January 27, 2014

The Honorable Patrick Leahy
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

Thank you for the opportunity to appear before the Committee on the Judiciary on January 8, 2014. Enclosed please find my responses to the Questions for the Record that I received from Ranking Member Grassley, Senator Sessions, Senator Cornyn, Senator Lee, and Senator Flake.

Sincerely,

Debo P. Adegbile

Enclosure

Senator Chuck Grassley
Questions for the Record

Debo P. Adegbile
Nominee, Assistant Attorney General for Civil Rights

1. Is it appropriate for employees of the Civil Rights Division to consult with groups such as the NAACP, La Raza, MALDEF, and the ACLU when making legal determinations?

   ANSWER: It is my understanding that the Civil Rights Division (the Division) has long been willing to meet with and hear the views of a range of outside groups. If confirmed, I would expect to continue that practice. This said, legal determinations are the Division's to make, based on the facts and the law.

2. According to a 2013 Inspector General report, the hiring procedures under former Assistant Attorney General for Civil Rights, Thomas Perez, resulted in a pool of candidates that was "overwhelmingly Democratic/liberal in affiliation." The report made the following recommendations to address the deficiencies in hiring practices. Please answer each subpart individually.

   a. "That the Voting Section use hiring criteria that are based on the specific skills, duties, and experience that are required or preferred for vacant positions and that appear in the Section's vacancy announcement." If confirmed, will you commit to implementing this procedure in your hiring practices?

      ANSWER: I understand that the Division took steps to improve the hiring process in response to both the 2008 Inspector General report on the Division and in response to the Inspector General's recent report. If confirmed, I will assess the Division's current hiring policies and practices and, consistent with applicable laws and policies, determine if any additional modifications are appropriate to ensure a broad and strong pool of candidates for any open positions.

   b. "That the Voting Section refrain from relying on the 'general civil rights/public interest' criterion in the future." If confirmed, will you commit to implementing this procedure in your hiring practices?

      ANSWER: I understand that the Division took steps to improve the hiring process in response to both the 2008 Inspector General report on the Division and in response to the Inspector General's recent report. If confirmed, I will assess the Division's current hiring policies and practices and, consistent with applicable laws and policies, determine if any additional modifications are appropriate to ensure a broad and strong pool of candidates for any open positions.

   c. "That the Voting Section adopt hiring criteria that better account for the significant contributions that applicants with limited or no civil rights

backgrounds can make to the Section, including those with defensive litigation experience." If confirmed, will you commit to implementing this procedure in your hiring practices?

ANSWER: I understand that the Division took steps to improve the hiring process in response to both the 2008 Inspector General report on the Division and in response to the Inspector General's recent report. If confirmed, I will assess the Division's current hiring policies and practices, and consistent with applicable laws and policies, determine if any additional modifications are appropriate to ensure a broad and strong pool of candidates for any open positions.

d. "That the Civil Rights Division not place primary emphasis on 'demonstrated interest in the enforcement of civil rights laws' as a hiring criterion." If confirmed, will you commit to implementing this procedure in your hiring practices?

ANSWER: I understand that the Division took steps to improve the hiring process in response to both the 2008 Inspector General report on the Division and in response to the Inspector General's recent report. If confirmed, I will assess the Division's current hiring policies and practices and, consistent with applicable laws and policies, determine if any additional modifications are appropriate to ensure a broad and strong pool of candidates for any open positions.

3. During your predecessor's tenure as Assistant Attorney General for the Civil Rights Division there were no "hires" made who had ties to a conservative organization. What steps do you plan to take in order to ensure an ideologically diverse applicant pool for future hires in the Civil Rights Division?

ANSWER: I am not familiar with the claim that the Division hired no one with ties to a conservative organization during Mr. Perez's tenure, but if confirmed, I will assess the Division's current hiring policies and practices, and, consistent with applicable laws and policies, determine if any additional modifications are appropriate to ensure a broad and strong pool of candidates for any open positions.

4. After the NAACP's LDF had filed two amicus briefs on behalf of Mumia Abu-Jamal, but before LDF became lead counsel for Mr. Abu-Jamal during your tenure as Director of Litigation, Mr. Abu-Jamal's former lead counsel, Robert R. Bryan, circulated a petition addressed to President Obama that demanded a new trial for Mr. Abu-Jamal and advocated "global abolition of the death penalty." Please answer each subpart individually.

a. Did you sign the petition?

ANSWER: No.

b. To your knowledge, did any of your LDF colleagues sign the petition?

ANSWER: Not to my knowledge.

5. If you are confirmed as AAG for Civil Rights and the Department of Justice decides to review any aspect of Mr. Abu-Jamal's post-sentencing appeals or collateral attacks on his conviction, would you consider it proper to participate in any such review?

   ANSWER: No.

6. In a 2009 amicus brief you submitted to the United States Supreme Court in support of Mr. Abu-Jamal, the LDF noted its "long-standing concern with the influence of racial discrimination" in the criminal justice system and, specifically, in the jury-selection process. Please answer each subpart individually.

   a. Do you believe that racial discrimination remains—as you characterized it in a quotation cited in your brief—a "common and flagrant" practice during jury selection in the United States? If so, what aspects of *Batson* and its progeny, in your view, require revision by the federal courts?

      ANSWER: The "common and flagrant" phrase was quoted from a concurring opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), where it described the nature of the problem in the wake of *Swain v. Alabama*, 380 U.S. 202 (1965). Unfortunately, *Batson* violations persist. *See e.g. Miller-El v. Dretke*, 545 U.S. 2313, 266-273 (2005) (Breyer, J., concurring) (discussing the problem of jury discrimination and collecting sources).

      I have not had the opportunity to adequately examine the complex legal question of what, if anything, a court might do to more effectively police or deter *Batson* violations in an appropriate case.

   b. What types of litigation do you intend to pursue as AAG to affect change in civil-rights law regarding jury selection?

      ANSWER: Cases referred to the Civil Rights Division are evaluated on the merits. I have no current plans to pursue such litigation.

   c. Do you consider that the jury-selection procedure prior to Mr. Abu-Jamal's trial was characterized by "flagrant[ly]" racially discriminatory conduct by the prosecutor?

      ANSWER: I was involved in two LDF amicus briefs supporting Mr. Abu-Jamal's *Batson* claim in habeas proceedings which identified probative *Batson* evidence. The *Batson* claim, however, was rejected by the courts. In contrast, the sentence was held unconstitutional under *Mills v. Maryland*, 486 U.S. 367 (1986).

7. In the same 2009 LDF amicus brief, you argued that the Third Circuit improperly failed to consider "evidence of a culture of discrimination" and testimony from "Philadelphia defense attorneys indicating that the Philadelphia District Attorney's Office used its peremptory strikes to exclude African American prospective jurors." Please answer each subpart individually.

    a. In your view, under what circumstances is it proper for a trial court to take into account such extrinsic evidence?

    ANSWER: Under the Supreme Court's *Batson* precedents "a defendant may rely on all relevant circumstances to raise an inference of purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (internal quotations omitted); *see also id. at 263* (where the Court considered the fact that "for decades leading up to the time th[e] case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries.").

    b. In your view, would a bare allegation of "a culture of discrimination" or the anecdotal testimony of a local defense attorney be sufficient to make out a prima facie case under *Batson*'s step one?

    ANSWER: Under *Batson v. Kentucky*, 476 U.S. 79 (1986), a court must follow a three-part test to determine whether there is discrimination based on race. In *Batson's* step one, the party raising the *Batson* challenge must first make a prima facie showing that the striking party employed a peremptory challenge on the basis of race. *Id*. The court should consider "all relevant circumstances" supporting the challenging party's assertion of discrimination. *Id.* at 96-97. These circumstances can include a "pattern" of striking venire members of a particular race, or posing questions or making statements during *voir dire* to members of a particular race that support the inference of a discriminatory purpose. *Id*.

8. In 2006, during your tenure as LDF's Associate Director for Litigation, LDF filed an amicus brief on Mr. Abu-Jamal's behalf in which LDF argued that Mr. Abu-Jamal's trial was tainted by a climate of race prejudice and discrimination in "the historical conduct of the Philadelphia County District Attorney's Office." Please answer each subpart individually.

    a. What involvement, whether in a supervisory, authorial, editorial, or other role, did you have in the 2006 amicus brief?

    ANSWER: I did not participate in the drafting, review or filing of the aforementioned LDF amicus brief nor does my name appear on the brief.

    b. In a 2009 amicus brief LDF filed on Mr. Abu-Jamal's behalf, which you signed as counsel of record, LDF refers to "evidence of a culture of discrimination, including that the Philadelphia District Attorney's Office trained its young

prosecutors on how to exclude prospective jurors of color." Does the "culture of discrimination" you allege in the 2009 amicus brief refer to "the historical conduct of the Philadelphia County District Attorney's Office" that LDF cited in the 2006 amicus brief?

ANSWER: I did not sign the 2009 amicus brief as counsel of record, though I was one of the listed counsel on the brief. Moreover, as I mentioned above, I did not participate in the drafting or filing of LDF's 2006 amicus brief. It appears that there is some overlap in the *Batson*-related evidence identified in the two briefs.

9. On January 28, 2011, your colleague Christina A. Swarns, who appears with you on two LDF Supreme Court briefs on which you are counsel of record, stated at a rally for Mr. Abu-Jamal that "there is no question in the mind of anyone at the Legal Defense Fund that the justice system has completely and utterly failed Mumia Abu-Jamal and in our view, that has everything to do with race and that is why the legal defense fund is in this case."

    a. Does Ms. Swarns's claim that the "justice system…completely and utterly failed Mumia Abu-Jamal in [LDF's] view" refer to LDF's prior allegations of a culture of racial discrimination in the Philadelphia County District Attorney's Office?

    ANSWER: Ms. Swarns was counsel of record on the aforementioned briefs; I was not. I am not familiar with Ms. Swarns' comments and am not aware of the context in which they were offered. I do not know what Ms. Swarns had in mind when she made the comment.

10. Explain why, during your tenure as the LDF's Director of Litigation in 2011, you decided to cease advocating on behalf of Mumia Abu-Jamal as amicus curiae and became his lead counsel in Supreme Court litigation, *see, e.g.*, *Wetzel v. Abu-Jamal*, and subsequent litigation.

    ANSWER: Mr. John Payton, LDF's late President and Director-Counsel, made the decision that LDF would represent Mr. Abu-Jamal. My understanding is that he made the decision based upon an assessment of the constitutional claim.

11. Have you made any public statements—with the exception of statements made in a court or in court filings—regarding Mr. Abu-Jamal? Please provide a transcript or detailed record of any such statement and specify the date on which the statement was made.

    ANSWER: I do not believe I have made any such statements.

12. List all LDF court filings related to Mumia Abu-Jamal with which you had any involvement, whether in a supervisory, authorial, editorial, or other role. Please provide a copy of each filing.

ANSWER: Listed below are the only briefs I have identified in which I had any involvement.

U.S. Supreme Court

Wetzel v. Mumia Abu-Jamal, Brief in Opposition On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit: September 9, 2011

Mumia Abu-Jamal v. Beard, Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. In Support of Petitioner: March 5, 2009

U.S. Court of Appeals for the Third Circuit

Mumia Abu-Jamal v. Horn, Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. In Support of Appellee/Cross-Appellant's Petition for Rehearing and Suggestion of Rehearing En Banc: June 27, 2008

13. Under what circumstances do you consider racial preferences to be unconstitutional?

ANSWER: As a general matter, the Supreme Court has applied strict scrutiny to governmental decisions that provide a benefit to individuals based on race. Under this standard, decision-making that does not serve a compelling governmental interest and/or is not narrowly tailored is unconstitutional.

14. Under what circumstances do racial preferences violate Title VII of the Civil Rights Act?

ANSWER: One recent instance in which the Supreme Court found that the actions of an employer violated Title VII was in *Ricci v. DeStefano* where the Court explained: "Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, [under Title VII], and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race." 557 U.S. 557, 585 (2009).

15. Should the college admissions process consider both racial and economic status when determining whether to give applicants special consideration?

ANSWER: Within the limits established by the Supreme Court and any applicable state and federal laws, it is for colleges to determine the best approach to admissions. In *Grutter v. Bollinger,* 539 U.S. 306 (2003), the Supreme Court determined that the educational benefits of diversity constitute a compelling governmental interest sufficient to justify a narrowly tailored race conscious college admissions policy. The Court left this principle intact in *Fisher v. University of Texas,* 133 S.Ct. 2311 (2013). Accordingly,

within established limits, colleges may consider race but are not required to do so under the Supreme Court's 14th Amendment jurisprudence. Colleges are free to consider economic status in admissions decisions when that is rationally related to a legitimate government purpose.

16. Do you believe ethnic profiling in the context of the War on Terrorism is unconstitutional?

    ANSWER: We must do everything possible to ensure our nation's security consistent with the Constitution and our values. I believe that stereotyping is unfair and counterproductive, fostering distrust between law enforcement and the communities with whom we need to build strong relationships in the fight against terrorism. I understand that the Department is reviewing its racial profiling guidance and if confirmed, I look forward to being a part of that process.

17. Will you defend the use of racial preferences in the federal government's contracting and employment policies?

    ANSWER: In defending the government's policies, I will apply the Constitution and applicable precedent, including but not limited to *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

18. In *Rothe Development Corp. v. Department of Defense*, the Federal Circuit struck down the Department of Defense's racially preferential contracting program. Will you urge the federal government to end the use of preferences based on race, ethnicity, and sex in its contracting practices?

    ANSWER: *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008), concerned a provision of 10 U.S.C. § 2323 (known as Section 1207), which permitted the Department of Defense, in certain circumstances, give an award preference of up to 10% to small businesses owned and controlled by "socially and economically disadvantaged individuals." At the time of the decision, the price preference program had already been suspended. The Federal Circuit held Section 1207 unconstitutional on its face, finding that "Congress did not have before it, at the time of the 2006 reenactment of Section 1207, a 'strong basis in evidence' for the proposition that DOD was a passive participant in racial discrimination in relevant markets across the country and that therefore race-conscious remedial measures were necessary." *Id.* at 1049 (internal citation omitted). But the Federal Circuit "stress[ed] that [its] holding is grounded in the particular items of evidence offered by DOD and relied on by the district court in this case." *Id.* And it never reached the question whether the program, which had been "amended over time, [with] amendments [that] have tended to limit, rather than broaden, the application of preferences based on racial classifications," *id*., was narrowly tailored. Accordingly, I do not read *Rothe* as a blanket prohibition on such programs if there is sufficient, methodologically valid evidence set before Congress. Of course, if confirmed, I would follow all binding court precedent.

19. Is it constitutional for a university to have racially exclusive internships, scholarships, or summer programs?

ANSWER: The Supreme Court has made clear that strict scrutiny applies to governmental decisions that select applicants based on race. If confirmed, I will apply the applicable law to the facts of any such case.

20. Do you agree with your predecessors' decision to challenge racially exclusive fellowship programs at Southern Illinois University?

ANSWER: I am not familiar with the details of this litigation. The Supreme Court has made clear, however, that strict scrutiny applies to governmental decisions that select applicants based on race. If confirmed, I will apply the applicable law to the facts of any such case.

21. You have been critical of Supreme Court decisions regarding race issues, saying that the Court has "in recent years drastically undermined efforts to redeem the Fourteenth Amendment's promise of equal citizenship for all." If confirmed, what will be your priorities in regard to righting these, in your view, wrongly decided cases?

ANSWER: The Assistant Attorney General for Civil Rights enforces the Constitution and the law in a manner that is consistent with Supreme Court holdings. The Supreme Court's rulings on matters of constitutional interpretation are binding. Accordingly, if confirmed, I will enforce the law as interpreted by the Court and give effect to its holdings.

22. Will you embrace the theory of disparate impact in litigation initiated by the Civil Rights Division?

ANSWER: Certain federal laws enforced by the Civil Rights Division, as passed by Congress and/or as interpreted by courts, employ a disparate impact framework. If confirmed, I would enforce applicable law.

23. If a case is appealed to the Supreme Court questioning the use of disparate-impact theory will you allow that case to be heard or will you work to settle the case to avoid Supreme Court review of the theory?

ANSWER: In my experience, settlements are explored and achieved on a case-by-case basis following a careful evaluation of the facts, law, claims and an overall assessment of litigation risk. If confirmed as Assistant Attorney General, I would act in the best interests of the United States.

24. The Supreme Court has warned that the use of disparate-impact theory in litigation can have two negative consequences: (1) forcing employers and others to adopt surreptitious quotas to avoid being sued; and (2) forcing employers to abandon other legitimate selection criteria. Do you agree with this warning?

ANSWER: The law, founded in the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), provides that the disparate impact framework protects those policies and practices that are job-related and consistent with business necessity, to achieve non-discriminatory objectives, unless the challenger shows that other policies with a lesser adverse effect would also serve the employer's legitimate interests. If confirmed, I will follow applicable law.

25. In *Northwest Austin Municipal Utility District No. 1 v. Holder*, you argued on behalf of the intervenors-appellees that the District Court's decision that Section 5 of the Voting Rights Act precluded the utility district from receiving a Section 4 bailout because the district was not a "political subdivision." The Supreme Court unanimously reversed the District Court's decision and held that the utility district was a political subdivision and therefore eligible for bailout. Please answer each subpart individually.

    a. Do you still agree with the arguments you made in this case?

        ANSWER: The Supreme Court did not adopt my client's argument with respect to the bailout eligibility issue in that case and I accept the Court's interpretation as binding.

    b. What steps will you take, if confirmed, at the Department of Justice to further the arguments you made in this case?

        ANSWER: In *Shelby County v. Holder*, the Supreme Court struck down the Section 4(b) geographic coverage provision of the Voting Rights Act as unconstitutional as a basis for Section 5 preclearance. I will follow the Supreme Court's holding in *Shelby County.*

26. In *Shelby County v. Holder*, you argued on behalf of the respondent-intervenors that the Court should uphold Sections 4(b) and 5 of the Voting Rights Act. You argued that Section 5 "remains essential to safeguard our democracy from racial discrimination;" that Section 2 litigation is an "inadequate response to the persistent and adaptive problem of racial discrimination in voting in certain parts of our country;" and that "racial discrimination in voting remains concentrated in the jurisdictions that have historically been covered by Section 5." The Supreme Court struck down Section 4(b). Please answer each subpart individually.

    a. Do you still agree with the arguments you made in this case?

    ANSWER: The congressional record in support of the 2006 reauthorization of Section 5 of the Voting Rights Act supports the above quotes; in *Shelby County v. Holder*, the Supreme Court struck down the Section 4(b) geographic coverage provision of the Voting Rights Act as unconstitutional as a basis for Section 5 preclearance. I will follow the Supreme Court's holding in *Shelby County.*

b. Do you accept the Supreme Court's decision as final?

ANSWER: Yes.

c. What steps will you take, if confirmed, to further the arguments you made in this case?

ANSWER: If confirmed, I will follow the Supreme Court's holding in *Shelby County*.

d. In the brief, you argued that "racial discrimination in voting poses a unique threat to our democracy." What steps will you take, if confirmed, to stem this "unique threat?"

ANSWER: If confirmed, I will enforce the laws within the Civil Rights Division's authority that protect voters against discrimination.

e. In light of the Supreme Court's decision in *Shelby County v. Holder,* how will you use Section 2 litigation to protect rights of voters?

ANSWER: If confirmed, I will evaluate the facts, apply the law, and file Section 2 cases where appropriate.

27. The Pew Center on the States recently found that more than 1.8 million dead people are registered to vote, that 24 million registrations are either invalid or inaccurate, and that approximately 2.75 million people have registrations in more than one state. The report went on to say that "our democratic process requires an effective system for maintaining accurate voter registration information. Voter registration lists are used to assign precincts, send sample ballots, provide polling place information, identify and verify voters at polling places, and determine how resources, such as paper ballots and voting machines, are deployed on Election Day. However, these systems are plagued with errors and inefficiencies that waste taxpayer dollars, undermine voter confidence, and fuel partisan disputes over the integrity of our elections." The Civil Rights Division is responsible for the federal law that requires the states to maintain clean voter rolls. Please answer each subpart individually.

a. Would you agree with the Pew Foundation on the States that inaccurate state voter lists where dead voters, ineligible voters, and voters who remain on the voting rolls of multiple states is a national problem?

ANSWER: I am not familiar with the referenced Pew study. I agree that accurate voter registration lists are important for the proper functioning of elections. Registrations can be invalid for many different reasons, including death of a voter, residence relocation, marital name change, among others, as well as for some reasons that are technical or attributed to government error. Modernization of election systems could improve the accuracy of registration lists.

b. As the Civil Rights Division is responsible for enforcing the federal voting law in this area, what do you intend to do to resolve this national problem if you were to be confirmed by the Senate?

ANSWER: My understanding is that many different reasons contribute to voter registration list inaccuracy and, while the Civil Rights Division can take steps to address aspects of the problem, including federal list maintenance law enforcement, as I described above, the issue is multidimensional and manifests itself differently in different states. If confirmed, I will enforce applicable laws in the jurisdiction of the Civil Rights Division.

c. Will you fully enforce Section 8 of the NVRA that requires states to conduct list maintenance and properly remove deceased and other ineligible voters from state voter rolls if confirmed by the Senate?

ANSWER: If confirmed, I would enforce applicable provisions of the NVRA, including its list maintenance provisions, consistent with a careful assessment of the facts and the law.

28. In the Federal Voting Assistance Program's 18th Report to the President and Congress a few years ago, the absentee ballot return rate for active duty military overseas was only 67% as compared to a 91% success rate for domestic absentee ballot voters. Studies show that participation rates of overseas military voters is much lower than civilian voters due to difficulties they encounter in voting from remote areas. Military voters are more likely to be disenfranchised that any other group of voters and the Report noted that the majority of voting failure was the *untimely ballot transmission* when state and counties do not send ballots to voters on time, required 45 days before any federal election. The Civil Rights Division is responsible for the enforcement of military voting laws, particularly the MOVE Act which governs this area. Please answer each subpart individually.

a. Will the enforcement of the MOVE Act be a priority for you, if you are confirmed?

ANSWER: I respect the primacy of the right to vote in the United States and support efforts to expand voter access, including for our servicemembers who make substantial sacrifices for the nation. I understand that MOVE Act enforcement has been a priority of the Civil Rights Division and, if confirmed, I would continue those efforts.

b. There has been some criticism that in the past the Voting Rights Section has waited too long before bringing suit to protect military members. How do you plan to closely monitor counties and quickly enforce the law to protect voters before the election, not after the election?

ANSWER: I understand that enforcing the Military and Overseas Voter Empowerment Act has been a priority of the Division, and if confirmed, I would continue those efforts to protect before the election servicemembers' ability to vote. I also understand that Senators Cornyn and Schumer have introduced a bill—the Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act—that includes some provisions proposed by the Administration to strengthen MOVE Act enforcement, including a requirement that states report in advance of the election on the status of ballot transmission to military and overseas voters. Such a requirement would enhance the Division's ability to protect servicemembers' ability to vote, and I commend them for their work on this important issue.

29. Do you believe that legally requiring voters to have identification is the equivalent of a poll tax?

ANSWER: The legality of voting requirements must be evaluated on a case-by-case basis, looking at particular features of the state law in question, the particular allegations presented, and the case law that has developed on the question.

30. Do you believe that individuals who have broken this nation's laws by entering the country illegally should be allowed to gain citizenship?

ANSWER: If confirmed, I would enforce the laws delegated to the Division. I understand that the Senate has passed a bipartisan measure that provides what is known as a pathway to earned citizenship, and that the Administration supports the bill.

31. Last July, Department of Housing and Urban Development Secretary Shaun Donovan unveiled a new rule to allow the federal government to track so-called "diversity" in American neighborhoods and to create policies to change the makeup of neighborhoods it deems to be discriminatory. The policy is called, "Affirmatively Furthering Fair Housing," and will require HUD to gather data on segregation and discrimination in every single neighborhood and to try to remedy it. What will the Civil Rights Division's role be in enforcing that policy?

ANSWER: It is my understanding that HUD is still working on a final rule. The proposed rule does not alter DOJ's current authority to enforce the Fair Housing Act, the Housing and Community Development Act, or Title VI.

32. In your opinion, when is it appropriate to decline to defend the constitutionality of a federal statute?

ANSWER: The Department of Justice has a longstanding practice of defending federal statutes so long as reasonable arguments can be made in support of their constitutionality, If confirmed, I will discharge my responsibility to defend federal statutes in a manner that is consistent with the law and the Department's established practice.

33. Under what circumstances do you believe the death penalty to be constitutional?

ANSWER: Various state and federal statutes establish capital crimes. The Supreme Court has determined that capital punishment is constitutional. The Supreme Court also has determined in various rulings that a death sentence cannot be enforced if it was imposed in violation of certain substantive or procedural protections afforded by the Constitution.

34. In 2012, following issuance of guidelines by the EEOC that instructed employers to consider only relevant details related to a potential employee's criminal history, you stated that "[n]o one should be penalized for the rest of their life for mistakes that they made in the past." Please answer each subpart individually.

    a. Do you oppose an employer's ability to perform criminal background checks on potential employees?

    ANSWER: I would not oppose the ability for employers to perform reasonable criminal background checks on potential employees. If employers do perform background checks, the EEOC has released guidance on the subject. As I understand it, the guidance does not embrace a categorical bar on using information gleaned from such employment screens but rather requires some reasonable inquiry into the nexus between the conviction and the job responsibilities involved in the particular position.

    b. Will you, if confirmed, take action to abridge or eliminate an employer's ability to perform criminal background checks on potential employees?

    ANSWER: The EEOC has released guidance on the subject of employer background checks. As I read it, the guidance does not embrace a categorical bar on using information gleaned from such employment screens but rather requires some reasonable inquiry into the nexus between the conviction and the job responsibilities involved in the particular position.

35. You did not provide many notes from the speeches and talks you gave during this past year. Why did you not save these?

ANSWER: I did not provide notes for all of my speeches and talks because I often do not speak from notes or make any formal notations prior to my speaking engagements.

36. To your knowledge, were you considered for a position on the D.C. Circuit?

    a. If so, why did your nomination not proceed?

ANSWER: Yes, I was considered for a nomination to the D.C. Circuit, but I withdrew myself from consideration.

37. Do you agree with the following statement, the "minimum coverage provision [of the ACA] enhances the ability of individuals to participate in the economic, social, and civil life of our nation, thereby advancing equal opportunity and personal liberty?"

    a. If so, how will you, if confirmed, work as head of the Civil Rights Division to ensure that it advances equal opportunity and personal liberty?

       ANSWER: Yes, I agree with that statement. The Supreme Court upheld the ACA's minimum coverage provision in *Dept. of Health and Human Services v. Fla.* If the Civil Rights Division has a role with respect to that provision, if confirmed, I will enforce it.

38. While at LDF, you contributed to a brief in the case of the *District of Columbia v. Heller*. Do you still agree with the following statements? Please answer each subpart individually.

    a. "Indeed, the text of the Second Amendment itself does not provide for [a right for an individual to possess or use firearms outside the context of a lawfully organized militia], and for the Court to recognized an individual right to "keep and bear Arms" would represent a radical departure from the consistent and long-established understanding of the Second Amendment."

       ANSWER: Prior to its decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court had previously interpreted the Second Amendment in *United States v. Miller*, 307 U.S. 174, (1939), in which the Court observed that the Second Amendment's "purpose [was] to assure the continuation and render possible the effectiveness of [organized militias]," and that the "guarantee of the Second Amendment . . . must be interpreted and applied with that end in view." 307 U.S. at 178. In *Heller*, however, the Court stated that the Second Amendment protects "an individual right to possess and carry weapons in case of confrontation." *Id.* at 592. The Court's holding in *Heller* is binding.

    b. "Although these statements do not carry the weight of precedent, they illustrate how radical the position taken by the D.C. Circuit truly is. A robust Second Amendment right to 'keep and bear Arms' for purely private purposes has never been taken seriously by any majority of the members of the Court. Nor has the court ever invalidated a restriction on firearms under the Second Amendment. To do so know would represent a radical and unwarranted departure from the Court's Second Amendment jurisprudence."

       ANSWER: After the Supreme Court's opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), this statement is no longer accurate.

    c. "A recognition by this Court of an individual right to 'keep and bear Arms' for purely private purposes would represent more than a mere doctrinal shift; as a

practical matter, it would appear to require a massive change in the way firearms have been regulated for centuries."

ANSWER: Any time the Supreme Court strikes down a law as an unconstitutional infringement upon individual rights, it invariably affects what governments can and cannot do. The *Heller* opinion, however, expressly acknowledges that some degree of regulation is permissible. 554 U.S. at 626. Thus, the full implications of *Heller* and *McDonald* have yet to be determined, as courts throughout the country continue to grapple with these complex constitutional questions, and I have not had the opportunity to carefully study the question.

39. Do you believe that defendants under age 18 should ever be subjected to adult punishments in the criminal justice system? If you believe adult treatment for juvenile offenders is appropriate, please specify under what circumstances.

ANSWER: Many criminal justice statutes set forth considerations including, but not limited to, the nature of the offense at issue and a juvenile's prior record in order to determine whether adult treatment of a particular juvenile offender is proper. To the extent adult treatment of juveniles falls within the boundaries of the Constitution, as interpreted by the United States Supreme Court, such treatment is an available penalogical policy decision for legislators who grapple with the most effective approaches to sentencing and deterrence.

40. In an amicus brief submitted by the LDF in *Miller v. Alabama*, you allege that "racial overtones and stereotyping tainted the widespread enactment of laws that exposed youth to life without parole," and that such laws had a disproportionate impact on African-American and Latino youth. Please answer each subpart individually.

    a. Do you believe that life-without-parole sentencing laws and juvenile-court reforms enacted in the 1980s and 90s were designed with the intent, implicit or otherwise, to incarcerate larger numbers of youth of color?

    ANSWER: LDF's amicus brief in *Miller v. Alabama* explained the way in which exaggerations shaped perceptions that young people of color are criminals and affected the broader policy debate. The ensuing debates often culminated in more punitive measures for all youthful offenders, including life without parole.

    b. If yes, how do you account for the advocacy of such laws by prominent African-American political leaders, like former New York City Mayor David Dinkins and Rep. Carol Moseley Braun?

    ANSWER: Many leading voices in that period made public comments that embraced what had become a dominant narrative in the context of juvenile justice with respect to the scope of the problem associated with youthful offenders.

41. You contributed to an amicus brief in *Miller v. Alabama*. In this brief you argued that racism has stymied the proper evaluation with respect to ethnic minorities charged with criminal offenses. Do you still agree with the following statement from the brief: "Because it is clear that race critically and inappropriately informs the assessment of blameworthiness in the context of juvenile life without parole sentencing, such sentences are unconstitutional. …The perceived negative personality traits of African-American and other youth of color led officials to assess them as more culpable and dangerous than white youth and, therefore, to recommend more severe sentences for youth of color.…In light of the preceding arguments, the possibility that race may play any role in the administration of justice is especially disturbing in the context of life without parole sentences for youth.…At bottom, the gross racial disparities that pervade life without parole sentencing for children demonstrate that negative perceptions of youth of color have stymied the proper evaluation of their culpability."

    a. Do you believe this is an issue that is pervasive within the justice system in this country?

        ANSWER: Unfortunately, race continues to have an impact on sentencing outcomes and the treatment of youth in the criminal justice system. Recent data detailing disparities in student discipline for example, released by the U.S. Department of Justice and U.S. Department of Education on the topic of nondiscriminatory administration of school discipline, is instructive guidance. These data show that youth of color—particularly African-American and Latino youth—are more often referred to law enforcement and disciplined at higher rates than their white counterparts. Moreover, these disparities are not explained by the frequency or seriousness of misbehavior by youth of color.

    b. If so, what role will the Civil Rights Division play in remedying this?

        ANSWER: If confirmed, I will enforce the law, within its jurisdiction, to ensure that the justice system is administered in a fair and appropriate manner.

42. In the LDF amicus brief you submitted in *Miller v. Alabama*, your claim that "it is clear that race critically and inappropriately influences the assessment of blameworthiness in the context of juvenile life without parole sentencing" is supported primarily by non-empirical social science – the brief even suggests that life-without-parole sentencing laws "appeal to cultural archetypes in the collective unconscious about the 'alien other' who poses a fearful and menacing threat to society." To what extent will your decisionmaking as Assistant Attorney General be guided by social-science concepts such as "cultural archetypes" and "the collective unconscious"?

    ANSWER: If confirmed, my decision-making would be guided by the law and the facts.

43. Given your argument in the LDF's *Miller* amicus brief that "[r]acial disparities in juvenile life without parole sentences are not surprising given that these disparities exist at all levels of children's contact with the criminal justice system," what, if any, steps do

you plan to take as Assistant Attorney General to ameliorate racial disparities in federal sentencing?

ANSWER: Although I am not currently at the Department of Justice, I understand that the Department is reviewing sentencing as a Department-wide issue. To the extent that the Assistant Attorney General for Civil Rights plays a role in such a process, if confirmed, I look forward to contributing to the extent appropriate.

44. In the context of juvenile defendants, you wrote in an amicus brief the LDF submitted in *Graham v. Florida* that "dynamics of race, class and the nature of indigent defense" may "disadvantage" a defendant's "relationship with counsel and contribute to a significant risk of an unreliable sentencing outcome that fails to reflect actual culpability." Please answer each subpart individually.

    a. Do you believe this assertion to be true in the context of adult defendants?

        ANSWER: I believe that the Supreme Court cited LDF's amicus brief favorably for the proposition that the characteristics of youth can hamper the attorney-client relationship. Those dynamics can undermine the nature of a defendant's relationship with defense counsel.

    b. If so, what if any measures do you intend to undertake as Assistant Attorney General to lessen the disadvantages you previously argued that defendants who belong to disadvantaged groups face?

        ANSWER: Although I am not currently at the Department of Justice, I understand that the Department is reviewing sentencing as a Department-wide issue. I also understand that the Office of Justice Programs recently provided significant grant-based funding to improve the delivery of indigent defense services across the country. To the extent that the Assistant Attorney General for Civil Rights plays a role in these efforts, if confirmed, I look forward to contributing to the extent appropriate.

45. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court stated that the First Amendment prohibits governmental "interference with an internal church decision that affects the faith and mission of the church itself," and unanimously rejected the argument advanced in an LDF amicus brief that you signed that application of anti-retaliation provisions of civil rights laws to parochial school teachers comports with the First Amendment. Given the Supreme Court's unanimous rejection of LDF's position in *Hosanna-Tabor*, what provisions of civil-rights laws, in your view, may employees who qualify under the "ministerial exception" exercise without violating the First Amendment rights of their employer?

ANSWER: In its amicus brief, LDF argued against a categorical exception to federal anti-discrimination laws based on the central importance of these laws to protecting

opportunities for all Americans. As I understand the decision, the Court in *Hosanna-Tabor* did not categorically preclude the application of employment discrimination laws to religious institutions—and, in this respect, the decision is consistent with LDF's position. Rather, it said that federal discrimination laws cannot be applied to regulate a religious institution's employment of a minister. Under the Court's ruling, once such an institution has shown that a claimant is a "minister," a lawsuit for employment discrimination would be barred. In this way, the Court safeguards the important constitutional rights implicated in the case.

46. You contributed to an amicus brief in *Hosanna Tabor Evangelical Lutheran Church & School v. EEOC*. In this brief, you argue that "[a]ny burden on parochial schools' First Amendment interests in retaliating against their teachers is more than outweighed by the countervailing needs of law enforcement." The Supreme Court ruled 9-0 against your arguments. Please answer each subpart individually.

    a. Do you still believe this statement, and the rest of the arguments you made in the brief, are good and valid legal arguments?

        ANSWER: In its amicus brief, LDF argued against a categorical exception to federal anti-discrimination law based on the central importance of these laws to protecting opportunities for all Americans. As I understand the decision, the Court in *Hosanna-Tabor* did not categorically preclude the application of employment discrimination laws to religious institutions, and, in this respect, the decision is consistent with LDF's position. Rather, it said that discrimination laws cannot be applied to regulate a religious institutions employment of a minister. Under the Court's ruling, once such an institution has shown that a claimant is a "minister," a lawsuit for employment discrimination would be barred. In this way, the Court safeguards the important constitutional rights implicated in the case.

    b. Do you still believe that "[a]pplying a ministerial exception to parochial school teachers would be devastating to states' undeniably compelling interest in protecting children from abuse?"

        ANSWER: I recognize the balance that the Supreme Court struck in *Hosanna-Tabor* to guard constitutionally protected rights in the context of civil rights related claims. If confirmed to lead the Civil Rights Division, I would enforce the laws enacted by Congress as interpreted by the U.S. Supreme Court.

    c. Do you still agree with the following statement, "[e]ven if civil rights laws pervasively imposed significant burdens on religious practice that would not justify a categorical exemption for parochial schools?"

        ANSWER: I recognize the balance that the Supreme Court struck in *Hosanna-Tabor* to guard constitutionally protected rights in the context of civil rights

related claims. If confirmed to lead the Civil Rights Division, I would enforce the law as set forth by the U.S. Supreme Court.

47. In your view, does *Hosanna-Tabor*'s holding prevent an individual (1) who is employed by a religious institution; (2) and falls within the "ministerial exception," from suing under the anti-discrimination and anti-retaliation provisions of civil-rights statutes like Title VII or the Rehabilitation Act? Please answer each subpart individually.

    a. Would a suit by such an individual be permitted under the FMLA or the Equal Pay Act?

        ANSWER: I recognize the balance that the Supreme Court struck in Hosanna-Tabor to guard constitutionally protected rights in the context of civil rights claims. If confirmed, I would apply the First Amendment principles articulated by the Court in evaluating claims under the FMLA and the Equal Pay Act.

    b. In your view, does *Hosanna-Tabor*'s holding prevent such an individual from suing his or her employer alleging discrimination based on the individual's sexual orientation or gender identity?

        ANSWER: I recognize the balance that the Supreme Court struck in Hosanna-Tabor to guard constitutionally protected rights in the context of civil rights claims. If confirmed, I would apply the First Amendment principles articulated by the Court in evaluating claims alleging discrimination based on an individual's sexual orientation or gender identity.

48. Please identify what, if any, civil-rights provisions you consider to be neutral laws of general applicability—*see Employment Division v. Smith*—that may still be lawfully asserted against religious organizations by employees who fall with the ministerial exception, notwithstanding the Court's holding in *Hosanna-Tabor*.

    ANSWER: I am not currently at the Department of Justice nor have I had the opportunity to specifically study the full scope of each law that the Civil Rights Division enforces.

49. Following the Supreme Court's decision in *Ricci v. DeStefano*, do you believe that employers which have engaged in race-conscious employment actions or other conduct covered by Title VII can evade disparate-treatment liability based merely on a good-faith belief that the employment action may otherwise have caused racial disparities in jobs that have historically excluded racial minorities?

    ANSWER: On the facts presented in *Ricci v. DeStefano*, the Supreme Court held that there must be a strong basis in evidence of disparate impact liability before an employer could disregard the results of a civil service exam based on the racial makeup of the relevant pool of employees.

50. In a 2010 amicus brief LDF filed in *Wal-Mart v. Dukes*, you wrote that "[c]ivil rights cases are paradigmatic cases for Rule 23(b)(2) certification." Please answer each subpart individually.

    a. Given the Supreme Court's holding in that case that claims for monetary relief sought by putative class members cannot be certified under Rule 23(b)(2) where monetary relief is not incidental to injunctive or declaratory relief, please explain whether you believe that civil-rights lawsuits in which putative class members seek money damages may still be brought pursuant to Rule 23(b)(2).

       ANSWER: In *Dukes v. Walmart*, the Court stated that claims that would require "individualized assessments" for specific plaintiffs are not appropriate for (b)(2) certification, but instead must be litigated under (b)(3).

    b. If so, what circumstances in your view would permit a (b)(2) class in which members seek monetary relief?

       ANSWER: The Court in *Dukes v. Walmart* did not expressly decide this issue and I have not studied this issue.

    c. Further, do you consider monetary relief in the form of backpay to be declaratory or injunctive relief as those terms are used in Rule 23(b)(2)?

       ANSWER: Back pay is neither declaratory nor injunctive relief.

    d. Do you still maintain, as you did in the LDF brief, that "[r]estricting the reach of 23(b)(2) class actions—by, inter alia, limiting their certification to instances where monetary relief is not requested—contravenes the structure and purpose of disparate impact theory, as first conceived by [the Supreme Court]?"

       ANSWER: As argued in the amicus brief on behalf of LDF and other parties, use of Rule 23(b)(2) class actions to bring disparate impact claims has been essential to efforts at combatting institutional discrimination. If confirmed, I will ensure that the Division's enforcement focuses on those tools to combat actionable discrimination that are within the Civil Rights Division's jurisdiction.

51. Following the Supreme Court's decision in *Berghuis v. Smith*, please explain your view on the circumstances under which various methods of proof of systematic exclusion—absolute disparity, comparative disparity, and standard deviation—are appropriate tools in establishing fair-cross-section claims. Please answer each subpart individually.

    ANSWER: The Supreme Court, in *Berghuis v. Smith*, declined to adopt a particular method of proof of systematic exclusion, but instead noted that all three methods suffered from shortcomings. 559 U.S. 314, 329 (2010). Given the Supreme Court's decision not to adopt a specific statistical test, it may be appropriate to consider the results of all three

methods in each case to determine whether a group is fairly and reasonably represented in jury venires.

a. In cases involving an allegedly excluded minority group that comprises less than 10 percent of the total population, please explain the circumstances under which you would employ a comparative-disparity theory and the circumstances under which you would employ a standard-deviation theory.

ANSWER: The current state of the law, as explained by the Supreme Court in *Berghuis v. Smith*, is such that "'no court has accepted a standard deviation analysis alone as determinative in Sixth Amendment'" fair cross section challenges. 559 U.S. at 330 (quoting *United States v. Rioux*, 97 F.3d 648, 655 (2d. Cir. 1996). Thus, given the Supreme Court's declaration, it would seem advisable to mount multiple theories to resolve such cases.

52. In a 2008 amicus brief which you signed, LDF (and others) argued that Section 2 of the Voting Rights Act permits minority voters to satisfy the first *Gingles* precondition—i.e., whether a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"—even though the minority group does not comprise a numerical majority of voters in a given district. The Supreme Court rejected this so-called "functional majority test" in its plurality opinion in *Bartlett v. Stickland*. In light of that holding, please explain under what circumstances, in your view, a minority group can satisfy Section 2's majority-minority requirement if that group does not comprise a numerical majority in the voting district.

ANSWER: Under *Bartlett v. Stickland*, my understanding is that a single minority group below 50% cannot satisfy the first *Gingles* prerequisite.

53. In its plurality opinion in *Crawford v. Marion County Election Board*, the Supreme Court rejected a challenge that you, as LDF counsel of record, raised against the Indiana Voter I.D. law, and held that the Indiana law was "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process." The Court also held that the law—which allowed potential voters to obtain free identification cards by going to their local DMV office with appropriate documents—did not impose a substantial burden on an individual's right to vote, and that whatever additional burden the requirement may put on certain groups, i.e., the elderly, was mitigated by the ability of the voter to case a provisional ballot.

a. Please specify the circumstances under which you believe that a state law that imposes a voter I.D. requirement and provides a procedure for voters to obtain free, state-issued identification, would impose a substantial burden on voters or infringe the right to vote.

ANSWER: LDF did not raise the challenge in *Crawford v. Marion County Election Board*, but rather participated as amicus curiae. Under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, courts ask whether "based on the totality of

circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Thus, it is difficult to provide categorical guidance regarding the content of a particular law without examining how the law would operate in a particular jurisdiction. Accordingly, I am not in a position to offer specific guidance on this point.

54. What would be the considerations that you would apply if confirmed in deciding whether to challenge under the Voting Rights Act a state's enactment of a particular law requiring that voters display photo identification before casting their vote?

ANSWER: Any such decision would require an assessment of the facts and context of the state's particular law and its expected impact on voters.

55. Can you give guidance to any state contemplating enactment of such a law with respect to its content so that it could be certain that the Civil Rights Division would not bring a challenge? Or is it the case that the Civil Rights Division would challenge any such law under the Voting Rights Act?

ANSWER: I believe that the Civil Rights Division has precleared voter identification laws in the past. Under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, courts ask whether "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Thus, it is difficult to provide categorical guidance regarding the content of a particular law without examining how the law would operate in a particular jurisdiction.

56. In my state of Iowa, state officials have learned that not only are non-citizens on the voter rolls, but that a number of non-citizens have voted. The state has brought a number of successful prosecutions for voter fraud. Do you agree that voter fraud exists, that states have an important interest in preventing such fraud, and that a legitimate voter's fundamental right to vote is diluted equally if an ineligible person is allowed to vote as if an eligible voter is denied the right to vote?

ANSWER: Voting fraud occurs in some circumstances and there is no foolproof approach to combatting voting fraud. It is important to protect the legitimacy of the voting process so that eligible voters have their votes counted and do not have their votes diluted. Voter fraud protections are most effective when appropriately calibrated to the nature and scale of the problem.

The Honorable Jeff Flake
Written Questions for Debo Adegbile
Nominee, Assistant Attorney General Civil Rights Division
Senate Judiciary Committee
January 15, 2014

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1. You signed a brief on behalf of the NAACP in *Hosanna-Tabor v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), in support of the teacher dismissed by her employer, Hosanna-Tabor. The Court, in a unanimous opinion, upheld the ministerial exception. The unanimous opinion stated, "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

   a. Do you personally believe the position you took in *Hosanna-Tabor* was correct at the time you filed the brief?

      ANSWER: In its amicus brief, LDF argued against a categorical exception to federal anti-discrimination law based on the central importance of these laws to protecting opportunities for all Americans. As I understand the decision, the Court in *Hosanna-Tabor* did not categorically preclude the application of employment discrimination laws to houses of worship, and, in this respect, the decision is consistent with LDF's position. Rather, it said that federal discrimination laws cannot be applied to regulate a religious institution's employment of a minister. Under the Court's ruling, once such an institution has shown that a claimant is a "minister," a lawsuit for employment discrimination would be barred. In this way, the opinion in this case safeguards the important constitutional rights implicated in the case.

   b. Notwithstanding the Supreme Court's opinion to the contrary, do you still believe your brief is a correct analysis of the Constitution and precedent?

      ANSWER: I recognize the balance that the Supreme Court struck in *Hosanna-Tabor* to guard constitutionally protected rights in the context of civil rights related claims. If confirmed to lead the Civil Rights Division, I would enforce the law as set forth by the Supreme Court.

   c. In your brief, you stated: "Even if civil rights laws pervasively imposed significant burdens on religious practice, that would not justify a categorical exemption for parochial schools." How do you square this statement asserting the federal government may impose "significant burdens on religious practice," with the First Amendment protections, stating: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …"?

      ANSWER: I recognize the balance that the Supreme Court struck in *Hosanna-Tabor* to guard constitutionally protected rights in the context of civil rights

related claims. If confirmed to lead the Civil Rights Division, I would enforce the law as set forth by the Supreme Court.

2. In *Crawford v. Marion County*, 553 U.S. 181, you were the counsel of record on an amicus brief filed on behalf of the NAACP Legal Defense Fund urging the court to find Indiana's requirement that voters present government-issued photo identification to be unconstitutional. In a 6-3 plurality decision written by Justice Stevens, the Supreme Court upheld Indiana's voter photo identification law. Do you still believe the position you took in the brief was correct?

   ANSWER: The Assistant Attorney General for Civil Rights is entrusted with enforcing the Constitution and the law in a manner that is consistent with Supreme Court holdings. The Supreme Court's rulings on matters of constitutional interpretation are binding. Accordingly, if confirmed, I will enforce the law as interpreted by the Supreme Court and give effect to its holdings.

3. You signed a brief on behalf of the NAACP Legal Defense & Educational Fund in the case of *D.C. v. Heller*, 554 U.S. 570, urging the Supreme Court to overturn the U.S. Court of Appeals for the D.C. Circuit's decision that the District of Columbia's gun laws were unconstitutional. Your brief asserted, "The type of radical departure from this Court's Second Amendment jurisprudence that is reflected in the opinion of the D.C. Circuit is not warranted." Your brief continued, "for the Court to recognize an individual right to 'keep and bear Arms' would represent a radical departure from the consistent and long-established understanding of the Second Amendment." The Supreme Court upheld the D.C. Circuit's opinion in *D.C. v. Heller*.

4.

   a. Do you believe the Supreme Court's decision in *Heller* was a "radical departure" from the Supreme Court's prior jurisprudence?

      ANSWER: Prior to its decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court had previously interpreted the Second Amendment in *United States v. Miller*, 307 U.S. 174, (1939), in which the Court observed that the Second Amendment's "purpose [was] to assure the continuation and render possible the effectiveness of [organized militias]," and that the "guarantee of the Second Amendment . . . must be interpreted and applied with that end in view." 307 U.S. at 178. In *Heller*, however, the Court stated that the Second Amendment protects "an individual right to possess and carry weapons in case of confrontation." *Id.* at 592. The Court's holding in *Heller* is binding.

   b. Do you believe *Heller,* decided almost six years ago, has resulted in a "substantial upheaval in the manner in which firearms are regulated nationwide?"

      ANSWER: Any time the Supreme Court strikes down a law as an unconstitutional infringement upon individual rights, it invariably affects what governments can and cannot do. The *Heller* opinion, however, expressly acknowledges that some degree

of regulation is permissible. 554 U.S. at 626. Thus, the full implications of *Heller* and *McDonald* have yet to be determined, and I have not studied the issue.

5. As you likely know, the federal government is currently in a budget crisis where it is spending more than it brings in. As a result, all government departments, agencies, and even the legislative branch are being asked to tighten their belts and cut costs. If confirmed as the head of the Civil Rights Division, what actions would you take to cut costs, especially waste and abuse, at the Department?

   ANSWER: If confirmed, I would be a responsible steward of the resources that fund the Civil Rights Division and would seek to make effective use of those resources while avoiding waste.

Senator Jeff Sessions
Questions for the Record
Debo Adegbile

1. There is absolutely no doubt that voter fraud occurs in our federal elections through voter registration fraud, absentee ballot fraud, and ineligible voters casting ballots, to name just a few. Do you agree that when people who are ineligible to vote, do so, or when people vote multiple times it dilutes the votes cast by legal voters, thereby denying them their right to vote?

   ANSWER: Voting fraud occurs in some circumstances and there is no foolproof approach to combating voting fraud. It is important to protect the legitimacy of the voting process so that eligible voters have their votes counted and do not have their votes diluted. Voter fraud protections are most effective when appropriately calibrated to the nature and scale of the problem.

2. According to sworn testimony from Christopher Coates, former Voting Section Chief at the Department of Justice, Kristen Clarke, a lawyer at the NAACP Legal Defense Fund, pressured Justice Department officials to dismiss a lawsuit against the New Black Panther Party for voter intimidation in the November 2008 Presidential election in Philadelphia.

   a. Did you supervise or work with her during your time there?

      ANSWER: Yes. In my role as Director of Litigation, I supervised Ms. Clarke and the entire legal staff at the NAACP Legal Defense Fund.

   b. Were you aware of her efforts or did you instruct her to do so?

      ANSWER: No.

3. If you are confirmed, your deputy assistant attorney general in charge of overseeing the Voting Section will be Stanford Law Professor Pam Karlan. In the past, she has made

numerous partisan attacks on the Justice Department under President George W. Bush, some of which were demonstrably false. For example, in an article published in the *Duke Journal of Constitutional Law*, she wrote that "for five of the eight years of the Bush Administration, [the Civil Rights Division] brought no Voting Rights Act cases of its own except for one case protecting white voters." However, the record shows that cases were brought under the Voting Rights Act to protect non-white racial minorities in each of the eight years of the Bush administration. If confirmed, will you instruct her to correct her academic record so your enforcement of voting laws is not supervised by someone with the perception of partisanship and will you disavow her false scholarship?

ANSWER: I am not familiar with the details of the article or excerpt in the question above. If confirmed, I look forward to working with Deputy Assistant Attorney General Karlan to enforce the laws entrusted to the Civil Rights Division.

4. There has been some criticism from our military that the Justice Department, and specifically the Voting Section, waits too long before bringing a lawsuit to protect military voters and that when they finally do act, it is on the eve of an election and too late to provide any real remedy for overseas voters.

   a. If confirmed, will you commit to closely monitor counties and quickly enforce the law to protect military voters before an election and not wait until afterward?

      ANSWER: It is my understanding that Military and Overseas Voter Empowerment Act enforcement has been a priority of the Civil Rights Division, and if confirmed, I would continue those efforts.

   b. If confirmed, how do you intend to monitor each state to ensure full compliance?

      ANSWER: I understand that enforcing the Military and Overseas Voter Empowerment Act has been a priority of the Division, and if confirmed, I would continue those efforts to protect before the election servicemembers' ability to vote. I also understand that Senators Cornyn and Schumer have introduced a bill—the Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act—that includes some provisions proposed by the Administration to strengthen MOVE Act enforcement, including a requirement that states report in advance of the election on the status of ballot transmission to military and overseas voters. Such a requirement would enhance the Division's ability to protect servicemembers' ability to vote, and I commend them for their work on this important issue.

   c. State election officials have criticized the Voting Section for inappropriately bringing enforcement actions against States rather than counties. States often have little power or control over local jurisdictions, which are responsible for the procedures that result in the failure to send ballots on time. To fully protect our military voters, if confirmed, will you take appropriate legal action against counties that fail to comply with the law in this regard?

ANSWER: My understanding is that courts have found repeatedly that states are responsible for ensuring UOCAVA compliance.

5. A March 2013 report by the Justice Department Inspector General on the Voting Section revealed that the leadership of the Civil Rights Division, including former Assistant Attorney General Thomas Perez, interpreted the "preclearance" requirement of the Voting Rights Act, embodied in Sections 4 and 5, to be "race-conscious," in that it does not cover white voters even when they are clearly a minority in the jurisdiction.

   a. Do you interpret the preclearance requirement of the Voting Rights Act in that way?

      ANSWER: Although as a result of *Shelby County v. Holder*, Section 4 no longer justifies the preclearance requirements of Section 5 of the Voting Rights Act, it is not my understanding that Section 5 protected only racial minorities.

   b. It is my understanding that you have been working on legislation to amend the Voting Rights Act in response to the Supreme Court's holding that states cannot be subject to the preclearance requirement based solely on past discrimination. If Congress chooses to adopt a new trigger for Section 5 coverage, do you believe it should be "race-conscious," or do you believe it should apply equally to citizens of any race who happen to be a minority in a particular jurisdiction?

      ANSWER: I advised Chairman Leahy on potential legislative responses to the *Shelby County v. Holder* decision prior to my nomination. Since then, I have worked on other issues. I understand that a bicameral, bipartisan Voting Rights Act bill has been introduced.

6. In *League of United Latin American Citizens v. Perry*, a redistricting case, Chief Justice Roberts disagreed with the majority's holding that it was the Court's role "to make judgments about which *mixes* of minority voters should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district."

   a. Do you agree with Chief Justice Roberts' statement?

      ANSWER: If confirmed, I will enforce the law as articulated by the Supreme Court. Through cases like *League of United Latin American Citizens v. Perry*, the Court has held that cohesive voting blocs that constitute a majority and are adversely affected by racially polarized voting patterns can state a claim under Section 2.

   b. If confirmed, how will you ensure that Section 2 cases do not violate the Supreme Court's warnings against, as the Court put it, "racial gerrymandering"?

ANSWER: If confirmed, I will enforce the law consistent with Supreme Court precedents.

7. With the Supreme Court's June 2013 ruling in *Shelby County v. Holder*, and the lack of Section 5 submissions to the Voting Section, there are now, according to reports, seven senior attorneys with salaries of over $150,000 each with no Section 5 work. Taken together, those salaries equal over a million dollars a year in personnel costs. The salaries of perhaps a dozen Section 5 analysts together equal at least another million dollars in personnel and overhead costs. If confirmed, will you eliminate these positions or find other productive work for them?

ANSWER: If confirmed, I will ensure that resources within the Division are effectively allocated, and, with respect to the Voting Section, will endeavor to ensure that resources are deployed in a manner that strengthens access to the ballot and otherwise supports compliance with the law.

8. A recent report by the Inspector General on the operations of the Voting Section found that members of the Voting Section who were viewed as Republican or conservative were severely harassed on that account. For example, the report detailed how: "at least three career Voting Section employees posted comments on widely read liberal websites concerning Voting Section work and personnel. . . . The three employees who we were able to identify with certainty included three non-attorney employees [and] included a wide array of inappropriate remarks, ranging from petty and juvenile personal attacks to highly offensive and potentially threatening statements. The comments were directed at fellow career Voting Section employees because of their conservative political views, their willingness to carry out the policies of the [Civil Rights Division] division leadership, or their views on the Voting Rights Act. The highly offensive comments included suggestions that the parents of one former career Section attorney were Nazis, disparaging a career manager's physical appearance and guessing how he/she would look without clothing, speculation that another career manager was watching pornography in her office, and references to 'Yellow Fever,' in connection with allusions to marital infidelity involving two career Voting Section employees, one of whom was described as 'look[ing] Asian.'"

   a. One of the individuals responsible for making these demeaning statements initially lied to the Inspector General and later admitted that she perjured herself, but added that she had no regrets other than the fact that she was caught. It is my understanding that this individual is still employed by the Justice Department in the Voting Section of the Civil Rights Division. If confirmed, will you terminate her employment?

      ANSWER: Because I am not currently at DOJ, I do not know the details of the matter described above and am not in a position to make a commitment about personnel actions I would take if confirmed. I will handle personnel matters in accordance with all applicable legal and ethical standards and rules, however.

b. If confirmed, how will you ensure that such partisan political hostility towards certain employees does not continue under your leadership, as it did under the previous leadership of the Civil Rights Division?

ANSWER: I understand that the Division took steps to improve professionalism within the Division both before and in response to the Inspector General's recent report. If confirmed, I will assess the Division's policies and practices and, consistent with applicable laws and policies, determine if any additional modifications are appropriate

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Questions for the Record
for Debo Adegbile (DOJ AAG for Civil Rights)
Senator Mike Lee
January 8, 2014

1. In 2011, the NAACP Legal Defense Fund (LDF) took on the case of convicted cop killer Mumia Abu-Jamal. Abu-Jamal was sentenced to death for the 1981 murder of a 25-year-old Philadelphia police officer who had engaged Abu-Jamal's brother in a routine traffic stop. LDF took on Abu-Jamal's appeal while you were the director of litigation and you signed several briefs on his behalf, leading to the commutation of his death sentence to life in prison. Abu-Jamal has been and remains an iconic figure among activists.

    a. What part did you play in LDF's decision to take on the case?

    ANSWER: As the Litigation Director, I was aware of the request to represent Mr. Abu-Jamal, however, the late John Payton, NAACP LDF's former President and Director-Counsel, made the decision to take the case.

    b. Did you elect to play a role in representing Abu-Jamal? What was your motivation for that decision?

    ANSWER: I reviewed certain briefs filed in the matter by virtue of my role as the Litigation Director and my associated supervisory responsibilities at LDF

    c. At a New York Free Mumia Coalition event in 2011, Christina Swarms, your colleague at LDF at the time, included you when she stated, "There is no question in the mind of anyone at the Legal Defense Fund that the justice system has completely and utterly failed Mumia Abu-Jamal and, in our view, that has everything to do with race and that is why the legal defense fund is in this case."

        i. Do you believe that the justice system had at that time "completely and utterly failed Mumia Abu-Jamal"? If so, in what ways?

ANSWER: I do not know what Ms. Swarns had in mind when she made this comment. I know that the court found that there was a constitutional infirmity in the sentencing phase of Mr. Abu Jamal's case and accordingly vacated his death sentence and he was resentenced to life without the possibility of parole.

ii. Do you believe that such a failure had "everything to do with race"? If so, please explain your reasoning.

ANSWER: I do not know what Ms. Swarns meant by this comment.

iii. If you do not agree with Ms. Swarms statement, why do you believe LDF took on this case?

ANSWER: John Payton, LDF's late President and Director-Counsel, made the decision that LDF would represent Mr. Abu Jamal based upon an assessment of the constitutional claim.

d. In a January 2014 letter to the President opposing your nomination for your involvement in the Abu-Jamal case, the Fraternal Order of Police (FOP) expressed the need for law enforcement and minority communities to "build even greater bonds of trust and mutual respect," while decrying the work of the Civil Rights Division and its "aggressive and punitive approach towards local law enforcement agencies."

i. Under your direction, if confirmed, would the Civil Rights Division continue the methods, patterns, and practices established under the leadership of Thomas Perez and Roy Austin, Jr.?

ANSWER: Our communities rightly place a great deal of trust in law enforcement officers, the overwhelming majority of whom deserve our highest praise as dedicated public servants who keep our neighborhoods safe, our families secure, and dangerous criminals behind bars. If confirmed, I will enforce the applicable laws in a fair and even-handed manner.

ii. If confirmed, in what ways will you work to tear down the "obstacles" to trust and mutual respect that the FOP refers to in its letter?

ANSWER: If confirmed, I will work to further build a relationship of trust and mutual respect with the law enforcement community.

e. How will your experience advocating for Abu-Jamal inform your work in the DOJ if you are confirmed?

ANSWER: As I stated in my confirmation hearing, the LDF's representation of Mr. Abu Jamal is an example of our commitment, as a nation and through the Constitution, to follow our procedural rules even in the hardest of cases. If confirmed, I will uphold the Constitution and enforce the law in a fair and even-handed manner.

2. You have made a number of statements expressing strong views regarding the Voting Rights Act and voting rights more generally. Late in 2012, some members of this administration made troubling comments suggesting that they believe the executive branch should itself reform voter registration and even move to nationalize voter registration.

    a. Do you believe that the executive branch currently has statutory authority to make significant national changes to state voter registration systems and if so which statutes do you believe provide that authority?

    ANSWER: I am unaware of the comments to which the question refers. State voter registration systems are under the direct control of states, but are subject to a range of federal requirements, including both statutory and constitutional requirements, particularly with respect to elections for federal office. Those requirements have in the past required states to make significant changes, but the executive branch itself did not "make" those changes.

3. You have appeared on a number of amicus briefs on controversial issues before the Supreme Court. These briefs evidence an extreme view of the Constitution that in many cases has not been accepted by even a single member of the court. For example, with respect to religious liberty, in a brief you helped write in the *Hosanna Tabor* case, you argued strenuously against a ministerial exception, a position the Court rejected 9-0. With respect to the Second Amendment, you helped write a brief in the *Heller* case that argued the Second Amendment does not provide for the right of an individual to possess or use firearms outside the context of a lawfully organized militia. This position was rejected by the Court. In *Ricci v. DeStefano*, you likewise helped write an amicus brief arguing for a position the Court rejected.

    a. Do you believe religious organizations are not entitled to a ministerial exception?

    ANSWER: In its amicus brief, LDF argued against a categorical exception to federal anti-discrimination law based on the central importance of these laws to protecting opportunities for all Americans. As I understand the decision, the Court in *Hosanna-Tabor* did not categorically preclude the application of employment discrimination laws to religious institutions – and, in this respect, the decision is consistent with LDF's position. Rather, it said that discrimination laws cannot be applied to regulate a religious institution's employment of a "minister". Under the Court's ruling, once such an institution has shown that a claimant is a "minister," a lawsuit for employment discrimination would be

barred. In this way, the Court safeguards the important constitutional rights implicated in the case.

b. Do you believe the Second Amendment does not guarantee an individual's right to bear arms?

ANSWER: Prior to its decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court had previously interpreted the Second Amendment in *United States v. Miller*, 307 U.S. 174, (1939), in which the Court observed that the Second Amendment's "purpose [was] to assure the continuation and render possible the effectiveness of [organized militias]," and that the "guarantee of the Second Amendment . . . must be interpreted and applied with that end in view." 307 U.S. at 178. In *Heller*, however, the Court stated that the Second Amendment protects "an individual right to possess and carry weapons in case of confrontation." *Id.* at 592. The Court's holding in *Heller* is binding.

c. It appears that in many instances your views of the Constitution are at odds with those of the Court. What assurances can you give the Committee that you will respect and follow Supreme Court precedent?

ANSWER: I filed a number of briefs as an attorney at NAACP LDF on behalf of various clients or on behalf of my former employer. In some of those cases my client or employer's side prevailed; in some the opposing party prevailed. However, the positions articulated in each of these briefs should not be reflexively equated with statements of the personal views of the filing counsel. Moreover, the Assistant Attorney General for Civil Rights enforces the Constitution and the law in a manner that is consistent with Supreme Court holdings. The Supreme Court's rulings on matters of constitutional interpretation are binding. Accordingly, if confirmed, I will enforce the law as interpreted by the Court and give effect to its holdings.

Questions for the record of Senator John Cornyn for Debo Adegbile, nominee to be Assistant Attorney General for Civil Rights
January 15, 2014

1. In an interview with an NYU Law School alumni publication, you stated: "Not every wrong finds a remedy in the law, as it turns out. It takes a good bit of creative lawyering and tenacity on the part of litigators to formulate a winning theory . . ." Please describe, in detail, what you meant by "creative lawyering." As Assistant Attorney General, how would you use "creative lawyering," and will you pledge to pursue only remedies expressly provided for under current law?

ANSWER: If confirmed, I will ensure that the Civil Rights Division enforces the law as enacted by Congress and as interpreted by the Supreme Court or other federal courts as

applicable, based on an assessment of the facts presented and in consideration of the best interests of the United States.

2. As Assistant Attorney General, would you commit to only pursue legal theories that find strong support in the statutes passed by Congress and the interpretations given to them by the Supreme Court?

   ANSWER: If confirmed, I will ensure that the Civil Rights Division enforces the law as enacted by Congress and as interpreted by the Supreme Court or other federal courts as applicable, based on an assessment of the facts presented and in consideration of the best interests of the United States.

3. Are there differences between the role of Assistant Attorney General and the role of Director-Counsel of the NAACP Legal Defense and Educational Fund? How, specifically, would you approach these positions differently?

   ANSWER: The Civil Rights Division is a federal law enforcement agency created by Congress. If confirmed, I would be cognizant of my obligation to enforce the law in a fair and evenhanded manner and to lead the Civil Rights Division with a commitment to its duties, traditions and practices in collaboration with the able public servants who dedicate themselves to the work of the Division.

4. A recent Inspector General's report found "deep ideological polarization" and "bitter controversy" within the Voting Rights Section of the Civil Rights Division. What specific measures will you take to address the problems cited by the Inspector General?

   ANSWER: I understand that the Division took steps in response to both the 2008 Inspector General report on the Division and in response to the Inspector General's recent report. If confirmed, I will assess the Division's current policies and practices and, consistent with applicable laws and policies, determine if any additional modifications are appropriate.

5. In the Supreme Court's opinion in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009), Chief Justice Roberts' opinion described the "substantial federalism costs" that Section 5 of the Voting Rights Act of 1965 imposes on some states. Do you agree that Section 5 imposes such costs?

   ANSWER: Yes. In light of the anti-discrimination principle expressly embraced in the text of the Fourteenth and Fifteenth Amendments to the U.S. Constitution, however, as well as the history and purposes of their enactment, the federalism costs, while relevant to the analysis, do not end the inquiry.

6. In *Shelby County v. Holder*, 570 U.S. ___ (2013), the Supreme Court ruled that Section 4 of the Voting Rights Act of 1965 was unconstitutional because it utilized decades-old evidence to require certain states, including Texas, to seek federal approval before changing their voting laws. In congressional testimony in 2006, you stated: "The evidence in the record does

not indicate that the existing Section 4 coverage formula, or 'trigger,' needs to be revised or updated."

a. Do you accept the Supreme Court's decision, and will respect that decision while serving as Assistant Attorney General?

   ANSWER: Yes. The Assistant Attorney General for Civil Rights is entrusted with enforcing the Constitution and the law in a manner that is consistent with Supreme Court holdings. The Supreme Court's rulings on matters of constitutional interpretation are binding. Accordingly, if confirmed, I will enforce the law as interpreted by the Supreme Court and give effect to its holdings.

b. Do you believe that that an imbalanced treatment of states similar to Section 4 is still appropriate post *Shelby County*?

   ANSWER: Congress must determine whether targeted remedial protections are necessary in particular jurisdictions.

c. Do you agree with the Court's that: "There is no denying . . . that the conditions that originally justified" the preclearance process under Section 5 of the Voting Rights Act of 1965 "no longer characterize voting in the covered jurisdictions"?

   ANSWER: As a general matter, there has been very substantial progress in voting in the formerly Section 5 covered jurisdictions—progress that both Congress acknowledged during the 2006 Reauthorization, and the Supreme Court acknowledged in *Northwest Austin Municipal Utility District No. 1 v. Holder*. I understand that a bipartisan, bicameral Voting Rights Act bill has been introduced that would provide for a new form of coverage formula.

d. Do you agree with the Court's statement that the coverage formula under Section 4 of the Voting Rights Act of 1965 was "based on 40-year-old facts having no logical relation to the present day"?

   ANSWER: While the coverage provision retained its references to earlier elections, the substantial focus of the Congressional legislative record supporting the 2006 Reauthorization was based upon voting discrimination primarily within the covered jurisdictions between 1982 and 2006.

e. Had the same voter turn-out and registration thresholds set by Section 4 been applied in 2000 as required by statute, rather than 1964, 9 of the 14 counties in Massachusetts would have been subject to preclearance, while only 2 of Texas's 254 counties would have been covered. Yet, under Section 4, all of Texas was subject to preclearance, while none of Massachusetts was. In light of this evidence, do you believe that your congressional testimony in 2006 was accurate?

ANSWER: I believe my testimony was accurate. The goal and purpose of Section 5 was never limited to voter turnout and registration. The coverage provision also included jurisdictions that employed a "test or device" which were understood to have a discriminatory purpose and effect. Congress looked to continued discrimination to justify the 2006 reauthorization.

f. Absent the Supreme Court's ruling in this case, what would you consider to be sufficient evidence that the Section 4 coverage formula should be updated?

ANSWER: I am not able to answer this question in the abstract, but I understand that Congress is exploring ways to update the Section 4 coverage formula, and that a bipartisan, bicameral bill has been introduced to accomplish this goal.

g. Do you believe a coverage formula for preclearance, as provided in Section 4 of the Voting Rights Act of 1965, is the only way to properly protect minority voting rights? Why or why not?

ANSWER: No. While preclearance—and the use of the coverage formula to determine which jurisdictions are subject to preclearance—is a particularly effective way to protect minority voting rights, there are other mechanisms as well, including among other things both private and public enforcement of existing prohibitions on discrimination related to voting. And with respect to preclearance itself, there may be other ways to establish the reach of preclearance if Congress determines that preclearance remains essential. As stated above, I understand that a bipartisan, bicameral bill has been introduced that proposes a new form of coverage formula.

h. What, if anything, might be an appropriate alternative to preclearance in protecting minority voting rights?

ANSWER: In the decades since the passage of the Voting Rights Act, preclearance has been a demonstrably effective tool in rooting out voting discrimination. I understand that a bipartisan, bicameral Voting Rights Act bill has been introduced that would provide a new coverage formula.

7. What were your duties and responsibilities while serving as Senior Counsel to Senator Leahy? Were you involved in efforts to draft legislation remedying the constitutional defects of the Voting Rights Act of 1965, or otherwise amending it? Please describe those efforts. What outside organizations, if any, did you work with on these efforts?

ANSWER: Prior to the time of my nomination, I advised Senator Leahy on possible legislative responses to *Shelby County.* Since the time of my nomination, I have advised Senator Leahy on various other legislative and constitutional matters.

8. Do you accept the Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which the court upheld the constitutionality of Indiana's voter ID statute?

   ANSWER: Yes, the Assistant Attorney General for Civil Rights is entrusted with enforcing the Constitution and the law in a manner that is consistent with Supreme Court holdings. The Supreme Court's rulings on matters of constitutional interpretation are binding. Accordingly, if confirmed, I will enforce the law as interpreted by the Supreme Court and give effect to its holdings.

   a. Do you agree with Justice Stevens' statement that voter ID "is amply justified by the valid interest in protecting the integrity and reliability of the electoral process"?

      ANSWER: I accept as binding the decision of the Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which the Court rejected a facial challenge to Indiana's photo identification law.

   b. Do you accept the Supreme Court's distinction in Crawford between Indiana's voter ID law and a poll tax?

      ANSWER: I do not read Justice Stevens' opinion to draw a categorical distinction between voter ID laws and poll taxes. A poll tax claim was not at issue in *Crawford*.

   c. In the past, you have been a strong opponent of Voter ID laws. Will you use your position as Assistant Attorney General to continue to oppose state voter ID laws? If so, how will you select which of the growing number of state voter ID laws you will challenge?

      ANSWER: I understand that the Division has precleared such laws in the past. Congress has directed courts addressing claims under section 2 of the Voting Rights Act, 42 U.S.C. 1973, to ask whether "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

   d. Is there any form of state voter ID law that you find acceptable? If so, please describe the characteristics of an acceptable state voter ID law.

      ANSWER: I believe that the Civil Rights Division has precleared voter identification laws in the past. Under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, courts ask whether "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or

political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Thus, it is difficult to provide categorical guidance regarding the content of a particular law without examining how the law would operate in a particular jurisdiction.

9. In November, I introduced S. 1728, a bipartisan bill called the SENTRI Act (Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act), together with Sen. Schumer and four other senators. It is awaiting consideration in the Senate Rules Committee. It is my understanding that the Civil Rights Division supports this bill. Do you support our effort to better protect the voting rights of our troops both at home and overseas?

   ANSWER: I commend you on your efforts to ensure the voting rights of servicemembers who sacrifice for our country. Expanding the reach of voter access, including affirmative efforts to facilitate the access of our service members and overseas voters is an essential part of our national commitment to democracy. I understand that the SENTRI Act includes provisions adopting Administration proposals to enhance the Civil Rights Division's ability to protect these voters' access to this fundamental right, and if confirmed, I look forward to working with you on this important issue.

10. Is it appropriate for the Civil Rights Division to take a position in the national debate over same-sex marriage?

    ANSWER: The Division takes positions in litigation that falls within its jurisdiction.

11. In a guidance memo published in May 2012, the Equal Employment Opportunity Commission argued that: "An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1965, as amended." As Acting President and Director Counsel of the NAACP Legal Defense and Educational Fund, you praised this guidance memo—stating that: "No one should be penalized for the rest of their life for mistakes that they made in the past."

    a. Do you agree with the May 2012 guidance memo that ". . . an exclusion based on an arrest, in itself, is not job related and consistent with business necessity?"

       ANSWER: The EEOC has released guidance on the subject of employer background checks. As I read it, the guidance does not embrace a categorical bar on using information gleaned from such employment screens but rather requires some reasonable inquiry into the nexus between the conviction and the job responsibilities involved in the particular position.

    b. Do you believe that a private employer's decision categorically to exclude all persons convicted of a child pornography offense from the hiring pool may, in some instances, violate Title VII of the Civil Rights Act of 1965?

ANSWER: It is my understanding that the Civil Rights Division has jurisdiction to enforce Title VII with respect to state and local government employers, while the EEOC has jurisdiction to enforce that statute with respect to employers in the private sector, among others.

c. Do you believe that any person who has been convicted of a felony or crime of violence should be categorically excluded from working for the Department of Justice? If not, what classes of felons or violent offenders should be allowed to work for the Department of Justice?

ANSWER: If confirmed, I commit to following the Department's applicable personnel laws and guidance.

d. If confirmed as Assistant Attorney General for the Civil Rights Division, would you commit to performing a criminal background check on all prospective employees, and to prohibiting the hiring of any person who has been convicted of a felony or crime of violence? If not, please describe a particular situation in which you might, as Assistant Attorney General, recommend the hiring of a felon or violent offender.

ANSWER: If confirmed, I commit to following the applicable personnel laws and guidance.

2011 WL 4048834 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

John E. WETZEL, Secretary, Pennsylvania Department of Corrections, et al., Petitioners,
v.
Mumia ABU-JAMAL, Respondent.

No. 11-49.
September 9, 2011.

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

Brief in Opposition

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***1** SUMMARY OF ARGUMENT

In *Mills v. Maryland*, 486 U.S. 367 (1988), this Court declared that instructions indicating that a juror cannot "find a particular circumstance to be mitigating unless all 12 jurors agree[] that the mitigating circumstance ha [s] been prove[n] to exist," are unconstitutional. *Smith v. Spisak*, 130 S. Ct. 676, 682 (2010) (citing *Mills*, 486 U.S. at 380-381). In this case, the United States Court of Appeals for the Third Circuit, on remand from this Court, properly found that the verdict form and oral instructions given to Respondent's sentencing jury violated *Mills*. Specifically, after appropriately applying the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), the appellate court found that the form and instructions, taken together, required unanimity in the finding of mitigation, that the instructions at issue are materially different from those found to be acceptable in *Spisak*, and that the state court's decision was objectively unreasonable. Because the Circuit Court's decision is appropriately deferential and amply supported by the record, certiorari review is inappropriate.

ARGUMENT

This Court should deny certiorari because the Third Circuit's decision on remand is correct; the Circuit applied properly stated rules of law to the facts of this case; and the Circuit Court's grant of *Mills* relief is unlikely to affect future cases.

*2 I. The Third Circuit's Decision on Remand Is Correct.

The Third Circuit's conclusion that the *Abu-Jamal* jury instructions and verdict form were significantly different from - and worse than - those in *Spisak* and that the state court's rejection of Respondent's *Mills* claim was objectively unreasonable, is well supported by the record. Petitioners mischaracterize the Circuit's reasoning, fail to acknowledge substantial differences between this case and *Spisak* and incorrectly describe the state of the law at the time of the state court's decision. [1]

A. Procedural History

The procedural history of Respondent's *Mills* claim demonstrates that the Circuit Court has consistently and appropriately conducted the deferential review required by § 2254(d).

1. *State Court.*

Respondent Mumia Abu-Jamal was sentenced to death in Philadelphia, Pennsylvania. The Pennsylvania Supreme Court affirmed on direct appeal, *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989) ("*Abu-Jamal*"), and denied post-conviction relief, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) ("*Abu-Jamal-2*"). In the state post-conviction proceedings, Mr. Abu-Jamal ***3** exhausted a claim that the capital sentencing verdict form and jury instructions violated *Mills*.

2. *District Court.*

On federal habeas review, the U.S. District Court for the Eastern District of Pennsylvania (the "District Court") addressed the *Mills* claim at length. *Abu-Jamal v. Horn*, No. CIV. A. 99-5089, 2001 WL 1609690, *1, *114-*127 (E.D. Pa. Dec. 18, 2001) ("*Abu-Jamal-3*").

The District Court emphasized that it was applying the deferential standards set forth by the AEDPA, 28 U.S.C. § 2254(d), as required by this Court's ruling in *Williams v. Taylor*, 529 U.S. 362 (2000). *Abu-Jamal-3*, 2001 WL 1609690, at *10-*11 (*Williams* "cautioned federal habeas courts against insufficiently deferential review of state court decisions") (citing *Williams*, 529 U.S. at 409); *id.* at *107 (same) (citing *Williams*, 529 U.S. at 409); *id.* at *116 n.82 ("important to reiterate" in addressing a *Mills* claim that "a significant degree of deference is due the state supreme court's application of federal law").

Applying AEDPA, the District Court found that the jury instructions and verdict sheet violated *Mills* and that the state court's decision on the *Mills* claim was objectively unreasonable under § 2254(d)(1), *Abu-Jamal-3*, 2001 WL 1609690, at 130. Accordingly, the District Court vacated the death sentence. *Id.*

4 3. *Court of Appeals.

The Third Circuit unanimously affirmed the District Court's finding of *Mills* error. *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008) (*"Abu-Jamal-4"*).

It explained that it was applying the deferential standards of § 2254(d). *Id.* at 292 & n.21 (describing AEDPA's "deferential standard" of review); *id.* at 278-79 (collateral review requires deference unless "unreasonable application" threshold under § 2254(d)(1) is met); *id.* at 279, 287-88 (Mr. Abu-Jamal's habeas petition was "subject to AEDPA"); *id.* at 300 ("Our review is limited to whether the Pennsylvania Supreme Court unreasonably applied *Mills*.") (citing § 2254(d)(1) and *Williams*, 529 U.S. at 405).

After applying *Mills* and § 2254(d), and considering the verdict form, the oral instructions, and the state court's ruling, the Circuit affirmed the grant of habeas relief. *Id.* at 301-304.

4. *This Court.*

In 2008, Petitioners filed a certiorari petition, seeking this Court's review of the Third Circuit's ruling. Petition for Writ of Certiorari, *Beard v. Abu-Jamal*, No. 08-652, 2008 WL 4933629 (U.S. Nov. 14, 1008).

On February 23, 2009, while Petitioners' certiorari petition was pending, this Court granted certiorari in *Smith v. Spisak*, 129 S. Ct. 1319 (2009), to review, *inter alia*, the Sixth Circuit's grant of relief under *Mills*. On January 12, 2010, this Court reversed the Sixth Circuit. *Spisak*, 130 S. Ct. 676.

***5** On January 19, 2010, this Court issued a "GVR" order in the instant case: "Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Smith v. Spisak.*" *Beard v. Abu-Jamal*, 130 S. Ct. 1134 (2010) (*"Abu-Jamal-5"*). [2]

5. *Court of Appeals on Remand.*

After new briefing and oral argument, the Third Circuit again unanimously found that the jury instructions and verdict form violated *Mills*, that the state court unreasonably applied clearly established federal law, and that habeas relief was required under § 2254(d)(1). *Abu-Jamal v. Secretary*, 643 F.3d 370, 372 (3d Cir. 2011) (*"Abu-Jamal-6"*).

The Third Circuit again emphasized that it was applying the deferential standards of AEDPA's § 2254(d):
Our review on remand is limited to whether the Pennsylvania Supreme Court unreasonably applied United States Supreme Court precedent in finding no constitutional defect in the jury instructions and verdict form employed in the sentencing phase of Abu-Jamal's trial. See ***6** 28 U.S.C. § 2254(d)(1); *Williams []*, 529 U.S. [at] 405-06 …. Pursuant to the Supreme Court's order, we consider this question in light of *Spisak* ….

Under [§ 2254(d)], a state prisoner's application for a writ of habeas corpus will be denied unless the adjudication of a claim in state court proceedings "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

Abu-Jamal-6, 643 F.3d at 373. The Circuit explained that because the state court properly identified and applied *Mills* to Respondent's claim, its decision was not "contrary to" clearly established law. *Id.* at 374 (citing *Williams*, 529 U.S. at 405). The Circuit therefore considered whether the state court's decision involved an "unreasonable application" of federal law under § 2254(d)(1), and noted that:

"a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that ***7** application must also be unreasonable." *Williams*, 529 U.S. at 411; *see Schriro v. Landrigan*, 550 U.S. 465, 473 [] (2007).

Abu-Jamal-6, 643 F.3d at 374. Thus:

in making this inquiry, we "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409.

Abu-Jamal-6, 643 F.3d at 374.

The Circuit then observed that its specific task on remand was to reconsider its earlier ruling in light of *Spisak*. Because this Court found no *Mills* violation in *Spisak*, the Circuit first "evaluate[d] whether a *Mills* violation has occurred, and then proceed[ed] to examine whether the Pennsylvania Supreme Court's application of *Mills* was objectively unreasonable under the second clause of § 2254(d)(1)." *Id.* at 374.

After carefully comparing the *Mills* and *Abu-Jamal* verdict sheets and jury instructions, *id.* at 374-77, the Circuit concluded that "the [*Abu-Jamal*] verdict form together with the jury instructions" indicated that the jury could only consider the mitigating circumstances that it found unanimously. *Id.* at 377.

It then compared the *Abu-Jamal* and *Spisak* instructions and verdict forms, *id.* at 377-81, and found that the "verdict form and judge's instructions used in the sentencing phase of Abu-Jamal's trial are materially different and easily distinguished from those at issue in *Spisak*" *id.* at 379. Thus, the ***8** Circuit concluded that its finding of a *Mills* violation was "consistent with *Spisak.*" *Id.* at 380-81.

Finally, the Third Circuit applied AEDPA's deferential standards to the state court's decision on the *Mills* claim and concluded that it was objectively unreasonable. *Id.* at 374, 381. Thus, the Third Circuit again affirmed the District Court's grant of habeas relief as to Mr. Abu-Jamal's death sentence. *Id.* at 383.

B. The Third Circuit's *Mills* Analysis Was Correct and Supported By the Record.

The Circuit unanimously found that the "verdict form together with the jury instructions read that unanimity was required in the consideration of mitigating circumstances and that there is a substantial probability[3] the jurors believed they were precluded from independent consideration of mitigating circumstances in violation of *Mills.*" *Id.* at 377.

***9** Petitioners assert that requiring unanimity for the weighing result does not violate *Mills*. Petition at 12. Respondent agrees. Read in isolation from the rest of the instructions and verdict form, the weighing instruction correctly stated the law.

Petitioners erroneously contend, however, that the Third Circuit found a *Mills* violation based solely on this weighing language. *Id.* at 11; *see id.* at 10, 12, 24. Contrary to Petitioners' claims, the opinion makes clear that it was the rest of the verdict form along with the oral instructions that created a substantial probability that the jury would believe it could only consider and weigh unanimously found mitigating circumstances against the aggravating circumstances. *Abu-Jamal-6*, 643 F.3d at 375-76. The

Circuit's finding that the state court was objectively unreasonable in "conduct [ing] an incomplete analysis of only a portion of the verdict form, rather than the entire form," *id.* at 381, offers further proof that it did not rely solely on the weighing instruction as the basis for granting *Mills* relief. As in *Mills*, Mr. Abu-Jamal's jury was misled regarding the task that *preceded* the ultimate weighing - the process of identifying and considering mitigation.

Accordingly, the appellate court's finding of a *Mills* violation was correct.

1. *The verdict form's opening statement required unanimous findings by the jury of mitigating circumstance(s).*

The opening language on Page One of the verdict form reads as follows:

> ***10** We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:

App. 131. That language is followed by:
(1) We, the jury, unanimously sentence the defendant to

death

☐ life imprisonment.

(2) (To be used only if the aforesaid sentence is death)

We, the jury, have found unanimously

☐ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are

one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are *A*.

The mitigating circumstance(s) is/are *A*.

Id. at 131-32.

***11** By opening with "*[w]e, the jury*, having heretofore determined that the defendant is guilty of murder of the first degree, *do hereby further find that*:", *id.* at 131 (emphasis added), the verdict form required that *everything* marked on it be *found* by the *same jury* that found Mr. Abu-Jamal guilty - i.e., the unanimous jury. The form did not allow an individual juror to find anything on his own, including a mitigating circumstance.

Page One of the verdict form required the jury to specify the sentence; what "[t]he aggravating circumstance (s) is/are __"; and what "[t]he *mitigating circumstance(s)* is/are __." *Id.* at 131-32. (emphasis added). Because the opening statement required all verdict form findings to be unanimous, the form mandated that the sentence, the aggravating circumstances and the *mitigating* circumstances be unanimously found. While the first two requirements are proper, the third violates *Mills*.

2. *The verdict form provided space for only one check next to each mitigating circumstance.*

Pages Two and Three of the verdict form read as follows:
AGGRAVATING AND MITIGATING CIRCUMSTANCES

AGGRAVATING CIRCUMSTANCE(S):

(a) The victim was a fireman, peace officer or public servant concerned in official detention ***12** who was killed in the performance of his duties. (#)

[nine more statutory aggravating circumstances, labeled (b)-(j) and followed by a (), not checked by the jury]

MITIGATING CIRCUMSTANCE(S):

(a) The defendant has no significant history of prior criminal convictions (#)

[seven more statutory mitigating circumstances, labeled (b)-(h) and followed by a (), not checked by the jury]

[twelve lines with signatures of all jurors]

App. 132-35.

Thus, the jury was presented with a list of ten possible aggravating circumstances, and a list of eight possible mitigating circumstances, with a "()" next to each aggravating and mitigating circumstance to be checked, if found. The space provided next to each mitigating circumstance is too small for any marking beyond a single checkmark. Also, the form did not provide a mechanism for any individual juror to find, or indicate that s/he has found, independent of other jurors, a mitigating circumstance. These factors reinforce the notion that only unanimously found mitigating ***13** circumstances were to be considered. Read together with the opening statement that directed the jury to record only those items that are were unanimously found, the verdict form led the jury to believe that it could only consider an aggravating or *mitigating* circumstance that was *unanimously* found.

3. *Additional language in the verdict form required unanimous finding of mitigating circumstances.*

Just below the lines calling for the jury's sentence, the following express unanimity requirement appears on Page One of the verdict form:
We, the jury, have found *unanimously*

☐ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____.

one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are *A.*

The mitigating circumstance(s) is/are A.

App. 131-32 (emphasis added).

This portion of the form also requires the jury to find and consider only the aggravating and ***14** *mitigating* circumstances that it has "found *unanimously." Id.* at 131 (emphasis added). Because this language was read in conjunction with the verdict form's opening statement requiring the jury to note only those findings that "we, the jury, have found unanimously," and the list of

choices, each with one corresponding box that could be checked, directly underneath the opening statement, the only plausible interpretation is that the specifications of aggravators and mitigators on the lines provided required unanimous findings.

4. ***The verdict form required the signatures of all twelve jurors below the list of mitigating circumstances.***

The end of the verdict form, just below the list of mitigating circumstances on Page Three, requires the signatures of all twelve jurors. *Id.* at 135. This also ensured that only unanimously found mitigating circumstances are considered. If fewer than twelve jurors found a mitigating circumstance, checked it on the checklist on Page Three (although the form opens with a requirement that only findings of the unanimous jury be recorded), and wrote it on Page One (although Page One states "We the jury have found unanimously … [t]he mitigating circumstance(s) is/are ____", *id.* at 131-32), then the jurors who disagreed could not sign the verdict form without violating their oaths. The presence of all twelve signatures confirms the form's direction to unanimously consider and find mitigating circumstances.

15 5.** ***Aggravating and mitigating circumstances are treated identically on the verdict form.

The unanimous finding of mitigating circumstances was also required by the verdict form's consistently identical treatment of aggravating and mitigating circumstances. To comply with *Mills*, the jury would have had to ignore this and believe, contrary to the form's plain language and without any rational basis, that aggravation and mitigation should be treated differently. The court must "presume that, unless instructed to the contrary, the jury would read similar language throughout the form consistently." *Mills*, 486 U.S. at 378.

6. ***Mr. Abu-Jamal's verdict form was more problematic than the Mills verdict form.***

In finding constitutional error, the Third Circuit relied upon the similarities between the *Mills* and *Abu-Jamal* verdict forms, *Abu-Jamal-6*, 643 F.3d at 375-77. However, for several reasons, the *Abu-Jamal* form was more likely than the *Mills* form to be understood to require a unanimous mitigation finding.

The *Mills* form allowed the jury to mark "yes" or "no" for each listed mitigating circumstance, and the list was prefaced with: "[W]e unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist … and each mitigating circumstance marked 'no' has not been proven …." *Id.* at 375. Maryland's high court interpreted the jury's "no" entries as showing that ***16** the jury unanimously rejected the "no"-marked mitigating circumstance. *See id.* at 372. So-interpreted, the death sentence was constitutional - if the jury unanimously rejected each mitigating circumstance, no individual juror found a mitigating circumstance and no juror was prevented from giving effect to mitigation that s/he believed to exist.

This Court found the Maryland court's interpretation of the form "plausible" in light of the form's language. It was nevertheless declared unconstitutional because it was unclear that the jury interpreted the form the same way as the Maryland court. *See id.* at 375-76.

The *Abu-Jamal* form is not even susceptible to the "plausible" interpretation that the Maryland court gave the *Mills* form. Unlike in *Mills*, Mr. Abu-Jamal's jury's only options were to check a mitigating circumstance if it was found, or leave it blank. The failure to check plainly signifies the jury's failure to unanimously find a mitigating circumstance. Thus, the *Mills* violation is clearer in *Abu-Jamal* than it was in *Mills* itself.

7. ***The trial court's oral instructions compounded the Mills error.***

As the Third Circuit recognized, "the instructions throughout and repeatedly emphasized unanimity." *Abu-Jamal-6*, 643 F.3d at 377. The judge told the jury: "You will be given a verdict slip upon which to record your verdict and findings." App. 127. Here,

and throughout, the judge made no distinction between "findings" of aggravating circumstances and "findings" of mitigating circumstances, except for ***17** different burdens of proof. *See infra.* Section I. B. 7. Thus, the jury had no reason to believe that there were any differences (other than burdens of proof) between the processes for finding aggravating and mitigating circumstances - the instructions required both to be found unanimously.

The judge also instructed the jury on how to use the checklist of aggravating circumstances on Page Two and how to identify aggravating circumstances on Page One:

> [W]hat you do, you go to Page 2. Page 2 lists all the aggravating circumstances. They go from small letter (a) to small letter (j). Whichever one of these that you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.

App. 128.

The judge then used materially identical language to explain how to use Page Three's checklist of mitigating circumstances and how to complete Page One's identification of the mitigating circumstances:

> [T]hose mitigating circumstances appear on the third page here, they run from a little (a) to a little letter (h). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that ***18** on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors ….

App. 129.

These instructions, like the verdict form itself, treat aggravating and mitigating circumstances identically - both were to be "found" and recorded by a unanimous jury. As the Third Circuit found, "in light of the language and parallel structure of the form and instructions in relation to aggravating and mitigating circumstances, it is notable that neither the verdict form nor the judge's charge said or in any way suggested that the jury should apply the unanimity requirement to its findings of aggravating but not mitigating circumstances." *Abu-Jamal-6,* 643 F.3d at 377. The instructions do not even hint that the jury must unanimously find an aggravating circumstance, but not a mitigating one. Instead, the last instruction on finding mitigating circumstances and signing the form "places in the closest temporal proximity the task of finding the existence of mitigating circumstances and the requirement that each juror indicate his or her agreement with the findings of the jury" by signing the form. *Abu-Jamal-3,* 2001 WL 1609690, at *125. The judge's instructions on how to use the verdict form thus exacerbated the form's *Mills* error.

Other oral instructions also led the jury to treat aggravating and mitigating circumstances in the same manner:
Members of the jury, you must now decide whether the defendant is to be ***19** sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.

The verdict must be a sentence of life imprisonment in all other cases.

….

Remember, that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

App. 124-25; 126-27. In these instructions, like all of the instructions, aggravating and mitigating circumstances are treated identically as matters to be "found" by the unanimous jury or not considered at all. Nothing in the instructions would allow the jury to reasonably conclude that mitigating and ***20** aggravating circumstances should be treated differently.

The Third Circuit also found that the failure to distinguish between the process of finding aggravators and mitigators was "notable because the trial court distinguished between the two with respect to the proper burden of proof the jury should apply." *Abu-Jamal-6,* 643 F.3d at 377. In this regard, the court instructed the jury that:

> Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances you find are present in this case. … [A]ggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt, while mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

Addendum at 2a.
The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.

App. 126.

***21** Since the instructions stressed the different *burdens* for proving aggravating and mitigating circumstances, but were silent as to any differences in the manner of proof, jurors would naturally conclude that *both* "aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met." *See Frey v. Fulcomer,* 132 F.3d 916, 924 (3d Cir. 1997) (emphasis in original). Thus, the burden of proof instructions "likely cemented the jury's mistaken impression that it was obligated *not* to consider a mitigating circumstance that was found to exist by anything other than the entire panel." *Abu-Jamal-3,* 2001 WL 1609690, at **119* (emphasis in original).

The jury instructions were also problematic because the judge repeatedly used the pronoun "you" to refer without distinction to the entity that "finds" the defendant guilty, "finds" a sentence, "finds" aggravating circumstances, and "finds" mitigating circumstances.[4] To satisfy *Mills*, the jury would have to have know that "you" meant the "*unanimous jury*" for the first three matters, but meant "*each individual juror*" for the last. However, the "natural interpretation," *Mills,* 486 U.S. at 381, of the instructions was that the same "you" - the unanimous jury - must make all of these findings.

22 8. *Changes to Pennsylvania's capital jury instructions and verdict form after Mills underscore the constitutional error.

Just as this Court did in *Mills*, the Third Circuit noted that Pennsylvania adopted a new uniform sentencing verdict form for capital cases after *Mills* was decided. *Abu-Jamal-6,* 643 F.3d at 382 (citing Pa. R. Crim. P. 358 A). "[T]he new form … makes explicit that unanimity is not required in determining the existence of mitigating circumstances." *Id.*

The Pennsylvania Suggested Standard Criminal Jury Instructions were likewise amended in response to *Mills* and now make clear that the jury needs to be unanimous before finding an aggravating circumstance, but need not be unanimous to consider or find a mitigating circumstance. *See id.* "[T]hese clarifications highlight the ambiguity at issue in this case." *Id.* at 383.

C. The Third Circuit Correctly Found That This Case Is Very Different Than *Spisak*.

This Court found that the *Spisak* jury instructions and verdict form did not violate *Mills*. Mr. Spisak's trial was in Ohio where capital juries find the presence or absence of aggravating factors at the guilt phase. *Spisak*, 130 S. Ct. at 680, 683.[5] Thus, after the penalty phase evidence was presented, the legal instructions and form given to ***23** the jury were brief. They can be summarized as follows:

1. Oral Instructions:
a. Explanation and examples of mitigating factors;

b. *Weighing* instruction - aggravating circumstances against mitigating circumstances.

2. Verdict Form:

a. Two forms for each murder count - both solely addressed weighing;

b. One form read, in its entirety: "We the jury in this case … do find beyond a reasonable doubt that the aggravating circumstances which the defendant … was found guilty of committing were sufficient to outweigh the mitigating factors present in this case. We the jury recommend that the sentence of death be imposed."

c. The other form read, in its entirety: "We the jury in this case … do find beyond a reasonable doubt that the aggravating circumstance which the defendant … was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case. We the jury ***24** recommend that the defendant … be sentenced to life imprisonment."

Id. at 683-84.

Petitioners argue that the weighing instructions in *Spisak* (2b and 2c above) are virtually identical to the weighing instruction given here[6] therefore there was no *Mills* violation in Mr. Abu-Jamal's trial. *See* Petition at 9. However, this argument completely ignores the additional instructions and language in Mr. Abu-Jamal's verdict form, none of which were present in *Spisak*. As the Third Circuit recognized, "[b]y contrast with *Spisak*, the identified language of unanimity here indisputably addresses more than the final balancing of aggravating and mitigating factors." *Abu-Jamal-6*, 643 F.3d at 379.

The most significant difference between *Abu-Jamal* and *Spisak* is that the *Abu-Jamal* verdict form contains express unanimity requirements for finding mitigating circumstances, and demands that the jury specify which mitigating circumstances it has unanimously found. *See* App. 131-32, 134-35. The *Spisak* form, on the other hand, did not require the jury to make *any* findings about mitigating circumstances, and certainly did not require the jury to specify what mitigating circumstances were found. See 130 S. Ct. at 684. Instead, the only finding the *Spisak* form required the jury to make was the ultimate sentence. *Id.*[7]

***25** Petitioners argue that there "is no distinction" between the fact that Mr. Abu-Jamal's jury had to find and report on found mitigating circumstances and the *Spisak* jury did not because the *Spisak* jury still had to decide on mitigation. *See* Petition at 15. This entirely misses the point. The *Mills* and *Abu-Jamal* juries (but not the *Spisak* jury) were required to specify the mitigating circumstances that were found. The *Abu-Jamal* jury instructions and verdict form that purported to explain how to find, and specify in writing, the proven mitigating circumstances ultimately produced the *Mills* violation. *See supra* Section 1, B. Indeed, the format of the *Abu-Jamal* verdict form made it virtually impossible for the jury to record or communicate mitigation not found unanimously. The *Spisak* verdict form had no such problem even though the jury in that case considered the question of mitigation.

*Abu-Jama'l*s requirement that the jury specify the found aggravators and mitigators created additional *Mills* problems. A pervasive feature of the *Abu-Jamal* verdict form and jury instructions, which contributed to the Third Circuit's conclusion that they violate *Mills*, is their identical treatment (aside from burden of proof) of aggravating and mitigating circumstances to be

found by the jury. The natural conclusion is that, apart from burdens of proof, aggravating and mitigating circumstances should be found *in the same way - unanimously. See Abu-Jamal-6,* 643 F.3d at 377.

***26** The *Spisak* verdict form and jury instructions lacked this similar treatment of aggravating and mitigating factors, mainly because the structure of the Ohio capital sentencing scheme in *Spisak* rendered *any* similarities between proof of aggravating and mitigating factors highly unlikely. As explained above, in *Spisak* - as in every Ohio capital case - the aggravating factors were introduced to and found by the jury at the guilt phase; at capital sentencing, the judge then "instructed the jury that the aggravating factors they would consider were the specifications that the jury had found proved beyond a reasonable doubt at the guilt phase." *Spisak,* 130 S. Ct. at 683. Because the aggravating factors were found at the guilt phase, the jury had no reason to believe that consideration of mitigating circumstances, which were first introduced at the *sentencing phase*, had anything in common with the manner in which aggravating factors were proved. The contrast with *Abu-Jamal* - where aggravating and mitigating circumstances were *introduced together at sentencing and treated identically*, apart from burden of proof - is profound.

Another important distinction between *Spisak* and *Abu-Jamal* is that Mr. Abu-Jamal's verdict form required the signatures of all twelve jurors just below the checklist on which the jury must record its findings of mitigating circumstances. The natural reading of this is that all twelve jurors must agree that a mitigating factor exists, just as all twelve must agree as to the existence of each aggravating factor and the ultimate sentence. *See supra* Section I. B. 4. This natural reading of the signatures ***27** requirement was reinforced by the judge's oral instructions on how to use the form, which expressly connected the signatures requirement with finding mitigating circumstances. *See supra* Section I. B. 7. Although the *Spisak* form required the signatures of all twelve jurors, this fact was wholly insignificant because the verdict form *did not require the jury to specify what mitigating circumstances were found* and the oral instructions did not connect the signatures requirement to finding mitigating circumstances. 130 S. Ct. at 684. As a consequence, signing the *Spisak* form signified nothing about an individual juror's finding or consideration of mitigation.

Thus, upon remand for consideration of *Spisak*'s impact on its earlier ruling, the Third Circuit correctly noted the many differences between *Abu-Jamal* and *Spisak* and properly determined that these differences were crucial to Mr. Abu-Jamal's right to have his sentencing jury consider mitigation.

D. The Third Circuit Correctly Found That the State Court's Ruling Unreasonably Applied *Mills*.

On remand from this Court, the Third Circuit again found that the Pennsylvania Supreme Court unreasonably applied *Mills*.[8] ***28** *Abu-Jamal-6,* 643 F.3d at 372. This conclusion rested upon two primary factors: (1) the state court failed to evaluate the combined effect of the verdict form *and* the oral instructions and (2) the state court "conducted an incomplete analysis of only a portion of the verdict form, rather than the entire form." *Id.* at 381.[9]

1. *The state court's exclusive focus on the verdict form was objectively unreasonable.*

The Third Circuit recognized that by the time Mr. Abu-Jamal's jury reached the final weighing and verdict stages of its deliberations, the court's oral instructions combined with the verdict form to create a substantial probability that the jury would only weigh mitigating circumstances that were found ***29** unanimously. *Abu-Jamal-6,* 643 F.3d at 381-82. Even if the verdict form's language on weighing, taken in isolation, was proper, by ignoring the impact of the misleading oral instructions and other parts of the form, the state court failed to account for the "effect on the jury of being instructed identically and contemporaneously with respect to the making of individual determinations regarding mitigating and aggravating circumstances." *Id.* at 381. *See supra* Section I. B. 7.

Petitioners contend that the Circuit's criticism of the state court's failure to consider the oral jury instructions is unfair because Mr. Abu-Jamal's state post-conviction appeal relied only on the verdict form. Petition at 20. This is untrue. Indeed, the Third

Circuit rejected this exact argument and found that Mr. Abu-Jamal's state court pleadings "raised a *Mills* claim based on both the verdict form and the jury instructions." *Abu-Jamal-4*, 520 F.3d at 299-300.

2. *The state court's Mills analysis was limited to one portion of the verdict form.*

The Circuit found the state court's conclusions about the verdict form to be objectively unreasonable because the state court only considered one portion of that form. *Abu-Jamal-6*, 643 F.3d at 381-82. In Section I. B above, Mr. Abu-Jamal has presented in significant detail the *Mills*-related problems presented by the verdict form in his trial. Almost none of these problems were addressed by the state court because it did not address the entire the form. For example, the Third Circuit found it objectively ***30** unreasonable that the state court failed to "address the likely effect on the jury of having to choose aggravating and mitigating circumstances from visually identical lists and represent its findings as to each in an identical manner." *Id.* at 382.

Instead, the Pennsylvania Supreme Court's decision merely noted that the verdict form "consisted of three pages" and reached a series of conclusions that unreasonably focused on language viewed in isolation from the complete form and the oral instructions. *Abu-Jamal-2*, 720 A.2d at 119. By ignoring the ways in which the verdict form imposed a "requirement of unanimity," the state court unreasonably applied *Mills*. *See Williams*, 529 U.S. at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts).

(a) The state court inaccurately found that the "requirement of unanimity is found only at Page One in the section wherein the jury is to indicate its sentence." *Id.* In addition to stating "We, the jury unanimously *sentence* the defendant to death," Page One also states, "We, the jury, have found *unanimously* … The aggravating circumstance(s) is/are *A*. The *mitigating circumstance(s) is/are A*." App. 131-32. Thus, Page One's "requirement of unanimity" *expressly applied* to the finding of both aggravating and *mitigating* circumstances.

In addition to the express use of the word "unanimously," the verdict form opens with the requirement that *everything on the form* be the "find[ings]" of "the jury" that found Mr. Abu-Jamal guilty - *i.e.*, the *unanimous* jury. This applies to ***31** Page One's findings of "*mitigating* circumstance(s)" and to Page Three's checklist of *mitigating* circumstances, *just as clearly* as it applies to Page One's findings of "aggravating circumstance(s)" and Page Two's checklist of aggravating circumstances. Moreover, the verdict form closes with the required signatures of *all twelve jurors*, reinforcing the opening statement that all findings - including mitigation - must be made unanimously. The state court, however, "never addressed the effect of the lead-in language." *Abu-Jamal-3*, 2001 WL 1609690, at *126 n.91.

(b) The state court described the second page of the verdict form as containing "all the statutorily enumerated aggravating circumstances and … a designated space for the jury to mark those circumstances found." *Abu-Jamal-2*, 720 A.2d at 119. It unreasonably failed to recognize that the list of *mitigating* circumstances on Page Three is *identical* in format to this list of aggravating circumstances and, therefore, "the natural interpretation of the form," *Mills*, 486 U.S. at 381, was that both mitigating and aggravating circumstances must be *unanimously* found.

(c) The state court unreasonably relied on the fact that Page Three, which contains the mitigating circumstances checklist, "includes no reference to a finding of unanimity." *Abu-Jamal-2*, 720 A.2d at 119. As stated above, the verdict form opens with a requirement that *everything* therein be found by the *unanimous* jury; and the form ends - on Page Three, just below the checklist of mitigating circumstances - with a requirement that all twelve jurors sign, indicating their unanimous agreement with ***32** everything on the form. Furthermore, although Page Two's list of aggravating circumstances also contains no "reference to a finding of unanimity," it is undisputed that the jury knew it had to find aggravators unanimously. This identical treatment of aggravating and mitigating circumstances creates a "reasonable likelihood," *Boyde*, 494 U.S. at 378, that the jury believed it had to find mitigating circumstances unanimously.

Furthermore, the state court itself observed that Page Three is the "section where *the jury* is to checkmark those mitigating circumstances *found*." *Abu-Jamal-2*, 720 A.2d at 119 (emphasis added). There is a "reasonable likelihood" that the jury

understood Page Three in exactly that way - that only mitigating circumstances *"found" by "the jury"* - not *individual jurors* - should be checked and considered. In order to read Page Three consistent with *Mills*, the jury would have to know that each individual juror should check those mitigating circumstances s/he found, even if the other jurors disagreed. To say the least, that is an odd reading of the verdict form. Moreover, since the jury was to turn in one verdict form, not twelve, it would have no way of knowing how to communicate the lack of unanimity for any mitigating factor. In addition, the jury would have had to give this treatment to mitigating circumstances but not aggravating circumstances, despite the fact that aggravating and mitigating circumstances are treated identically on the form.

(d) The state court noted that Pages Two and Three, containing the lists of aggravating and mitigating circumstances, include no printed ***33** instructions, *Abu-Jamal-2*, 720 A.2d at 119, but unreasonably failed to recognize that this contributes to the *Mills* error. Without instructions accompanying the lists of aggravating and mitigating circumstances, the jury had to look to other parts of the verdict form, the overall structure of the form, and the judge's instructions to understand how to use those lists. As set forth herein, those factors indicated that aggravating and mitigating factors must be unanimously found.

(e) The state court unreasonably concluded that Page Three's signatures-of-all-jurors requirement was irrelevant "since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances." *Abu-Jamal-2*, 720 A.2d at 119. The reason it is "natural[]" for the twelve signatures to "appear at the conclusion of the form" is that it signifies the agreement of all twelve jurors to the findings recorded on the form. This is especially obvious here, where the form opens with a requirement that everything noted thereon be the findings of the jury, not individual jurors.

To the extent the signatures "have no explicit correlation to the checklist of mitigating circumstances," exactly the same is true for the checklist of aggravating circumstances and the sentence. To satisfy *Mills*, the jurors would have to know that signing the form signaled agreement to the sentence entered on Page One and agreement to the findings of aggravating circumstances entered on Page Two, but was meaningless with respect to mitigating circumstances on Page Three - the very page upon which they were to enter their signatures. ***34** Nothing in the verdict form or instructions conveyed that illogical concept.

Even if the state court's "reasoning" about the signatures made any sense in isolation, it unreasonably failed to consider the trial judge's oral "explanation of th[e] form". *Abu-Jamal-3*, 2001 WL 1609690, at *125. As stated above, the oral instructions on how to use Page Three made an "explicit correlation" between the signatures and the mitigating circumstances and, thereby, cemented the *Mills*-violation that is apparent on the face of the verdict form. The state court unreasonably failed to consider the effect of the oral instructions on the jury's understanding of the form.

(f) The state court's previous approval, in *Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995), of a "verdict slip[] similar to" Mr. Abu-Jamal's does not make its decision reasonable. *Abu-Jamal-2*, 720 A.2d at 119. The entire discussion of the verdict slip in *Murphy* is that "the portion of the verdict slip where the jury is to list mitigating circumstances is set apart from sections A and B of the verdict slip which do require a finding of unanimity." 657 A.2d at 936. There is no description of what the *Murphy* verdict slip actually said.

Petitioners argue that the Circuit's conclusion that the state court unreasonably applied *Mills* is erroneous because the state court correctly applied *Zettlemoyer*, the Circuit's then-governing *Mills* precedent. *See* Petition at 20-26. This is false. *Abu-Jamal* is as different from *Zettlemoyer* as it is from *Spisak*.

***35** Petitioners incorrectly claim that the *Zettlemoyer* instructions were "virtually identical to those here" and, in support, quote *one sentence* of the *oral* instructions given in *Zettlemoyer*. Petition at 20-21. While this *single sentence* is similar to *one part* of the *Abu-Jamal* oral instructions, there are "important distinctions" between the two instructions as a whole. *Abu-Jamal-3*, 2001 WL 1609690, at 120; *see id.* at *123.

More significantly, there are vast differences between the verdict forms in *Zettlemoyer* and *Abu-Jamal*. *See Abu-Jamal-3*, 2001 WL 1609690, at *126 n.92. Although Petitioners declare that "the *most cursory*' " comparison of the forms show they were

"saying exactly the same thing," Petition at 23 (emphasis added), there are substantial differences between the verdict forms in *Abu-Jamal* and *Zettlemoyer*.

In finding the *Zettlemoyer* verdict form constitutional, the Third Circuit stressed two factors which materially distinguish it from *Abu-Jamal*.

First, the *Zettlemoyer* form said "We the jury have found unanimously … The aggravating circumstance is __," but there was *no such language* for *mitigating* circumstances. 923 F.2d at 308. "The absence of a similar instruction for mitigating circumstances indicates that unanimity is not required." *Id.* In sharp contrast, the *Abu-Jamal* form contains identical language for aggravating *and* mitigating circumstances. App. 131-32. Thus, the presence on the *Abu-Jamal* form of "a similar instruction for mitigating circumstances indicates that unaninimity" is required.

***36** Second, on the *Zettlemoyer* verdict form, "the jury was obliged to specify the aggravating circumstance it found," but "it had no such duty with respect to mitigating circumstances, thus suggesting that consideration of mitigating circumstances was broad and unrestricted." 923 F.2d at 308. Again, the *Abu-Jamal* form is very different - it required the jury to specify both the aggravating and mitigating circumstances it found, with no distinction made between the two. Thus, the *Abu-Jamal* verdict form required both aggravating and mitigating circumstances be unanimously found.

In short, the *Abu-Jamal* form suffers from the exact *Mills*-violating features that the Third Circuit found absent from the *Zettlemoyer* form. Moreover, the *Abu-Jamal* form requires a unanimous mitigation finding for the additional reasons, *see supra* Section I. B that also were absent from the *Zettlemoyer* form.

The state court's *Mills* decision was objectively unreasonable. [10]

***37 II. This Court Should Deny Certiorari Because Petitioners' Quarrel Is with the Third Circuit's Application of Properly Stated Rules of Law to the Facts of this Case.**

Certiorari "is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." Supreme Court Rule 10. Here, the Third Circuit applied "properly stated rule[s] of law" to the facts of this case for both the constitutional merits of the *Mills* claim and the deference due state court decisions under AEDPA.

It is undisputed that the applicable rule of federal constitutional law is derived from *Mills v. Maryland*, "in light of *Smith v. Spisak.*" *Abu-Jamal-5*, 130 S. Ct. at 1134. The Third Circuit expressly recognized that *Mills* and *Spisak* set forth the applicable constitutional rule; applied *Mills* and *Spisak* to the facts of Mr. Abu-Jamal's case; and applied no other substantive law or lower court interpretations of *Mills* or *Spisak*. *See supra* Section I. A.

It is also undisputed that the applicable rule of deference under AEDPA is 28 U.S.C. § 2254(d)(1), as interpreted by this Court. The Third Circuit expressly recognized that § 2254(d)(1) sets forth the applicable rule of deference; acknowledged this Court's interpretations of § 2254(d)(1) in cases such as *Williams*, 529 U.S. 362 and *Landrigan*, 550 U.S. 465; and applied these deferential standards to this case. *See supra* Section I. A.

Because the Circuit clearly identified and applied the correct rules of constitutional law and § 2254(d) deference, Petitioners' request for certiorari review should be denied.

***38 III. This Court Should Deny Certiorari Because the Circuit Court's Grant of *Mills* Relief is Unlikely to Affect Future Cases.**

This Court grants certiorari in order to review "question[s] of national importance." *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003). This is not such a case because the error is unlikely to affect future cases.

For several reasons, very few Pennsylvania capital cases are eligible for *Mills* relief under Respondent's circumstances:

First, over 22 years ago - in February 1989 - Pennsylvania's courts *stopped using the verdict forms and jury instructions now at issue*. And, in response to *Mills*, the Pennsylvania Supreme Court promulgated a new standard verdict form and jury instructions that are *Mills*-compliant. *See Abu-Jamal-6*, 643 F.3d at 382-83.

Second, the applicability of *Mills* is limited by the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). Because *Mills* announced a "new rule," it is only available to habeas petitioners whose convictions became final after this Court decided *Mills* on June 6, 1988. *Beard v. Banks*, 542 U.S. 406 (2004).

Thus, in order for another prisoner to benefit from the Circuit's decision, the case cannot be "too new" - it had to be tried *before Mills*, or at least before the official change in the verdict form on February 1, 1989. This eliminates every case tried in the last 22 years. At the same time, the case cannot be "too old" - it had to be final *after Mills*. This also eliminates a significant body of cases.

***39** Third, to benefit from the Circuit's decision a *Mills* claim must survive all other habeas-related barriers, such as the exhaustion requirement and procedural default rules. Very few cases could survive this filtering and properly present the issues on which Petitioners seek review. Few if any are likely to present themselves to the Third Circuit in the future.

Finally, the limited relevance of *Mills* error in Pennsylvania is reflected by the decisions of the Third Circuit. Apart from Respondent's case, the Third Circuit has addressed *Mills* claims in only eight other Pennsylvania capital cases: *Zettlemoyer*, 923 F.2d at 306-08; *Frey*, 132 F.3d at 920-25; *Szuchon v. Lehman*, 273 F.3d 299, 320-24 (3d Cir. 2001); *Hackett*, 381 F.3d 281 (3d Cir. 2004); *Albrecht v. Horn*, 485 F.3d 103, 116-20 (3d Cir. 2007); *Fahy v. Horn*, 516 F.3d 169, 175-76 (3d Cir. 2008); *Banks v. Horn*, No. 99-9005 (3d Cir. Aug. 25, 2004); and *Kindler v. Horn*, 542 F.3d 70, 80-83 (3d Cir. 2008), *vacated and remanded on other grounds*, 130 S. Ct. 612 (2009).

In *six* of these cases - *Zettlemoyer*, *Szuchon*, *Hackett*, *Albrecht*, *Fahy*, and *Banks* - the Third Circuit *denied relief* on the *Mills* claim. In three of these cases - *Banks*, *Albrecht*, and *Fahy* - the Circuit found that the *Mills* claim was barred by *Teague*. In one - *Szuchon* - the Circuit held that the *Mills* claim was procedurally defaulted. In two, the Circuit denied the *Mills* claim on the merits - under pre-AEDPA *de novo* review in *Zettlemoyer* and under AEDPA's § 2254(d) in *Hackett*.

***40** In just *two* of the eight cases, *Frey* and *Kindler*, did the Third Circuit grant relief under *Mills*. In both cases, habeas review was *de novo*, not under AEDPA's § 2254(d). In *Frey*, the claim *would have been denied* under *Teague* had Petitioners not waived their *Teague* defense. 132 F.3d at 920 n.4.

Thus, the Third Circuit's *Mills* decisions highlight the limited availability of *Mills* relief in Pennsylvania due to the above-described combination of non-retroactivity under *Teague*, post-Mills changes to Pennsylvania's verdict forms and jury instructions, and other procedural issues. The rulings also show that even when the rare *Mills* claim survives those obstacles, the Third Circuit takes a nuanced approach that has led to habeas relief in some cases and denial of relief in others. Mr. Abu-Jamal's meritorious *Mills* claim is, therefore, a rarity even in Pennsylvania, and *Mills* claims will scarcely ever be presented in future cases. Accordingly, this Court should not waste its rarely granted certiorari jurisdiction on this case.

***41 CONCLUSION**

For the reasons stated herein, certiorari should be denied.

Footnotes

* Counsel of Record

1 As detailed in the Procedural History, *supra* at pp. 2-8, both the District Court and the Third Circuit properly recognized and applied the deferential standard of review set forth by § 2254(d).

2 This Court's "GVR" order was what Justice Scalia has suggested "might be called [a] 'no-fault V & R': vacation of a judgment and remand *without* any determination of error in the judgment below." *Stutson v. United States,* 516 U.S. 163, 178 (1996) (Scalia, J., dissenting) (emphasis in original); *see Gonzalez v. Justices of Mun. Ct. of Boston,* 420 F.3d 5, 7 (1st Cir. 2005).

3 The Third Circuit noted that in *Spisak*, this Court described the relevant standard to be a "substantial possibility" but concluded that since *Mills* termed the standard to be "substantial probability," this Court's use of the word, "possibility" was likely inadvertent. *Abu-Jamal-6,* 643 F.3d at 374 n.3. In *Boyde v. California,* 494 U.S. 370 (1990), this Court clarified that the relevant legal standard was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.* at 378. The Third Circuit found that a "'substantial probability', is neither more nor less than [the *Boyde* standard of] a 'reasonable likelihood' " and that it would utilize the "substantial probability" standard to be consistent with *Spisak. Abu-Jamal-6,* 643 F.3d at 375 n.4.

4 See *also* App. 1224-29.

5 *See State v. Gumm,* 653 N.E.2d 253, 260 (Ohio 1995); *State v. Jenkins,* 473 N.E.2d 264, 277 (Ohio 1984).

6 This is not entirely true. The word, "unanimous" does not appear on the verdict forms in *Spisak*.

7 While the *Spisak* form is radically different from the *Abu-Jamal* form, it is similar to the form in *Zettlemoyer v. Fulcomer,* 923 F.2d 284 (3d Cir. 1991), which the Third Circuit held did not violate *Mills. Id.* at 308. *See also infra* Section I. D. 2.

8 Petitioners contend that the Third Circuit's review of the state court's decision should have been "doubly deferential." Petition at 13 (citing *Cullen v. Pinholster,* 131 S. Ct. 1388, 1403 (2011); *Harrington v. Richter,* 131 S. Ct. at 770, 788 (2011)). Petitioners are mistaken - the "double deference" requirement governs only claims of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). *See Harrington,* 131 S. Ct. at 788; *Pinholster* at 1410-11. Furthermore, as detailed in the Procedural History and elsewhere above, the Third Circuit, in finding the state court's decision objectively unreasonable, properly identified and applied the deferential standard of review required by § 2254. Thus, Petitioners' assertion that the Circuit failed to accord appropriate deference to the state court decision, Petition at 13-14, 18, 19, 25, 29, is false. In order to accept Petitioners' arguments this Court would have to believe that the deference language repeatedly cited by the Circuit was a smokescreen to hide its bad faith decisionmaking.

9 It was also objectively unreasonable and contrary to this Court's precedent for the Pennsylvania Supreme Court to fault Mr. Abu-Jamal for offering "absolutely no evidence in support of this claim at the PCRA hearing." *Abu-Jamal-2,* 720 A.2d at 119. *See Mills,* 486 U.S. at 381 ("There is, of course, no extrinsic evidence of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions."); *Kelly v. South Carolina,* 534 U.S. 246, 256 (2002). Here, as in *Mills* and most cases challenging jury instructions, the claim is based upon "the verdict form and the judge's instructions." *Mills,* 486 U.S. at 381.

10 Petitioners contend that *Noland v. French,* 134 F.3d 208, 213-214 (4th Cir.), *cert, denied,* 525 U.S. 851 (1998), supports the state court's decision because it finds that a general unanimity instruction did not cause the jury to believe it had to be unanimous in finding mitigation. Petition at 26. Petitioners are wrong. In *Noland*, the instructions included an express unanimity requirement for aggravating circumstances (and the sentence), but the word "unanimously" was not used on the verdict form question regarding mitigating circumstances. Thus, *Noland* does not undermine the Third Circuit's finding here because in *Abu-Jamal*, no distinction was made between findings of aggravating and mitigating circumstances, and the verdict form required that both be unanimously found.

No. 08-8483

IN THE
Supreme Court of the United States

MUMIA ABU-JAMAL,

Petitioner,

v.

JEFFREY A. BEARD, SECRETARY
PENNSYLVANIA DIRECTOR OF CORRECTIONS, ET AL.,
Institutional Division,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society, formed to assist African Americans in securing their rights through the prosecution of lawsuits. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF has represented defendants in numerous jury selection cases before this Court including, *inter alia, Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana* 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in, *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El v. Dretke*, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Cockrell*, 537 U.S.322 (2003), *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992). In addition to its jury discrimination work in this Court, LDF submitted an *amicus* brief and presented oral argument in the court below in the instant matter.

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation or submission.

Because of its long-standing commitment to the elimination of racial discrimination in the criminal justice system and its experience litigating claims of discrimination in the jury selection process, LDF has an interest in Mr. Abu-Jamal's petition, which presents important issues regarding the application of *Batson* and its progeny, and believes its perspective would be helpful to this Court in evaluating the claim presented in this case.

SUMMARY OF ARGUMENT

Since 1986, this Court has consistently recognized and reinforced the principle that courts must promptly examine and eradicate all founded allegations of discrimination in the exercise of peremptory challenges in order to ensure a fair trial for the accused, to protect prospective jurors from discrimination, and to protect the integrity of the criminal justice system. Specifically, in *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, this Court has declared that a petitioner claiming discrimination in the exercise of peremptory challenges should only be subject to a modest initial burden of proof, and that courts evaluating such a claim should consider "all relevant circumstances" suggestive of discrimination. *Id.* at 96-97. By rigorously enforcing these two core dictates, this Court seeks to ensure that no relevant evidence of discrimination is ignored and that public confidence in the integrity of the criminal justice system is assured. *See id.* at 86-87; 103.

Amicus respectfully requests that this Court grant review of the decision below affirming the denial of Mumia Abu-Jamal's *Batson* claim. The Court of

Appeals declared that Mr. Abu-Jamal failed to establish a *prima facie* case of discrimination under *Batson* because he did not offer evidence "comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire." *Abu-Jamal v. Horn*, 520 F.3d 272, 290 (3d Cir. 2008). In reaching this conclusion, the panel majority rendered irrelevant substantial evidence strongly indicative of discriminatory jury selection presented by Mr. Abu-Jamal.

Consequently, the lower court ruling – which conflicts with decisions of the Courts of Appeals of the Second, Ninth and Eleventh circuits – undermines *Batson* by elevating the burden of proof to be met by litigants advancing *Batson* claims, and ignores numerous indicators of discrimination, thereby insulating credible allegations of racial discrimination in jury selection from constitutional scrutiny.

This Court should grant review and reaffirm *Batson*'s authority as a powerful tool for the eradication of racial discrimination in jury selection.

I. Experience Teaches, and this Court has Held, that a Light Initial Burden of Proof is Necessary to Assure that Jury Selection is not Infected by Racial Discrimination in the Exercise of Peremptory Challenges.

This Court's rulings appropriately recognize that American juries operate to "safeguard[] a person accused of crime against the arbitrary exercise of power by [a] prosecutor or judge." *Batson*, 476 U.S. at

86 (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). Racial discrimination in jury selection diminishes the jury's power to perform this critical function by subjecting a criminal defendant to trial before a biased tribunal and "undermin[ing] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 86-87 (citations omitted); *see also Miller-El*, 545 U.S. at 238("When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial,' . . .'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication.")(quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)). Discriminatory jury selection also unfairly exposes qualified citizens of color to public exclusion and a "brand" of inferiority. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (explaining that exclusion from jury service "is practically a brand upon [the potential juror], 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."). For each of these reasons, a prosecutor's exercise of race-based peremptory challenges is pernicious, shameful and repugnant to the very underpinnings of the Constitution in general and the Equal Protection Clause in particular. *See Batson*, 476 U.S. at 102 (Marshall, J., concurring).

In order to ensure that the criminal justice system is not corrupted by such discrimination, this Court in *Batson* declared that the use of peremptory challenges to exclude prospective jurors from an

individual case because of race is unconstitutional. Specifically, *Batson* lowered the "crippling,"*Batson*, 476 U.S. at 92, and "unworkable," *Miller-El*, 545 U.S. at 239, threshold burden of proof that had been imposed by this Court's earlier decision in *Swain*, *supra*.[2] *See also Georgia v. McCollum*, 505 U.S. 42, 47 (1992) (noting that *Batson* "discarded *Swain*'s evidentiary formulation."). This Court was compelled to act because petitioners claiming discrimination under *Swain* were overwhelmingly unable to meet its extremely high initial burden and, as a result, the "misuse of the peremptory challenge to exclude black jurors" became "common and flagrant." *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

In response, *Batson* declared "inadequa[te]" "any burden of proof for racially discriminatory use of peremptories that requires that 'justice . . . sit supinely by' and be flouted in case after case before a remedy is available." *Id.* at 102 (Marshall, J. concurring) (quoting *Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting)). It rejected the *Swain* formulation and directed courts confronted with claims of discrimination in the exercise of peremptory challenges to "undertake 'a sensitive inquiry into such circumstantial and direct

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[2]Under *Swain*, a petitioner alleging the discriminatory exercise of peremptory challenges had to demonstrate that "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Swain*, 380 U.S. at 223.

evidence of intent as may be available,'" *Id.* at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252, 266 (1977)) and established the now familiar three-part test:

> [f]irst, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the...court must determine whether the defendant has shown purposeful discrimination.

Miller-El, 537 U.S. at 328-29 (citations omitted).

In recognition of the fact that *Swain*'s insurmountable first step burden had the effect of insulating unlawful discrimination from constitutional scrutiny, the *Batson* court declared that a petitioner seeking to establish a *prima facie* case of discrimination need only

> show that he is a member of a cognizable racial group, [ ] and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. [T]he defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." [T]he defendant must

> show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (internal citations omitted).

This Court also made clear that there was no specific formula for establishing a *prima facie* case:

> [i]n deciding whether the defendant has made the requisite showing, *the trial court should consider all relevant circumstances. For example*, a 'pattern' of strikes against black jurors included in the particular venire *might* give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges *may* support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

Batson, at 96-97 (emphasis added).

To make absolutely certain that evidence of discrimination was no longer ignored, the *Batson* Court repeatedly directed judges evaluating claims of intentional discrimination in the exercise of peremptory challenges to consider all "circumstantial and direct evidence of intent as may be available," *Id.* at 93 (quoting *Arlington Heights*, 429 U.S. at 266), and explained that "any ... relevant circumstances [can] raise an inference that the prosecutor used that

practice to exclude the veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96. *See also Johnson*, 545 U.S. at 172 ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."); *Abu-Jamal*, 520 F.3d at 314 n.44 (Ambro, J., dissenting) ("were we to summarize *Batson* in layperson's terms, a defendant needs to raise, based on whatever evidence exists, a reasonable possibility that the prosecutor intended to exclude from the jury but one person because of race.").

Thus, in order to ensure that unlawful discrimination in the exercise of peremptory challenges is exposed and eliminated, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. ___, 128 S.Ct. 1203, 1208 (2008).

II. The Decision Below Inexplicably Departs from This Court's Teachings and Conflicts with Rulings of Other Courts of Appeal Respecting the Elements of a *Prima Facie* Case under *Batson*.

This Court has repeatedly addressed this subject and provided detailed guidance to lower courts about how *Batson* claims should be analyzed and decided. *See, e.g., Snyder, supra; Johnson, supra; Miller-El v. Dretke, supra; Miller-El v. Cockrell, supra.* It is ironic, then, that in the ruling below, the panel majority's opinion retreats from this Court's directive to undertake a broad review of all circumstances when assessing claims of discrimination in the exercise of peremptory challenges and instead improperly heightens the evidentiary burden on defendants

raising such claims. This departure from controlling precedent warrants plenary review by this Court, in order to assure that *Batson* remains an effective vehicle for uncovering and eradicating racial discrimination in the exercise of peremptory challenges.

In affirming the District Court's conclusion that Mr. Abu-Jamal failed to establish a *prima facie* case of discrimination under *Batson*, the panel majority failed to conduct the constitutionally required broad review of all relevant evidence of discrimination. Instead, the Court concluded that Mr. Abu-Jamal's purported failure to proffer "evidence from which to determine the racial composition or total number of the entire venire – facts that would permit the computation of the exclusion rate[3] and would provide important contextual markers to evaluate the strike rate"[4] was, in and of itself, fatal to his effort to set forth a *prima facie* case of discrimination under *Batson*. *Abu-Jamal*, 520 F.3d at 291-292. The panel majority conceded that "[t]here may be instances where a prima facie case can be made without evidence of the strike rate and exclusion rate," but offered no insight into how a petitioner might do so

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[3]The Third Circuit explained that the "exclusion rate" is "calculated by comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire." *Abu-Jamal*, 520 F.3d at 290.

[4]The "strike rate is computed by comparing the number of peremptory strikes the prosecutor used to remove black potential jurors with the prosecutor's total number of peremptory strikes exercised." *Abu-Jamal*, 520 F.3d at 290.

and summarily declared that Mr. Abu-Jamal did not meet this heightened and ambiguous standard. *Id.* at 292. Indeed, the majority acknowledged only in passing the non-statistical evidence of discriminatory intent that was presented by Mr. Abu-Jamal. *Id.* at 291 n.17.[5] By focusing solely on the exclusion rate and by giving Mr. Abu-Jamal's abundant evidence of discriminatory intent only "cursory consideration," the Court "misapplie[d] *Batson*, ... [by] fail[ing] to 'consider all relevant circumstances' of [the] case" and elevating *Batson*'s Step One burden. *Abu-Jamal*, 520 F.3d at 319 (Ambro, J., dissenting).

The Third Circuit's declaration that exclusion rate evidence is a necessary component of *Batson*'s *prima facie* case requirement reveals a fatal

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[5]Mr. Abu-Jamal relied on the following evidence in support of his claim of discrimination in the exercise of peremptory challenges: the fact that he is an African American man charged with killing a white police officer; the fact that Mr. Abu-Jamal was a prominent African American community activist; the trial prosecutor's pattern of peremptory strikes against prospective jurors of color; the trial prosecutor's statement of discriminatory intent; and evidence of a culture of discrimination, including that the Philadelphia District Attorney's Office trained its young prosecutors on how to exclude prospective jurors of color, testimony by Mr. Abu-Jamal's trial lawyer and other Philadelphia defense attorneys indicating that the Philadelphia District Attorney's Office routinely used its peremptory strikes to exclude African American prospective jurors, a study documenting significant exclusion of prospective jurors of color in Philadelphia capital trials, and the fact that at the time of his trial, state law authorized the use of race-based peremptory challenges. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 24-30, *Abu-Jamal v. Horn,* No. 08-8483 (Dec. 19, 2008) (filed on behalf of Petitioner, Mumia Abu-Jamal).

misunderstanding of the history and purpose of the *Batson* Step One burden. *Batson* recognized that *Swain*'s flawed and singular focus on systemic statistical evidence impeded the identification and eradication of discrimination in the exercise of peremptory challenges and contributed to public mistrust in the administration of justice. It therefore required courts to conduct a complete assessment of evidence of discrimination in the exercise of peremptory challenges and acknowledged that a single strike, accompanied by such evidence, can sustain the *prima facie* case threshold. *Batson*, 476 U.S. at 99 n.22.

The decision below directly contradicts *Batson* and threatens to dramatically *reduce* the pool of cases eligible for judicial review from those that raise an inference of discrimination based on any and all relevant circumstances to those that do so based on "exclusion rate" evidence. By leaving those cases that present credible and compelling non-statistical evidence of discrimination beyond the reach of the courts, the Third Circuit leaves serious questions about the fairness of the criminal justice system unanswered. In so doing, that court "'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." *Miller-El*, 545 U.S. at 238 (quoting *Powers*, 499 U.S. at 412).

This elevation of statistical analysis above any other evidence of discrimination not only conflicts with *Batson*'s goals, it also contradicts its express terms. *Batson* clearly indicates that a pattern of strikes and the prosecutor's questions and statements may establish a *prima facie* case of discrimination. *Batson*,

476 U.S. at 96-97. The ruling below that "exclusion rate" evidence is an indispensable component of a *prima facie* case fails to give effect to this guidance. Additionally, *Batson* expressly suggested that a finding of intentional discrimination would be proper even if based on the exclusion of a single prospective juror. *Batson*, 476 U.S. at 99 n.22. It is entirely unclear how one discriminatory peremptory challenge could be exposed and corrected under the logic of the panel majority in this case.

It is for these reasons that several other Courts of Appeals have rejected the suggestion that statistical evidence such as "exclusion rate" is a necessary component of a *Batson prima facie* case. *See Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998); *Turner v. Marshall*, 63 F.3d 807, 812 (9th Cir. 1995); *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989) (per curiam).

This Court should grant review to resolve this conflict among the Circuits and to insure the integrity of its consistent jurisprudence applying the bedrock ruling in *Batson*.

CONCLUSION

Amicus respectfully urges this Court to affirm *Batson*'s dictate that petitioners seeking to prove racial discrimination in the exercise of peremptory challenges must face a modest threshold burden of proof, and that courts considering such challenges must consider "all relevant evidence" of discrimination.

Respectfully submitted,

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March 5, 2009

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Nos 01-9014 and 02-9001

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

E-Transmission
Signature to follow

MUMIA ABU-JAMAL,
APPELLEE IN No. 01-9014 and *APPELLANT IN No. 02-9001*
v.
MARTIN HORN, PENNSYLVANIA DIRECTOR OF CORRECTIONS, *et. al.*
APPELLANT IN No. 01-9014 and *APPELLEE IN No. 02-9001*

BRIEF OF *AMICUS CURIAE* THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEE/CROSS-APPELLANT'S PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Dated: June 27, 2008

STATEMENT OF COUNSEL UNDER FRAP 35(b)(1) AND LAR 35.1

I express my belief, based upon reasoned and studied professional judgment, that the Panel Majority's ruling conflicts with *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, by contradicting *Batson*'s dictate that courts reviewing claims of discrimination in the exercise of peremptory challenges consider "all relevant circumstances," by undermining *Batson*'s conclusion that one discriminatory strike violates the Constitution, by failing to offer any recourse for compelling evidence of discrimination, and by improperly elevating *Batson*'s *prima facie* case burden. I also express my belief, based upon reasoned and studied professional judgment, that this case involves questions of exceptional importance, and that consideration by the full Court is necessary to secure uniformity of this Circuit's decisions.

Respectfully submitted,

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* files the following statement of disclosure: The NAACP Legal Defense & Educational Fund, Inc., is a nonprofit 501(c)(3) corporation and is not a publicly held company that issues stock.

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Brief of Amicus Curiae The NAACP Legal Defense and Educational Fund, Inc., In Support of Appellant Seeking Reversal, In Part, of the District Court's Order 4

A divided panel of this Circuit has affirmed the District Court's partial denial of habeas relief in this capital case. *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008). *Amicus Curiae* respectfully submits this brief in support of Mr. Abu-Jamal's *Petition for Panel Rehearing and Suggestion for Rehearing En Banc*. For the reasons stated in Mr. Abu-Jamal's submission and herein, rehearing should be allowed.[1]

INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation formed to assist African Americans in securing their rights through in-court litigation. LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We therefore represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Comm'n of Greene County* , 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El*

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[1]The Panel Majority's opinion is cited as "Panel Majority Op." followed by the Federal Reporter page number. Judge Ambro's dissenting opinion is cited as "Panel Dissent Op." followed by the Federal Reporter page number. Appellant/Cross-Appellee are referred to as "the Commonwealth." Appellee/Cross-Appellant is referred to by name. Transcripts of state court proceedings in Pennsylvania are known as "Notes of Testimony" and cited as "NT" followed by the date and page number. All emphasis is supplied unless otherwise indicated.

v. Dretke, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992). In addition to our jury discrimination work in the United States Supreme Court, LDF was counsel of record in *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005) and submitted an *amicus* brief and presented oral argument before the three-judge Panel in the instant matter. Given its expertise, LDF believes its perspective would be helpful to this Circuit in resolving the issues presented in this case.

STATEMENT OF THE CASE

In 1982, Mumia Abu-Jamal was convicted of first degree murder and sentenced to death by a jury for the shooting death of a police officer in Philadelphia, Pennsylvania. Mr. Abu-Jamal is entitled to an evidentiary hearing on his claim of discriminatory jury selection because he has "produc[ed] evidence sufficient to permit the [court] to draw an inference" that the trial prosecutor intentionally used his peremptory challenges to exclude prospective jurors of color. *Johnson*, 545 U.S. at 170. *See* Panel Dissent Op. at 318. In rejecting Mr. Abu-Jamal's claim, the Panel Majority undermined the purpose and intent of *Batson v. Kentucky* by marginalizing relevant and credible evidence of discrimination and thereby allowing apparent discrimination to go unchecked.

Mr. Abu-Jamal has presented substantial evidence indicating that his trial prosecutor intentionally used his peremptory challenges to exclude prospective jurors of color. Specifically, Mr. Abu-Jamal has asserted that he "is black, and therefore 'a member of a cognizable racial group;'" "that the prosecutor exercised peremptory challenges against black prospective jurors;" and that "'peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.'" Panel Dissent Op. at 315-316 (quoting *Batson*, 476 U.S. at 96).

Mr. Abu-Jamal has also established that "the prosecutor exercised 15 peremptory strikes, 10 of which were used to remove black venirepersons. That means that the 'strike rate' for blacks was 66.67%. As the Supreme Court has noted, '[h]appenstance is unlikely to produce this disparity.'" Panel Dissent at 316 (citing *Commonwealth v. Abu-Jamal*, No. 1357, 1995 WL 1315980, at *103 (C.P.Ct.Phila.Cty. Sept. 15, 1995); quoting *Miller-El*, 537 U.S. at 342)).

Mr. Abu-Jamal has additionally demonstrated that "this was a racially charged case,[2] involving a black defendant and a white victim;" that "[Mr.] Abu-Jamal was

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[2]As detailed in LDF's *amicus* brief before the Panel in this matter, in the months between the incident and the trial, local media continually highlighted the following racial aspects of the case: Mr. Abu-Jamal was an African-American community activist and a member of and/or advocate for African-American organizations; as a reporter, Mr. Abu-Jamal worked for African-American media

a member of the Black Panther Party;" that "he was charged with killing a police officer;" and that "this is a capital case." Panel Dissent Op. at 318-319.

Finally, Mr. Abu-Jamal has shown that the trial prosecutor's pattern of striking prospective jurors of color was consistent with that of prosecutors around the country before *Batson*,[3] was reflective of the common practices of the Philadelphia County

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outlets and/or focused on African-American issues; Mr. Abu-Jamal wore his hair in dreadlocks; Mr. Abu-Jamal demonstrated interest in and/or involvement with the Rastafarian religious-cultural movement; Mr. Abu-Jamal was born Wesley Cook but changed his name; prior to his arrest, Mr. Abu-Jamal made public statements regarding the rights and experiences of African Americans; African-American organizations established and/or supported a defense fund for Mr. Abu-Jamal; and members of the Philadelphia-based, African-American organization, MOVE, attended the court proceedings and supported Mr. Abu-Jamal's defense. *See Brief of Amicus Curiae The NAACP Legal Defense and Educational Fund, Inc., In Support of Appellant Seeking Reversal, In Part, of the District Court's Order* at 12-16 (citations omitted).

[3]*See Batson*, 476 U.S. at 103 (Marshall, J. concurring) ("Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant.").

District Attorney's Office,[4] and was expressly authorized by the Pennsylvania Supreme Court. *See Commonwealth v. Henderson*, 438 A.2d 951, 953 (Pa. 1981).

Although this combination of evidence amply "clear[s] the low *prima facie* hurdle of the *Batson* analysis," Panel Dissent Op. at 317, the Panel Majority concluded that Mr. Abu-Jamal could not set forth a *prima facie* case of discrimination absent documentation of the "'exclusion rate'" – a "compari[son of] the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire." Panel Majority Op. at 290. The Panel Majority reached this conclusion despite the fact that that *Batson*'s *prima facie* case burden is low, that *Batson* directs courts confronted with claims of discriminatory exercise of peremptory challenges to consider "all relevant

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[4] *See, e.g.*, NT 3/18/82 at 12 (counsel for Mr. Abu-Jamal noting that in his experience, the Philadelphia County District Attorney's Office consistently used its peremptory challenges to exclude African American prospective jurors); NT 7/28/95 at 208-09 (same); *Commonwealth v. Brown*, 417 A.2d 181, 186 (Pa. 1980) (defense attorney noting Philadelphia County District Attorney's Office's persistent use of peremptory challenges against African Americans); *Diggs v. Vaughn*, 1991 WL 46319, *1 (E.D. Pa. March 27, 1991) (crediting testimony by Philadelphia lawyers regarding Philadelphia prosecutors routinely using peremptory challenges to exclude African-Americans); *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring) (noting that an extensive study of peremptory strikes in Philadelphia found that "in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors" with the racial disparities being higher before *Batson* than after); *Wilson*, 426 F.3d at 655 (finding *prima facie* case and error based, in part, on videotaped training tape wherein a Philadelphia prosecutor "repeatedly advises [the] audience to use peremptory challenges ... in apparent violation of *Batson*.")

circumstances," *Batson*, 476 U.S. at 96, that this Circuit has previously declared that "*Batson* does not place the burden on the petitioner to develop a full statistical accounting" at the *prima facie* case stage, and that this Circuit "ha[s] relied on the strike rate alone despite the absence of other contextual markers" in finding *Batson* error. Panel Dissent Op. at 317, 318.

The Panel Majority summarily dismissed Mr. Abu-Jamal's substantial evidence of intentional discrimination with a conclusory footnote declaring that "Abu-Jamal has not demonstrated that these allegations make the Pennsylvania Supreme Court's decision objectively unreasonable." Panel Majority at 291 n.17. By focusing solely on exclusion rate and by giving Mr. Abu-Jamal's abundant evidence of discriminatory intent only "cursory consideration," the Panel Majority "misapplie[d] *Batson*, ... [by] fail[ing] to 'consider all relevant circumstances' of [the] case." Panel Dissent Op. at 319.

Amicus believes that rehearing is warranted because the Panel Majority's decision undermines and contradicts *Batson*.

ARGUMENT

Batson's Low *Prima Facie* Case Burden Can Be Met By Relying on "All Relevant Circumstances"

As detailed in LDF's prior *amicus* brief in this matter, the Supreme Court developed the *Batson* test to lower the "crippling,"*Batson*, 476 U.S. at 92, and "unworkable," *Miller-El*, 545 U.S. at 239, burden of proof that was imposed by *Swain v. Alabama*.[5] Because defendants alleging discrimination in jury selection were overwhelmingly unable to meet *Swain*'s extremely high threshold burden of proof, the "misuse of the peremptory challenge to exclude black jurors" became "common and flagrant." *Batson*, 476 U.S. at 103 (Marshall, J. concurring).

In order to curb these abuses, the *Batson* Court declared "inadequa[te]" "any burden of proof for racially discriminatory use of peremptories that requires that 'justice ... sit supinely by' and be flouted in case after case before a remedy is available." *Id.*, 476 U.S. at 102 (Marshall, J. concurring) (quoting *Commonwealth v. Martin*, 461 Pa. 289, 299 (1975) (Nix, J., dissenting)). Instead, *Batson* declared

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[5]Pursuant to *Swain*, a petitioner alleging the discriminatory exercise of peremptory challenges had to demonstrate that "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Swain*, 380 U.S. at 223.

that courts confronted with claims of discrimination in the exercise of peremptory challenges, "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). It therefore announced the now familiar three-part test: first a defendant must set forth a *prima facie* case of discrimination; second, if the defendant meets his burden, the prosecutor must offer race-neutral reason(s) for the challenged strike(s); third, the court must determine whether the defendant has proven intentional discrimination. *See Miller-El*, 537 U.S. at 328-29 (citations omitted).

In order to ensure that its test did not suffer from the infirmities of *Swain*, the *Batson* Court made clear that petitioners claiming discrimination could not be saddled with a heavy evidentiary burden. *See, e.g., Johnson*, 545 U.S. at 170. Thus, the Court declared that to set forth a *prima facie* case of discrimination, a petitioner need only

> show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (internal citations omitted)). The Court also made clear that there is no specific formula required for establishing a *prima facie* case:

> [i]n deciding whether the defendant has made the requisite showing, *the trial court should consider all relevant circumstances. For example*, a 'pattern' of strikes against black jurors included in the particular venire *might* give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges *may* support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

Batson, 476 U.S at 96-97. *See also* Panel Dissent at 314 n.44. Thus, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 128 S.Ct. 1203, 1208 (2008) (citing *Miller-El*, 545 U.S. at 239).

Consistent with this clear dictate, this Circuit has repeatedly rejected interpretations of *Batson* that place an undue burden on petitioners claiming discrimination in the exercise of peremptory challenges and has found that a variety of factors can satisfy *Batson*'s *prima facie* case burden. This Circuit has stated that "the question whether a *prima facie* case has been established must be judged based on all relevant circumstances; no rigid test need be satisfied; and in some cases, a *prima facie* case may be made out based on a single factor." *Brinson v. Vaughn*, 398 F.3d 225, 235 (3d Cir. 2005) (granting *Batson* relief and finding that a "stark pattern"

of peremptory challenges against black potential jurors was, in and of itself, "more than sufficient" to satisfy the *prima facie* case burden).[6]

This Circuit has also recognized that "there is no 'magic number or percentage [necessary] to trigger a *Batson* inquiry,' and that '*Batson* does not require that the government adhere to a specific mathematical formula in the exercise of peremptory challenges.'" Panel Dissent at 314-315 (quoting *Clemons*, 843 F.2d at 746). More specifically, this Circuit has declared that "[n]otably absent from the... *prima facie* case is any call for trial judges to seek ... [a] statistical accounting [of the race of the jury venire]" and that "requiring the presentation of such a record simply to move past the first stage in the *Batson* analysis places an undue burden upon the defendant." *Holloway v. Horn*, 355 F.3d 707, 728 (3d Cir. 2004) (finding a *prima facie* case based

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[6]*See also Wilson*, *supra* (finding a *prima facie* case – and *Batson* error – based on the trial prosecutor's disproportionate use of peremptory challenges to exclude prospective jurors of color and a videotape of the trial prosecutor making "a number of highly inflammatory comments implying that he regularly seeks to keep qualified African-Americans from serving on juries."); *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995) (finding a *prima facie* case and error after declaring that five factors relevant to a *prima facie* case are the number of racial group members in a panel, the nature of the crime, the race of the defendant and victim, a pattern of strikes against racial group members, and the prosecution's questions and statements during voir dire); *U.S. v. Clemons*, 843 F.2d 741, 748 (3d Cir. 1988) (noting that among the "relevant factors" to be considered in assessing the existence of a *Batson prima facie* case are "how many members of the 'cognizable racial group' ... are in the panel; the nature of the crime; and the race of the defendant and the victim").

solely on a pattern of strikes and noting that "a defendant's *Batson* objection ... can be based, for example, on a single strike accompanied by a showing that the prosecutor's statements . . . support an inference of discrimination.").

Thus, both the Supreme Court and this Circuit have made clear that *Batson*'s *prima facie* case burden is (and must be) low and can be satisfied through the presentation of "all relevant circumstances." *Batson*, 476 U.S. at 96.

The Panel Majority's Determination that a *Prima Facie* Case Requires "Exclusion Rate" Evidence Conflicts with *Batson* and Improperly Elevates the Step One Burden

The Panel Majority's pronouncement that "exclusion rate" evidence is a necessary component of a *prima facie* case contradicts *Batson*'s dictate to consider "all relevant circumstances" and its conclusion that one discriminatory strike violates the Constitution. It also undermines the intent of *Batson* by offering no recourse for cases presenting compelling evidence of discrimination. Because the Panel Majority has established a "burden of proof for racially discriminatory use of peremptories that requires that 'justice ... sit supinely by' and be flouted ... before a remedy is available," *Batson*, 476 U.S. at 102 (Marshall, J. concurring), this Court should grant rehearing and reverse.

First, the Panel Majority's declaration that Mr. Abu-Jamal cannot set forth a *prima facie* case of discrimination absent "exclusion rate" evidence flies in the face

of *Batson*'s express direction that courts should consider "any ... relevant circumstances" that raise an inference of discrimination, *Batson*, 476 U.S. at 96, and that "a 'pattern' of strikes against black jurors" as well as "the prosecutors questions and statements during *voir dire* examination and in exercising his challenges" can support a *prima facie* case of discrimination. *Batson*, 476 U.S. at 97. *See also Snyder*, 128 S.Ct. at 1208.

It also ignores the fact that both the Supreme Court and this Circuit have relied on a variety of factors – including the tracking of race by the trial prosecutor, a history of discrimination by the individual prosecutor and/or the prosecutor's office, jury shuffling, and comparative juror analysis – in evaluating *Batson* claims (and finding *Batson* violations) and the fact that neither court has suggested that any one particular category of evidence is required to successfully establish a *prima facie* case of discrimination. *See, e.g., Snyder*, 128 S.Ct. at 1211; *Miller-El*, 545 U.S. at 253-254, 263-264; *Wilson* 426 F.3d at 653; *Brinson* 398 F.3d at 225.

Thus, the Panel Majority's declaration that "exclusion rate" evidence is a necessary component of a *prima facie* case simply lacks constitutional support or circuit authority. With this decision, the Panel Majority subverts *Batson* by marginalizing evidence that the Supreme Court and this Circuit have expressly deemed to be relevant to the *prima facie* case assessment.

Second, by singling-out "exclusion rate" evidence and devaluing all other evidence of discrimination, the Panel Majority allows powerful indicators of racial discrimination to go unchecked and improperly raises *Batson*'s *prima facie* case burden. *See, e.g., Johnson*, 545 U.S. at 172 ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.").

As noted above, *Batson*'s initial burden of proof was intentionally set low because the imposition of a high standard allowed racial discrimination in jury selection to proliferate. *Batson*, 476 U.S. at 92-93. The Panel Majority's finding that without the "exclusion rate," the evidence upon which Mr. Abu-Jamal relied in order to establish an inference of discrimination – his own race (African-American), the race of the victim (white), the pattern of strikes against prospective jurors of color (10/15), Mr. Abu-Jamal's membership in the Black Panther Party, the fact that the decedent was a police officer, the fact that Mr. Abu-Jamal faced the death penalty, the fact that the trial prosecutor's pattern of striking prospective jurors of color was consistent with that of prosecutors around the country before *Batson*, the fact that the trial prosecutor's pattern of striking prospective jurors of color was reflective of the

common practices of the Philadelphia County District Attorney's Office, and the fact that the Pennsylvania Supreme Court expressly authorized the use of race-based peremptory challenges – was insufficient to meet the *prima facie* case threshhold unquestionably elevates *Batson*'s Step One burden because this Circuit has previously found error in cases presenting substantially less evidence of discrimination. *See, e.g., Simmons, supra.* By raising the bar in this way, the Panel Majority improperly insulates suspicious peremptory challenges from constitutional scrutiny.

Although the Panel Majority suggests that "there may be instances where a *prima facie* case can be made without evidence of the strike rate and exclusion rate," Panel Majority at 292, it's failure to articulate a method for determining which cases or combinations of facts overcome this vague hurdle renders the existence of this supposed gateway meaningless. The fact that Mr. Abu-Jamal's case – which, as previously noted, is *replete* with serious indicators of discriminatory intent – apparently fails to meet this unknown standard makes clear the extent to which the Panel Majority has raised the *prima facie* case bar and demonstrates that few cases will meet it.

Finally, the Panel Majority's single-minded focus on "exclusion rate" ignores the fact that *Batson* can be violated with a single strike. *Batson*, 476 U.S. at 99 n.22.

See also Snyder, 128 S.Ct. at 1208 (citing, *inter alia*, *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *Clemons*, 843 F.2d at 747). Under the Panel Majority's interpretation, there can be no meaningful recourse for a single discriminatory peremptory challenge.

CONCLUSION

En banc and panel rehearing are appropriate for the reasons stated herein and in Mr. Abu-Jamal's submission to this Circuit.

Respectfully submitted,

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CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Christina A. Swarns, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Word Count

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because it contains 5673 words, excluding the parts of the brief exempted by Fed. R.App.P. 32(a)(7)(B)(iii).

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