqualified to serve on a jury.

> subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias.

(*Wilkerson, supra*, 493 U.S. at pp. 927–28 (Marshall, J., dissenting from the denial of certiorari).) These difficulties in effective implementation and fairness alone are enough to reject the "mixed-motive" test, especially where, as here, the panel must reconcile its decision with the constitutional principles set forth in *Wheeler* and the California Constitution.

III. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court issue a revised opinion, holding that the prosecutor's admitted use of improper motives in striking the only two openly gay jurors from the venire panel was a violation of the rights guaranteed by article I, section 16 of the California Constitution, the equal protection clauses of both the federal and state constitutions, California Code of Civil Procedure Section 231.5, and *Batson* and *Wheeler*.

Respectfully submitted,

Sonali D. Maitra