COLORADO SUPREME COURT Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED: July 18, 2023 3:57 PM FILING ID: E5D20A1859F29 CASE NUMBER: 2022SC313
CERTIORARI TO THE COLORADO COURT OF APPEALS Case No. 2019CA0340 Opinion by Fox, J. Dailey, J., concurring in judgment Schutz, J., dissenting **DISTRICT COURT, COUNTY OF GILPIN** District Court Judge: The Hon. Dennis J. Hall District Court Case No. 2017CR193	
Petitioner: REGINALD KEITH CLARK **v.** **Respondent:** THE PEOPLE OF THE STATE OF COLORADO	**▲COURT USE ONLY ▲**
***Attorneys for Amicus Curiae, in Support of Respondent*:** William E. Trachman, Atty. Reg. No. 45684 James L. Kerwin, Atty. Reg. No. 57545 MOUNTAIN STATES LEGAL FOUNDATION 2596 S. Lewis Way Lakewood, CO 80227 Phone: (303) 292-2021 Fax: (877) 349-7074 Email: wtrachman@mslegal.org Email: jkerwin@mslegal.org	Case No. 22SC313
BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT THE PEOPLE OF THE STATE OF COLORADO	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2) & (3), C.A.R. 32, and C.A.R. 29.

This brief complies with the word limits set forth in C.A.R. 29(d) (an *amicus* brief may be no more than one-half the length authorized for a party's principal brief). It contains 4,472 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ William E. Trachman
William E. Trachman

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Mountain States Legal Foundation submits this *amicus curiae* brief in support of the Respondent, The People of the State of Colorado.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit public interest law firm based in Colorado. MSLF is dedicated to the defense and preservation of individual liberties: the right to equal protection of the laws, the right to speak freely, and the need for limited and ethical government. For decades, MSLF attorneys have litigated the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Masterpiece Cakeshop, Inc. v. Scardina*, No. 2023SC00116 (Filed Apr. 27, 2023) (granting MSLF and another organization leave to participate as *amici curiae* on petition for certiorari) (petition for certiorari pending); *Knipp v. Tri Cnty. Health*, No. 2022SC000647, 2022 WL 17586338 (Colo. Dec. 12, 2022) (granting MSLF leave to participate as *amicus* on petition for certiorari) (certiorari denied).

To secure these interests, MSLF files this *amicus curiae* brief.

FACTUAL BACKGROUND

In this case, after the topic of the Petitioner's race was raised at *voir dire*, another juror questioned the lack of diversity within the courtroom. Several minutes later, the following interaction took place with Prospective Juror K (Juror K):

> JUROR K: You've said a lot, and I'm trying to think through each thing ... I apologize for some of my thoughts.
>
> DEFENSE COUNSEL: Don't apologize.
>
> JUROR K: The diversity and stuff, yes, it's obvious there's a Black gentleman over there. This is Gilpin County. I moved to Gilpin County. I didn't want diversity. I want to be diverse up on top of a hill. That's—I hear the things, that diversity makes us stronger and things like that. I don't quite believe it in life from what my personal experiences are. And I can't change that. I can look and judge what is being said by your side and their side and be fair, but I can't change that—when I walked in here seeing a Black gentleman here. And I can't say that the prosecutor has a leg up on this or something until I hear what's happened.

People v. Clark, 512 P.3d 1074, 1077 (Colo. App. 2022) (underline added) (internal brackets omitted).

From this exchange, the Colorado Court of Appeals concluded that Juror K "moved to Gilpin County because he 'didn't want diversity'—the obvious inference being that he moved to Gilpin County to distance himself from nonwhite people." *Id.* at 1078.

Of note, the Colorado Court of Appeals rejected the trial court's previous finding below, that mere opposition to the concept of "diversity" did not constitute *per se* evidence of racial animus. *Accord id.* at 1077 ("[H]e didn't think that diversity was a good thing, or something to that effect. But that's a political view, I think.") (quoting the trial court judge). With that, Petitioner used one of his peremptory challenges to strike Juror K.

But the trial court judge was correct to reject the idea that opposition to the concept of diversity constitutes *per se* evidence of racial animus. While it is certainly possible that Juror K would have acknowledged his own racial animus upon further questioning, the appellate court failed to grapple with the underlying merits of the trial court judge's conclusion, and instead concluded, by *ipse dixit*, that Juror K harbored racial animus against the Defendant based on his opposition to the broad concept of "diversity."

SUMMARY OF THE ARGUMENT

To the extent that the Court writes an opinion regarding racial animus generally, it should avoid repeating the error of the Colorado Court of Appeals, and refrain from using language implying that mere opposition to diversity as a concept is evidence that a potential juror is racially biased, and thus precluded from jury service.

Of course, it cannot be disputed that prospective jurors who harbor racial animus against criminal defendants may not serve. *See Pena-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2240–41 (2019) ("[T]he central concern of the Fourteenth Amendment was to put an end to governmental discrimination on account of race.") (internal quotation marks

omitted); *see also Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2023 WL 4239254, at *25, 31 (Jun. 29, 2023) ("SFFA") (Thomas, J., concurring) ("History has vindicated Justice Harlan's view …").

Here, *amicus* fully condemns racial animus of all forms. *Amicus* also fully embraces the constitutional principle that every individual, including every criminal defendant, is entitled to equality before the law. Yet, in this case, neither the Petitioner nor the Respondent addresses the underlying question of whether the juror in question displayed unambiguous evidence of racial animus. While some of Juror K's statements certainly should have been probed further—in particular, whether his comment about moving to Gilpin County specifically related to harboring personal racial animus against non-Caucasians—the rest of his comments are somewhat of a hash. He "didn't want diversity." Yet, he then stated that he "want[ed] to be diverse on top of a hill." Then, he again confused the situation by stating in broad terms that he didn't believe "that diversity makes us stronger."

Against this backdrop, the trial court correctly concluded that an individual's mere opposition to "diversity"—and even, perhaps, a strong desire to avoid whatever one's personal concept of "diversity" is—does not exhibit *per se* racial animus. And that is correct; reasonable and tolerant people of good faith can reject vague notions of diversity based on the strong negative connotations associated with the word, as

well as related words. For that reason, this Court should not presume to draw a straight line between the rejection of diversity and outright racism.

Indeed, if that were the rule, countless Colorado citizens would likely be barred from serving on any jury in the state, ever.

ARGUMENT

I. There are Race-Neutral Reasons to Justify Opposition to the Concept of Diversity.

As Justice Clarence Thomas recently pointed out in oral argument in the *SFFA* cases, the concept of "diversity" lacks a definite meaning:

> Justice Thomas: I've heard the word "diversity" quite a few times, and I don't have a clue what it means. It seems to mean everything for everyone.

Transcript of Oral Argument at 71:13–16, *Students for Fair Admission v. University of North Carolina* (No. 21-707); *id.* at 74:13–15 ("I guess I don't put much stock in [the University of North Carolina's arguments in support of diversity] because I've heard similar arguments in favor of segregation too.").[1] It is thus extremely difficult to assign a concrete meaning—when a potential juror is answering questions posed during *voir dire*—merely by reference to opposition to diversity, which lacks a universally agreed upon definition.

Moreover, given that schools and other institutions have often used the word

[1] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_m64n.pdf

"diversity" to justify treating individuals differently based on race, it may be that an individual's opposition to the concept of diversity can sometimes be evidence of a lack of racial animus. *See SFFA*, 2023 WL 4239254, *12 ("Eliminating racial discrimination means eliminating all of it."); *see also* Letter of Thirteen Attorneys General to Fortune 100 CEOs, July 13, 2023, at 2 (*infra* "Letter") (criticizing Microsoft's diversity quotas and diversity disclosures regarding black-owned approved suppliers, and contending that they constitute race discrimination).[2]

a. The Concept of Diversity is Often Used to Further Race Discrimination.

As this Court is aware, the U.S. Supreme Court recently rejected the idea that student body diversity is a sufficiently concrete goal to pass constitutional muster in the college admissions context. *SFFA*, 2023 WL 4239254, *16 ("It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue."); *id.* at *52 (Gorsuch, J., concurring) (noting that paid advisors recommend that Asian-American applicants to elite colleges hide or downplay their Asian descent as part of a holistic admissions process).

Even before the *SFFA* decisions, however, the idea of "diversity" was closely tied to the discriminatory use of race:

[2] https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. … We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (underline added)[3]; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.") (underline added).

Indeed, at times, institutions have attempted to paper over their aggressive racial discrimination by labeling it a diversity measure. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 733 (2009) (plurality Opinion of Roberts, C.J.) ("However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled 'racial diversity' or anything else.").

Even decades ago, courts recognized the tie between "diversity" and racial considerations, including differential treatment. *See Regents of Univ. of California*

[3] Notably, Justice Kennedy's dissent in *Grutter* observed that many academics conceded that a school's interest in "diversity" was merely pretextual, and a "rationale of convenience," for those who wanted to offer racial preferences as a means to correct historical wrongs. *See id.* at 393 (Kennedy, J., dissenting).

v. Bakke, 438 U.S. 265, 322 (1978) ("[T]his new definition of diversity has meant that race has been a factor in some admission decisions.") (Appx. of Powell, J.); *DeFunis v. Odegaard*, 416 U.S. 312, 334 (1974) (Douglas, J., dissenting) (asserting that "[t]he Indian who walks to the beat of Chief Seattle of the Muckleshoot Tribe in Washington" could represent his culture as part of a diverse student body).

Colorado citizens—particularly those who believe in colorblindness as a guiding principle of government and society—can be forgiven for instinctively rejecting the notion of "diversity," as carrying the heavy baggage of racial discrimination.

b. Diversity Currently Has Strong Political Undertones.

The trial court judge was certainly correct that one's opinion regarding diversity may be about politics, as opposed to race specifically. Even the Department of Education's Office for Civil Rights—which enforces Title VI the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, barring race discrimination by recipients of federal funds—has flip-flopped between presidential administrations when it comes to the use of race in the context of diversity in education.

For instance, in an *amicus* brief submitted to the U.S. Supreme Court in the *SFFA* cases, public officials from the Department of Education's Office for Civil Rights (OCR) noted how the differences between the Obama, Trump, and Biden Administrations—under then-existing jurisprudence on the topics of diversity and

equity—caused a disruptive effect on the use of race at K-12 and postsecondary institutions. *See* Brief of Amici Curiae Former Federal Officials of the U.S. Dep't of Educ.'s Off. for Civil Rights in Support of Petitioner, *Students for Fair Admission v. Harvard, et al.*, 2022 WL 2919010, *25 (May 6, 2022) ("In other words, what *Amici* determined to be a textbook example of race discrimination against teachers and students—a matter so egregious that it was highlighted in OCR's 2020 Annual Report to Congress—the Biden Administration instead found to be a potentially lawful approach to racial equity."). In other words, the existence of "regulatory whiplash" on the topic of diversity can explain one's skepticism regarding the concept, as a political matter, separate and apart from whether one harbors racial animus.

In a similar example, at the end of the Trump Administration, the OCR published guidance in the form of a webinar, which addressed the use of race by schools throughout the country. It noted that some schools were pursuing diversity interests illegally, in violation of Title VI:

> Unfortunately, OCR is aware of recent concerning reports that schools across the country are discriminating on the basis of race in different ways. Sometimes, these reports have involved schools' purported efforts to promote diversity and equity among students, but are nevertheless prohibited because they violate Title VI.

U.S. DEP'T OF EDUC., OFF. FOR CIVIL RIGHTS, OCR WEBINAR: RACIALLY EXCLUSIVE PRACTICES AND TITLE VI (JAN. 19, 2021) (underline added).[4] Among the examples listed in the Guidance Document were racially segregated classes, award ceremonies, graduations, and school orientations, among many others. *Id.* at 2; *accord* Sharon Song, KTVU Fox, *UC Berkeley's Black Grad, a space to celebrate 'achievements, resilience' draws backlash from some* (May 30, 2023) (defending U.C. Berkeley's segregated Black Graduation ceremony as consistent with the school's commitment to "diversity, equity, inclusion, and belonging.").[5] The document also rejected the idea that schools could engage in different pedagogical methods based on race, in the interest of diversity:

> Now let's discuss assignments and grading policies. Schools may not use race when administering their academic programs. For example, neither schools nor instructors may have students participate or complete assignments on the basis of their race, such as assigning different work to students, because of their race, or assigning certain grades to students on the basis of race. . . . Similarly, it is improper to give students of a particular race extra time or resources, such as the use of notes or textbooks, to complete an assignment. Schools also may not grade students differently or apply different grading criteria to students based on race.

Id. at 2.

[4] https://www2.ed.gov/about/offices/list/ocr/docs/ocr-tvi-webinar-reptvi.pdf

[5] https://www.ktvu.com/news/uc-berkeleys-black-grad-a-space-to-celebrate-perseverance-and-achievement-draws-backlash-from-some

Yet, despite OCR's conclusions with respect to federal civil rights law, the Biden Administration nevertheless swiftly withdrew the document, and its conclusions. *Id.* at 1 (withdrawn in part as contrary to Executive Order 13985 addressing "Advancing Racial Equity"). The fact that pursuing diversity or equity through outright racial segregation or direct discrimination might be appropriate and, indeed, legal under Title VI, would strike many as a strange conclusion for the Biden Administration to draw. However, the shift of political winds appeared to make it so. Colorado citizens can thus hardly be blamed for viewing these sorts of drastic changes as political or ideological ones, as opposed to ones tied to racial animus.

Most recently, in a public letter signed by thirteen Republican attorneys general, these officials wrote about the increase in diversity and equity programming in Fortune 100 companies. They wrote: "We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise." *See* Letter, *supra*, at 1. In response, the Co-Chairs of the Democratic Attorneys General Association issued a statement, stating: "We strongly condemn this anti-diversity, anti-business, and anti-economy letter by some Republican Attorneys General." *See* Democratic Attorneys General Association, *DAGA Co-Chairs Condemn Republican AG Letter That Threatens Businesses Over Diversity* (Jul 14, 2023) ("To be clear: it is legal for businesses to

be responsive to their workforce's wishes and concerns through diversity programs and initiatives.").[6]

Given that Republicans and Democrats have sparred, and will continue to spar, over the legality of certain diversity programs, it would hardly be inappropriate for some ordinary Coloradans to think that the concept of "diversity" has a political valence to it, and that one's view on the topic may correlate strongly to one's political beliefs.

c. Diversity is Commonly Tied to the Negative Connotations of "Equity."

The concept of diversity is often associated with the separate term "equity." *See, e.g.*, Colorado Legal and Judicial Education Committee Regulation 103.1(1)(a)(iii)(3) (grouping "Equity" and "Diversity" together for CLE purposes, along with the term "inclusion"). That term, like the term "diversity," also lacks a definite meaning. *See, e.g.,* Joseph Wulfsohn, Fox News, *Bill Maher praises Bernie Sanders' honest answer when stumped on equity-equality question: 'You're not alone'* (Mar. 11, 2023) ("Sanders, I-Vt., was asked by comedian Bill Maher on HBO's 'Real Time with Bill Maher' to differentiate between [equality and equity], but the self-avowed socialist said, 'I don't know what the answer to that is.'").[7]

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[6] https://dems.ag/daga-co-chairs-condemn-republican-ag-letter-that-threatens-businesses-over-diversity/

[7] https://www.foxnews.com/media/bill-maher-praises-bernie-sanders-honest-answer-stumped-equity-equality-question

And the word "equity"—however it is defined—can itself carry significant negative baggage.

For instance, undersigned counsel is currently litigating a Title VII case involving the Colorado Department of Corrections' official "Equity, Diversity, and Inclusion" (EDI) training. *See Young v. Colorado Dep't of Corrections, et al.*, No. 22-CV-00145, 2023 WL 1437894, at *6 (D. Colo., Feb. 1, 2023). In the case, the plaintiff, Josh Young, alleges that his employer invoked EDI when it "implemented mandatory trainings that made sweeping negative generalizations regarding individuals who are white, and other gross generalizations about members of other racial demographics." *Id.* at *1.[8]

Specifically, the complaint in *Young* noted that the government's official EDI training used the term "whiteness" as a noun, and described how all non-Caucasians perpetuate white supremacy. *Id.* at *1. In the same vein, the training attacked Caucasians who denied their part in promoting racism as merely "fragile" individuals, who could not handle being confronted with their racial biases. *Id.* And the training asserted that the very concept of race was invented by Caucasians in order to oppress non-Caucasians. *Id.* The training went further, stating that non-blacks think of blacks generally using the N-word. *See* McDonald & Trachman,

[8] Although the District Court dismissed the Complaint in the matter, that ruling is on appeal to the Tenth Circuit. *See Young v. Colorado Dep't of Corrections*, No. 23-1063 (Filed March 3, 2023).

National Review, *What Happens When Our Prisons Go 'Woke'?* (Feb. 6, 2022) ("[T]he concept of a middle class black only exists in the mind of a middle class black.").[9] Put simply, it would not be surprising to find numerous individuals—Caucasian or otherwise—rejecting these "EDI" principles as either offensive or unscientific.

The negative connotations related to the term "equity" do not stop there. In another document from OCR, the agency reported to Congress that schools were increasingly using terms like equity to engage in outright racial segregation, along with efforts to target Caucasian individuals:

> A teacher in a Chicago-area school district filed a complaint with OCR alleging that the district implemented a series of racial "equity" policies and programs that discriminated against staff, students, and job applicants; implemented certain policies and programs that discriminate against staff, students, and job applicants, including segregating staff and students into affinity groups based on race; used "Black Lives Matter" materials to advocate to students that white individuals bear collective guilt for racism, police brutality, and other social ills; and failed to discipline some students appropriately by allegedly taking race into consideration in its disciplinary decisions.

[9] https://www.nationalreview.com/2022/02/what-happens-when-our-prisons-go-woke/

See U.S. DEP'T OF EDUC., OFF. FOR CIVIL RIGHTS, ANNUAL REPORT TO THE SECRETARY, PRESIDENT, AND THE CONGRESS, at 46 (2021) (hereinafter "2021 OCR Annual Report").[10]

Thus, even if many individuals consider the term "diversity" in a positive light it is understandably dragged down by the associations it maintains with other terms, such as "equity." In that regard, it is fully consistent for a prospective juror to oppose diversity, and nevertheless fully reject any racial animus.

II. Impliedly announcing a *Per Se* Bar on Individuals Who Are Opposed to or Skeptical of Diversity Would Raise Serious Constitutional Questions.

The government may generally not discriminate based on an individual's expression of a message. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023) ("Generally, too, the government may not compel a person to speak its own preferred messages.").

In this context, *amicus* worries that the Court may announce an opinion implying that only prospective jurors who express support for diversity may be able to sit on juries, but prospective jurors who state their opposition to diversity will be permanently excluded from ever performing their civic duty. Such an outcome would raise grave constitutional questions under the First Amendment. *Id.* at 2320 ("Perhaps the dissent finds these possibilities untroubling because it trusts state

[10] https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf

governments to coerce only 'enlightened' speech. But if that is the calculation, it is a dangerous one indeed."); *Greenberg v. Haggerty*, No. 20-3822, 2020 WL 7227251, at *14 (E.D. Pa., Dec. 8, 2020) ("At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.").

Such an outcome would also be in serious tension with the Sixth Amendment. "The Sixth Amendment's promise of a jury of one's peer means a jury selected from a representative cross-section of the entire community." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020). Yet, removing jurors from a juror pool based on their beliefs regarding the concept of diversity would potentially result in a jury pool where any dissent from orthodoxy would be cause for a bar on serving on any jury. While polls vary, at least one poll indicates that a majority of potential jurors may be vulnerable to being struck from the jury pool. *See* Ryan King, New York Post, *Firm majority of Americans back SCOTUS on affirmative action decision: Poll* (Jul. 2, 2023) ("A firm majority of Americans back the Supreme Court's decision to gut affirmative action in college admissions, according to a new poll.").[11]

As one example, a local legal scholar has advanced the argument that diversity "is a mixed bag" in the education context. *See* Rob Natelson, *Supreme Court should*

[11] https://nypost.com/2023/07/02/firm-majority-of-americans-back-scotus-on-affirmative-action-decision-poll/

recognize 'diversity' programs are about leftist politics, not education (Mar. 14, 2022) ("Any honest and experienced educator can tell you that ethnic or cultural diversity is a mixed blessing for student learning.").[12]

To be sure, Mr. Natelson firmly rejects *de jure* discrimination. *Id.* (I'm not denying that diversity promotes education in some contexts (advanced literature courses, for example). Nor am I arguing for racial, ethnic, or cultural segregation."). Yet, he also questions whether diversity is invariably positive. *Id.* ("Consider the enviable records of women's colleges and historically black colleges."). However controversial these beliefs, it would be an odd result to announce that a legal scholar like Mr. Natelson—or anyone who shares similar beliefs—may never sit on a jury in Colorado.

Further, as a policy matter, barring jurors who express opposition to diversity would lead to gamesmanship. This Court can surely envision instances where attorneys who hope to have certain jurors struck ask strategic questions about diversity during the *voir dire* process. Eventually, systemic exclusion of prospective jurors based on this single criteria would undermine the public confidence in the fairness of our justice system.

III. Generally, Higher Courts Defer to a Trial Court Judge, who is in the Best Position to Recognize Racial Animus.

[12] https://i2i.org/supreme-court-should-recognize-diversity-programs-are-about-leftist-politics-not-education/

As noted above, Juror K's comments were a confusing mixture of thoughts about the Petitioner's race, the concept of diversity broadly, awkward support for diversity "on the top of a hill," and his personal decision about where to live, in order to avoid diversity, which he did not think "makes us stronger." Indeed, given the strange mix of thoughts, *amicus* certainly does not rule out the possibility that Juror K might have in fact harbored racial animus against the Petitioner.

Yet, as it evaluates the circumstances here, the Court should keep in mind its preference for giving trial court judges the appropriate space for making careful judgments about prospective jurors. When a juror demonstrates an initial bias, it is the trial judge's duty to recognize the discrepancy, and to potentially dismiss the juror from serving. *See People v. Clemens*, 401 P.3d 525, 528–29 (Colo. 2017) ("This standard gives deference to the trial court's assessment of the credibility of prospective juror's responses, recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of prospective jurors, and serves to discourage reviewing courts from second-guessing the trial court based on cold record."). As the trial judge is generally in the best position to evaluate prospective jurors, higher courts should presume the accuracy of the trial court's decisions. *See id.* at 529.

Here, given the confused set of beliefs expressed by Juror K, it was especially important to consider the trial court judge's interpretation of events. Notably, when

a prospective juror expresses a concerning statement, that does not automatically mandate removal from the jury pool. *See People v. Drake*, 748 P.2d 1237, 1243–44 (Colo. 1988) ("The test to be applied in determining whether a prospective juror should be dismissed for cause is whether the person would be able to set aside any bias or preconceived notion and render an impartial verdict based on the evidence adduced at trial and the instructions given by the court").

Further, *Clemens* confirms that "[a] juror who has indicated enmity or bias toward the defendant or the state will not be excused for cause if, after further examination, the court believes that the juror will follow the law and can be impartial." *Clemens*, 401 P.3d at 529 (holding that courts should rely on a trial judge's discretion when it denies a for-cause challenge).

Of course, there are situations where it is appropriate to reject a trial court's finding. But where a judge probes the reasoning for a prospective juror's initial concerning comments, and then allows that individual sit on the jury, courts are reluctant to second-guess such decisions. *See Marko v. People*, 432 P.3d 607, 613-14 (Colo. 2018) ("This is precisely the type of in-person assessment that appellate courts are loath to second-guess on the paper record."). To reverse a trial court's decision, this Court must find an abuse of discretion. *See People v. Gulyas*, 512 P.3d 1049, 1054–55 (Colo. App. 2022) ("Because Juror R expressed a bias in favor of the

child victim, and he was not rehabilitated, the trial court abused its discretion in denying the challenge for cause.").

Here, the trial judge understood the Petitioner's objection to Juror K. The trial judge then cogently explained that he did not dismiss prospective Juror K because opposition to diversity is properly understood as a political belief, and the juror confirmed that he would be impartial during the trial. *Clark*, 512 P.3d at 1077. Instead of relying on the trial court's opinion, the Colorado Court of Appeals held that Juror K harbored racial against the Petitioner. But that was an unusual conclusion, especially under these circumstances.

CONCLUSION

For the foregoing reasons, this Court should affirm the Petitioner's conviction, and draft any opinion with care to avoid implying that mere opposition to the concept of diversity constitutes racial animus.

Respectfully submitted this 18th day of July 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July 2023, I filed the foregoing **BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT THE PEOPLE OF THE STATE OF COLORADO** with the Clerk of the Court and that a copy of the foregoing was served upon all counsel of record via Colorado Court E-filing system (CCEF).

/s/ *William E. Trachman*
William E. Trachman