No. 05-2358

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: UNITED STATES OF AMERICA,

Petitioner,

vs.

DARRIL GREEN; BRANDEN MORRIS; JONATHAN HART; and EDWARD WASHINGTON,

Defendants/Respondents

Petition for A Writ of Mandamus from An Order
Entered in the United States District Court
For the District of Massachusetts

BRIEF OF *AMICI CURIAE* THE BOSTON BAR ASSOCIATION, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN OPPOSITION TO THE GOVERNMENT'S PETITION FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state as follows:

The Boston Bar Association has no parent corporations and has issued no publicly traded stock.

The Committee for Public Counsel Services has no parent corporations and has issued no publicly traded stock.

The National Association of Criminal Defense Lawyers has no parent corporations and has issued no publicly traded stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

PROCEDURAL RULES

OTHER AUTHORITIES

CONSENT TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Fed. R. App. P. 29(a), *amici curiae* have obtained the consent of all parties to file this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Boston Bar Association ("BBA"), the Committee for Public Counsel Services ("CPCS"), and the National Association of Criminal Defense Lawyers ("NACDL") submit this brief *amici curiae* in support of Defendants/Respondents and in opposition to the Government's Petition for a Writ of Mandamus.

Boston Bar Association

The mission of the BBA, founded by John Adams in 1761, is to "advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large." The BBA, calling on the vast pool of legal expertise of its members, serves as a resource for the judiciary, as well as the legislative and executive branches of government. The BBA's interest in this case arises from its mission to facilitate access to justice. The potential exclusion of African Americans from the jury selection process in this case creates the risk that these defendants will be deprived of their right to a jury pool representing a fair cross-section of the community. Social science data demonstrates that African American jurors offer unique perspectives and contributions in the determination

of guilt and exposure to the death penalty in capital cases. Moreover, any systemic defect which results in underrepresentation of African Americans on juries diminishes access to justice for all criminal defendants. The potential exclusion of any segment of the community from any aspect of the legal process directly conflicts with the BBA's mission and undermines confidence in the judicial system as a whole. Because the BBA is committed to maintaining the strength and fairness of the judicial system, it supports the remedy ordered by the District Court in this case.

Committee for Public Counsel Services

CPCS is the Massachusetts Public Defender agency, statutorily mandated to provide counsel for indigent defendants in criminal proceedings. Mass. Gen. L. ch. 211D, §§1-2, 5 (2004). CPCS joins this brief as *amicus curiae* to emphasize the importance in criminal proceedings of a jury composed of persons representing a cross-section of the community. Criminal defendants have a right to a jury trial under the Sixth Amendment to the United States Constitution and under Article 12 of the Massachusetts Declaration of Rights. The right to a fairly-constituted jury also belongs to members of the public, each of whom is equally entitled to serve on a jury. Juries composed of a cross-section of the community bring knowledge of their diverse cultures and values to the critically important task of determining whether a person charged with a crime is innocent or guilty. Exclusion of certain

communities, whether intentional or accidental, undermines the reliability of jury verdicts and does a disservice to us all.

National Association of Criminal Defense Lawyers

NACDL is a non-profit corporation with more than 12,200 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because criminal defendants are entitled to select a jury from a representative cross-section of the community. Underrepresentation of any cognizable group in the jury pool undermines the legitimacy of the criminal justice system and creates a disadvantage for all defendants and society as a whole.

ARGUMENT

If convicted of the charged offenses, Defendants face the ultimate punishment—death. Under the current system, Defendants are more likely to be convicted and to receive the death penalty based on two realities, outside of their control and totally unrelated to the facts of the case. One, Defendants—young African American males[1]—are almost certain to have an all-white jury. Two, it is well established that all-white juries are more likely than mixed juries to render guilty verdicts and more likely to impose the death penalty against African American defendants. The situation faced by Defendants is unfair, but not unusual. It results from a systemic problem with the jury process in the Eastern Division of the United States District Court for the District of Massachusetts ("Eastern Division") that precludes a jury chosen from a proportional cross section of the community, and, therefore, in all likelihood will deny Defendants the benefit of an African American juror's perspective. The flaws in the jury selection process will inevitably cast doubt on the legitimacy of any potential verdict in this case and, more generally, on the legitimacy of the judicial system in the Eastern Division. The District Court recognized the gravity of the situation:

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[1] Although Defendants in this case are African American, the problems raised by the lack of representation of African Americans in the jury wheel are not limited to cases involving any particular minority. The exclusion of this large and identifiable group destroys the possibility for all defendants, regardless of their race, that juries will reflect a representative cross section of the community.

> The stakes could not be higher. Undermining the right to a representative jury casts a pall over all jury trials in our District. The issue is particularly important for the capital jury, not only because of the stakes, but also because of that jury's unique role. It renders not simply a factual judgment—guilt or innocence—but an ethical judgment expressing the conscience of the community.

Memorandum and Order Re: Defendants' Challenge to the Composition of the Jury Venire, issued Sept. 2, 2005 ("Order") at 4 (internal quotations and citations omitted).

Just as the law requires, at a minimum, that the jury pool provide the potential for African Americans to be proportionally represented on Eastern Division juries, sound policy considerations, supported by critical social science evidence, counsel that African Americans must be provided the opportunity to participate in equal proportion in the jury process, especially when the potential sentence is death. The race of individual jurors and the racial composition of the jury play a role in the capital sentencing decision. People of different racial backgrounds tend to differ substantially and significantly on how they view crimes and defendants, no doubt shaped by their personal experiences. These different personal experiences lead black and white jurors to hold fundamentally different assumptions about the causes of crime and about the trustworthiness of the criminal justice process. Without the presence of both of these perspectives fairly represented on the jury wheel, thereby creating the potential for both perspectives

on Eastern Division juries, Defendants will face a jury that does not accurately reflect a representative cross section of the community (which includes 7% African Americans) and will lose the unique and valuable perspective that African American jurors bring to the jury room.

The remedy ordered by the District Court is a mere baby step in the direction of fairness. It does not guarantee that Defendants will face a fairly-constituted jury. Far from it. The remedy is little more than a modest gesture. If anything, it represents the bare minimum required by law. The remedy attempts to ensure that neighborhoods in the Eastern Division actually receive proportionate numbers of valid summonses so that all residents of the Eastern Division have the same chance of being called to participate in the jury process. It creates the potential for a modicum of fairness for the instant Defendants and, more generally, it may even help to enhance the legitimacy of the judicial system in the eyes of African Americans.

For these reasons, *amici curiae* stand in opposition to the Government's Petition for Writ of Mandamus and urge this Court to deny the Petition and to permit the District Court to enact the remedies ordered by Judge Gertner and approved by Chief Justice Young.

I. AFRICAN AMERICAN DEFENDANTS IN THE EASTERN DIVISION WILL MOST LIKELY FACE AN ALL-WHITE JURY.

A. African Americans Are Grossly Underrepresented in the Eastern Division Jury Wheel, and, Consequently, Grossly Underrepresented on Juries.

The District Court found, and nobody appears to dispute, that African Americans are undercounted and underrepresented on the current jury wheel. Seven percent of Eastern Division residents are African American, yet African Americans make up roughly 3% or less of the jury wheel. Order at 6. Thus, over one half of African American residents in the Eastern Division are never even given a chance to serve on a jury. Estimates (undisputed by the Government) suggest that, with a fully representative wheel, well over half of the juries in the Eastern Division (approximately 58%) would include African American jurors. Order at 41. By contrast, less than 30% of juries impaneled based on the current underrepresentative wheel would include even a single African American juror. Order at 41. As a result, Defendants are "likely to be tried before all white or largely all white juries . . . [who] could decide whether they live or die." Order at 1. This result flies in the face of the Supreme Court's admonition that the absence from the jury room of a large and identifiable segment of the community removes "from the jury room qualities of human nature and varieties of human experience...and deprives the jury of a perspective on human events that may have

unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-4 (1972) (Marshall, J.).

B. The Undercounting of African Americans on the Jury Wheel Has Been A Long-Standing Recognized Problem in the Eastern Division.

The underrepresentation of African Americans on the Eastern Division jury wheel, and, as a result, in the jury room, is nothing new to anyone who has practiced in the Eastern Division. Indeed, the issue has been litigated several times, and each time, the gap between the number of African American residents on the jury wheel and the number of African American residents in the Eastern Division has grown wider. *See, e.g., United States v. Royal*, 174 F.3d 1 (1st Cir. 1999) (4.86% of Eastern Division residents were African American, but only 1.89% on jury wheel); *United States v. Hafen*, 726 F.2d 21 (1st Cir. 1984) (3.73% of Eastern Division residents were African American, but only 1.714% on jury wheel). Judge Gertner acknowledged "the District of Massachusetts has wrung its collective hands over the problem of minority representation on its juries for over a decade." Order at 1. In this case, however, the disparity is particularly troubling because Defendants face the death penalty, and both common sense and statistical data dictate that all-white juries are more likely than mixed juries to convict and to impose the death penalty on African American defendants.

II. AFRICAN AMERICAN DEFENDANTS ARE MORE LIKELY TO BE CONVICTED AND TO BE SENTENCED TO DEATH IF THEY FACE AN ALL-WHITE JURY.

Defendants are more likely to be convicted and sentenced to death because the Eastern Division jury wheel (and thus the jury ultimately impaneled) underrepresents African American residents by a factor of at least 50%. The Supreme Court has acknowledged that "[m]ore subtle, less consciously held racial attitudes" are apt to influence jurors' decisions, even where overt racial prejudice is absent. *Turner v. Murray*, 476 U.S. 28, 36 (1986). This issue is particularly compelling in a capital murder case, where the jurors are called upon to decide whether defendants should live or die, a fundamental moral judgment that goes far beyond the jury's usual role as fact finder.[2] *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (rev'd on other grounds) (capital sentencing decision is "reasoned moral response"); *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) (capital sentencing decision requires "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves"). Unfortunately, under the current system, the unique discretionary nature of a jury deciding punishment in a capital murder case "gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to fact-finding." *Turner*, 476 U.S. at 36

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[2] *See generally*, William J. Bowers, et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON PAST, PRESENT, AND THE FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker et al., eds. 2d edition 2003) (hereinafter, "*Legal Fiction*").

n.8. "[T]he risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sentencing jurors must face involve far more subjective judgments than when they are deciding guilt or innocence." *Id.* at 38 n.12.

A. Social Science Data Demonstrates that White Jurors are More Likely to Convict and to Impose the Death Penalty on African American Defendants.

Social science research examining the role of real jurors in actual capital cases shows a wide and meaningful disparity in conviction and sentencing decisions, generally speaking, based on the racial composition overall of the jury and on the race of individual jurors. William J. Bowers, et al, *Death Sentencing In Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001) (hereinafter, *"In Black and White"*). Perhaps not surprisingly, "the perspectives of blacks on crime and the criminal justice system diverge widely from those of whites." *Id.* at 180 This conclusion is based on data collected by the Capital Jury Project ("CJP"),[3] created

[3] The nationally renowned social scientist, Professor William J. Bowers, Principal Research Scientist at the College of Criminal Justice, Northeastern University, has served as the CJP's founder, director, and Principal Investigator since its inception and is the lead author of *In Black and White.* Dr. Bowers has written numerous articles and texts on capital punishment and on jury decision-making in capital cases, including EXECUTIONS IN AMERICA (1974) and LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 (1984), which have been cited with approval in more than half a dozen United States Supreme Court decisions. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988) (concluding death sentence for person who committed crime when under age of 16 unconstitutional) (O'Connor, J., concurring); *Woodson v.*

in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation. From its inception, the mission of the CJP has been to gather and to present empirical data to inform the Supreme Court about the reality of how actual jurors in actual capital trials make decisions.[4] *In Black and White* is the first comprehensive review of racial bias in capital sentencing based on the CJP data.[5]

The District Court acknowledged the role of this data: "[e]mpirical research indicates that there are differences in the way African-American defendants are treated as the proportion of African-Americans on juries increases." Order at 15 n.19. For example, the data shows differences in the way white and black jurors interpret and perceive evidence:

> Whites are apt to make pro-prosecution interpretations of evidence, especially when defendants are black and particularly on highly determinative issues such as eyewitness identification, probable cause, and resistance to arrest. Blacks may be more critical in their interpretation of factual questions presented at trial, particularly when police testimony is involved. And in

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North Carolina, 428 U.S. 280, 291 n.24 (1976) (concluding mandatory death sentence unconstitutional).

[4] The jurors that participated in the CJP study were members of capital juries and, as such, were "death-qualified." Thus, their answers likely were not biased to fit an anti-death penalty agenda.

[5] *See also Legal Fiction*, 449-462 (discussing CJP data with respect to race linked punishment decision-making); William J. Bowers, et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DePaul L.R. 1497 (2004) ("*Crossing Racial Boundaries*"); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 30 Crim. L. Bull. 51, 75-80 (2003) (discussing CJP data with respect to influence of race on capital sentencing decision) ("*Still Singularly Agonizing*").

> capital cases, blacks may be more sympathetic than white jurors to mitigating evidence presented by a black defendant with whom they may be better able to identify and empathize, and whose background and experiences they may feel they understand better than do their white counterparts.

In Black and White, at 180-81.

According to the CJP data, "[b]lack and white jurors [become] polarized on punishment—whites for death and blacks for life—over the course of the trial." *Crossing Racial Boundaries*, at 1501. The presence of a single black male on a jury is strongly associated with the imposition of a life sentence, while the dominance of white males on a jury is strongly associated with the imposition of a death sentence. *Id.*, at 1501; *see also, generally,* Joe Soss, et al., *Why Do White Americans Support the Death Penalty*, 65 J. Pol. 397 (2003). For example, in cases in which the defendant is black and the victim is white, all-white juries imposed the death sentence in 75% of the cases, while juries in the same types of cases with at least one black male imposed the death penalty 42.9% of the time. *In Black and White*, at 193 & n.104. Likewise, in cases in which both the defendant and victim were black, the presence of one or two African American male jurors reduced death sentence outcomes by 24%. *Id.* at 195.

B. African American Jurors, Generally Speaking, Have Different Perspectives on at Least Five Issues That Result in African American Jurors Being Less Likely to Impose the Death Penalty.

The CJP data reveal different perspectives between black and white jurors in at least five kinds of important considerations involved in the jury's decision making process: (1) credibility of minority witnesses; (2) lingering doubts about defendants' guilt; (3) impressions of defendants' remorsefulness; (4) perceptions of defendants' future dangerousness; and (5) consideration of mitigating evidence.

1. African Americans are More Likely to Believe Minority Witnesses are Credible.

Black and white jurors interpret the same evidence and the same testimony differently. Interviews with jurors as part of the CJP showed that:

> Where a white juror sees black witnesses as faking or 'putting on,' a black juror sees them as sincere. Where a white female juror interprets the black defendants demeanor as hard and cold, a black male juror sees him as sorry. Where a white female juror sympathizes with the anguish of the black defendant's mother, she blames the defendant for it and rationalizes that his execution will be in his mother's best interest. The black juror in the same case sees the defendant as genuinely sorry and wishes he had stood up for life.

In Black and White, at 257-58. Similarly, in rape cases, white jurors are less willing to believe the testimony of black victims, where largely middle class white jurors seem to harbor stereotypes about female black victims. Gary D. Lafree, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT,

154-55, 200-01 (1989). These divergent non-evidentiary views of black and white jurors permeate the decision of guilt and innocence as well as whether to impose the death penalty.

2. African Americans Are More Likely to Have Lingering Doubts About Defendants' Guilt.

African American jurors are more likely to have lingering doubts about the defendant's guilt, which make them more reluctant to impose a death sentence. *In Black and White* at 203-11. African American jurors interviewed as part of the CJP reported "being generally less willing to believe that the capital sentence process is free from error, and they were more concerned than their white counterparts about the possibility that the jury will make mistakes in the punishment decision." *Id.* at 211. Such lingering doubts were "very important" in the punishment decision for nearly a quarter of African American jurors (~24%), whereas less than 6% of white jurors found doubt to be "very important" in their decisions. *Id.* at 205. And African American jurors' lingering doubts about defendants' guilt are not limited to minority defendants. In fact, by a margin of 12.8% to 4.7%, African American jurors tend to have more lingering doubts about white defendants than do white jurors. *Id.* These findings are consistent with numerous studies showing that blacks are far more likely than whites to distrust the criminal justice system, regardless of the defendant's race, a fact that likely stems

from the sordid history in the United States of lynchings, sheriff's posses, and wrongful convictions of African Americans by all-white juries. *Id.* at 211.

3. African Americans are More Likely to View Defendants as Remorseful.

Black jurors are generally more likely than their white counterparts to see defendants, regardless of race, as remorseful. In contrast, white jurors are particularly unlikely to see black defendants as remorseful. *Id.* at 216. The starkest numbers are seen when defendants are black and the victims are white. In such cases, 64.7% of African American jurors feel the African American defendant was "sorry for what he did," while only 17.3% of white jurors feel the same way. *Id.* at 213. Disparate impressions of defendants' remorsefulness reflect African American jurors' greater likelihood of identifying with and feeling empathy and mercy toward defendants. *Id.* at 216-18. Black male jurors in particular are more likely to find redeeming qualities in defendants and to see basic virtues or redemptive values where others do not. This tendency among black male jurors "discourages the dehumanization of the defendant thought to be crucial for a death verdict." *Crossing Racial Boundaries*, at 1510-11. The CJP researchers posit that white jurors may be especially insensitive to remorse of black defendants because whites do not identify with African Americans' circumstances and cannot imagine themselves in the shoes of black defendants or their families. *In Black and White*, at 216.

4. African Americans Place Less Weight on Defendants' Future Dangerousness as an Aggravating Factor.

Black and white jurors differ about their perceptions of defendants' future dangerousness, which results in differing views about death versus life in prison. *Id.* at 219-26. The data shows that white jurors "appeared to believe that black defendants are more dangerous than white defendants." *Id.* at 222. Moreover, the issue of future dangerousness played a significant role in the white jurors' punishment decisions. A sizable 42.9% of white jurors, in contrast to a mere 8% of African American jurors, said dangerousness made them "much more likely" to vote for death. *Id.* at 225 This distinction is important because, although the Supreme Court has attempted to prevent jurors from voting for the death penalty based on false assumptions about available non-death sentencing alternatives, *see Shafer v. South Carolina*, 532 U.S. 36, 48 (2001); *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994), the CJP data demonstrates that this limitation is not working in practice. *Still Singularly Agonizing*, at 54. Moreover, culturally rooted racial stereotypes may tend to demonize and dehumanize African Americans accused of lethal violence by portraying them as especially dangerous. *In Black and White*, at 219. Accordingly, whenever there is an impression among jurors (whether accurate or not) that a defendant may be released before completing a "life" sentence, white jurors are more likely to impose death.

5. African Americans are More Likely to Consider Mitigating Evidence.

The Supreme Court requires "full consideration of evidence that mitigates against the death penalty [] if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime." *Penry*, 429 U.S. at 328 (internal quotation and citation omitted) (emphasis in original). But white jurors as a group are much less receptive to such evidence than their black counterparts. *Crossing Racial Boundaries,* at 1515. The CJP data shows that "white jurors often appear to be unable or unwilling to consider the defendant's background and upbringing in context." *In Black and White*, at 260. Moreover, what black jurors see as mitigating circumstances, white jurors often see in a contrary light. *Id.*, at 260-61.

For example, in a case study of an all white jury that sentenced an African American man to death, many of the white jurors made up their minds about the punishment—the death penalty—before the jury even reached a verdict on guilt, let alone heard any evidence of mitigation during the punishment phase. *Id.* at 1519-21. In another case, a minority juror explained: "[the white jurors] were not considering what background [the defendant] came out of. They were looking at it from a white middle-class point of view. . . . and you have to put yourself into that black lifestyle. . . . We had to look at it like the lifestyle he came out of, the background he came out of." *Id.*, at 251. White jurors' failure to consider

mitigating evidence in the same potentially empathetic light as black jurors further increases the likelihood that an all-white jury would sentence Defendants to death.

III. THE PROPOSED REMEDY MOVES THE EASTERN DISTRICT IN THE DIRECTION TOWARD ENSURING A FAIR JURY SELECTION PROCESS.

A. The District Court's Remedy is a First Step in Creating the Opportunity for a Jury Representative of a Proportional Cross Section of the Community

The narrowly tailored remedy order by the District Court in this case is a tiny step toward remedying the systemic deficiencies that exclude one half of African American residents in the Eastern Division from inclusion in the jury wheel, and ultimately, in the jury room. The long term remedies proposed by Judge Gertner and supported by Chief Judge Young further the goal that African Americans be represented fairly and have the opportunity to participate in the judicial process. These remedies are a bare minimum requirement here because they increase the potential for proportional participation of African Americans in the jury process and increase the chance that the life and death decisions that will be made about these Defendants will be made by a representative cross section of Defendants' community.

The proposed remedy creates at least a slim possibility that Defendants will face a jury composed of a cross-section of the community, a community that includes at least 7% African Americans. The remedy aims to ensure that each

neighborhood will receive a proportionate number of valid summonses, thereby leveling the chance and opportunity for each resident, including the 7% of the African Americans residing in the Eastern Division, to participate in the jury process. Of course, the remedy is not a guarantee that any African Americans will be impaneled as jurors in this case or in any case. By Defendants' own numbers, a representative jury wheel would include African Americans on only approximately 58% of the Eastern Division juries. Order at 41. Nonetheless, this is a necessary and legally mandated first step in remedying a systemic and ingrained deficiency in the jury process that works to the detriment of African American defendants and, ultimately, all residents of the Eastern Division.

B. The Proposed Remedy is a Step Toward Restoring Credibility and Legitimacy of the Judicial System Among African Americans.

The exclusion of African Americans from proportional representation in the jury process not only deprives Defendants of a jury selected from a representative cross section of the community, it also "denies the class of potential jurors the privilege of participating equally in the administration of justice." *Peters*, 407 U.S. at 499 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). It should come as no surprise that African Americans are more likely to distrust the judicial process, and particularly the capital decision process, when all-white, or largely all-white, juries time and time again are deciding the fate (including life or death) of African American defendants in the Eastern Division. *See* Order at 5 n.8

("Among minorities, a perception that they are not being called to serve in sufficient numbers exacerbates existing suspicions about whether the justice system works for minorities or is stacked against them.") (internal citations and quotations omitted); *see also In Black and White*, at 211. When one half of African American residents are excluded from the jury wheel and not even invited to participate in the judicial process as jurors, the legitimacy of the entire judicial process is called into question. The remedy ordered by Judge Gertner is needed to help the judicial system attain credibility and legitimacy in the Eastern Division among African Americans.

CONCLUSION

For the reasons set forth above, the Government's Petition for a Writ of Mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, Julie M. Wade, counsel for the Boston Bar Association, the Committee for Public Counsel Services, and the National Association of Criminal Defense Lawyers (collectively, "*Amici Curiae*"), hereby certifies pursuant to Fed. R. App. P. 32(a)(7)(C) that the Brief of *Amici Curiae* the Boston Bar Association, the Committee for Public Counsel Services, and the National Association of Criminal Defense Lawyers, In Opposition to the Government's Petition for a Writ of Mandamus complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word count of Word for Windows, the word-processing system used to prepare the brief, the brief contains 4820 words.

Julie M. Wade

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