IN THE SUPREME COURT OF IOWA
No. 21–0900

MICHAEL SAVALA,

Appellant,

vs.

STATE OF IOWA,

Appellee,

Appeal from the Iowa District Court for Polk County
Jeanie K. Vaudt, District Judge

APPELLEE'S FINAL BRIEF

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ISSUE PRESENTED

I. Does a civil litigant have a constitutional right to challenge a jury pool for failing to include a fair cross-section of the community based merely on an underrepresentation of part of the community in the pool?

Turner v. Rogers, 564 U.S. 431 (2011)
Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)
State v. Sewell, 960 N.W.2d 640 (Iowa 2021)
U.S. Const. amend. V
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U.S. Const. amend. VII

ROUTING STATEMENT

The State agrees with Savala that the Supreme Court should keep this case. Whether a civil litigant in Iowa has a constitutional right to challenge a jury pool for failing to include a fair cross-section of his community just because of the lack of a particular part of the community in his pool is an issue of first impression. *See* Iowa R. App. P. 6.1101(2)(c). And if a party to a civil suit can halt a trial to demand inquiry into systematic jury practices based on such alleged underrepresentation, that is an urgent issue of broad public importance to district courts and litigants across the state that the Supreme Court should decide. *See* Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

Michael Savala sued his employer, the State of Iowa, for employment discrimination. He claimed that he had received late performance evaluations and related pay raises because of his race, color, national origin, and age.

On the first day of his week-long jury trial, he objected to the composition of the jury pool because it included no Latino jurors. App. 63. He alleged that this absence violated his "constitutional right to a fair cross-section of his community." *Id.* And he asked the district court to provide historical jury data—so that he could analyze it for systematic underrepresentation—and to permit him to call the jury clerk to testify. App. 63–64.

The district court overruled Savala's objection. App. 65. It agreed with the State that Iowa law doesn't recognize his claimed constitutional right for civil trials. App. 64–65. And the court thus reasoned that it didn't need to provide anything to Savala at that time. App. 65.

The parties then selected a jury and tried Savala's case. After deliberating, the jury returned a verdict for the State. App. 24–25. Savala later filed this appeal. App. 29.

STATEMENT OF THE FACTS

Michael Savala works for the Iowa Department of Corrections. Tr. vol. III at 122:24–25. As the Department's general counsel, he reports directly to the Department's director. Tr. vol. II at 68:17–20. For two and a half years, then-Director Jerry Bartruff "dropped the ball" and failed to complete performance evaluations for Savala. *Id.* at 82:15, 166:16–18. Director Bartruff also failed to complete most of the performance evaluations for his other direct reports during this time. Tr. vol. III at 84:16–85:3; Tr. vol. IV at 142:6–10. But because of the oversight, Savala was ineligible for—and didn't receive—merit pay increases during that period. Tr. vol. II at 82:15–19; Tr. vol. III at 170:14–19.

Savala eventually filed a civil rights complaint alleging that the director discriminated against him because of his race, color, national origin, and age. Tr. vol. III at 183:8–9. Savala is Hispanic and was 56 years old at trial. *Id.* at 85:7–9, 122:20. When Director Bartruff learned Savala believed he was being discriminated against, Director Bartruff was horrified. Tr. vol. IV at 140:12–14. He apologized and set out to make things right. *Id.* at 140:23–141:14.

Director Bartruff completed the performances evaluations. Tr. vol. III at 185:16–186:14. He gave Savala all the missed pay raises, setting Savala's salary at the maximum of his pay range. Tr.

vol. IV at 141:1–14; App. 60. And he tried to pay Savala the $29,000 backpay lost from the delayed raises, paying the $12,000 that he legally could from current fiscal year funds and providing a claim form that Savala needed sign to receive the remainder. *See* Tr. vol. III at 88:9–14; App. 60; Ex. S. But Savala refused to sign and submit the form. Tr. vol. III at 91:20–22. So it was never paid.

Savala eventually sued the State. App. 6. While he first included other claims and parties, the only claims submitted to the jury were intentional age, race, color, and national-origin discrimination based on Director Bartruff's failure to complete his performance evaluations. *See* App. 24–27. And for this alleged harm, he asked the jury for $2.8 million in damages. Tr. vol. V at 30:7–9.

On the first day of trial, before beginning jury selection, Savala objected to "the jury pool composition based on an underrepresentation of Latinos in the jury population." App. 63. The pool of 24 potential jurors had one juror who identified as a mixed race. *Id.* The other jurors were white. *Id.*

Savala asserted that census data showed that Latinos made up 7.58% of Polk County in 2010 or 8.7% in 2019. *Id.* And he thus reasoned "we would expect to see two Latino jurors if we had a truly reflective pool." *Id.*

Savala argued that he "has a constitutional right to a fair cross-section of his community." *Id.* And besides objecting to the

pool, he requested that the court provide 24 months of historical jury pool information "so that we can do the analysis of systemic underrepresentation." *Id.* He also requested "to take testimony from the jury clerk on how we got this jury pool." App. 64.

The State urged the district court to reject Savala's objection and requests, arguing that his "constitutional challenge is not recognized by Iowa law." *Id.* The State reasoned that the Iowa cases permitting a fair-cross-section challenge—*State v. Plain*, 898 N.W.2d 801 (Iowa 2017), and *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019)—are criminal cases resting on the Sixth Amendment and article I, section 10 of the Iowa Constitution. And that right hasn't "been extended to civil trials." App. 64.

The district court agreed with the State and overruled Savala's objection. App. 65. The court explained, "I tend to agree with the State on this. I don't think there is anything that I need to provide the plaintiff at this point related to this trial." *Id.*

The case proceeded to a week-long jury trial. And in the end, the jury returned a verdict for the State. App. 24–25. This appeal followed.

ARGUMENT

I. A civil litigant has no constitutional right to challenge a jury pool for failing to include a fair cross-section of the community based merely on an underrepresentation of part of the community in the pool.

In the district court, Savala objected to the jury pool because it contained no Latinos. App. 63. He argued that this violates his "constitutional right to a fair cross-section of his community." *Id.* While proper to preserve some challenge, he relied on no specific constitutional provision or other authority granting him that right.

Now on appeal, he points to the United States Constitution's Fifth Amendment and Seventh Amendment as the source of his right. But neither amendment applies to regulate jury procedures in state court proceedings. So any claim based on them collapses.

Savala also relies on Iowa criminal cases recognizing a fair-cross-section right. But these all interpret either the Sixth Amendment or article I, section 10, of the Iowa Constitution. And those provisions apply only to criminal cases—not civil cases like this one.

Thus, Savala still cites no applicable constitutional provision or precedent that could grant him the right he seeks to enforce. And this Court should not extend its heightened fair-cross-section jurisprudence from the criminal to civil context with no constitutional basis to do so. Therefore, conducting de novo review—as Savala correctly urges—the district court's ruling should be affirmed.

A. No right to an impartial jury under the Fifth Amendment or the Seventh Amendment could apply to state court proceedings.

After failing to cite any constitutional provision to the district court, App. 63, Savala now depends on the Fifth and Seventh amendments to the United States Constitution. *See* Appellant's Br. at 18–19; *see also id.* at 4 (listing no constitutional provisions). But these provisions provide him no help in a challenge to the composition of a jury pool in a state civil proceeding.

The Seventh Amendment provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. But "the Seventh Amendment applies only to federal court proceedings and not to state court proceedings." *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 853 (Iowa 2001) (citing *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916)); *see also Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) ("The States, so far as [the Seventh] amendment is concerned, are left to regulate trials in their own courts in their own way."); *Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 432 & n.14 (1996). Savala thus cannot assert a Seventh Amendment right here.

The Fifth Amendment likewise applies directly only to the federal government. *See Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833) ("[T]he fifth amendment must be understood as restraining the power of the federal government, not as appliable to the states."). Though some parts have been incorporated to the States through the Due Process Clause of the Fourteenth Amendment, others have not. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding that the Fifth Amendment's double jeopardy prohibition "should apply to the States through the Fourteen Amendment"); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) ("[T]he Court has never held that federal concepts of a 'grand jury,' binding on the federal courts under the Fifth Amendment, are obligatory for the States."). And the due-process guarantee against the States rests in the Fourteenth Amendment—not the Fifth Amendment. *See* U.S. Const. amend. XIV § 1 ("[N]or shall *any state* deprive any person of life, liberty, or property, without due process of law . . . ." (emphasis added)).

In any event, courts have not recognized an underrepresentation claim, like Savala asserts here, under the Due Process Clause of either the Fifth Amendment or the Fourteenth Amendment. None of the federal or other States' cases cited by Savala do so. They stand for the unremarkable proposition that civil parties have a right to impartial jurors. *See, e.g.*, *Skaggs v. Otis Elevator Co.*, 164

F.3d 511, 514–16 (10th Cir. 1998) (considering challenge to juror for actual bias after trial); *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981) (same); *Kiernan Van Schaik*, 347 F.2d 775, 778–83 (3d Cir. 1965) (reversing after improper limitation on voir dire).[1] And that civil parties cannot discriminate in the exercise of their peremptory challenges any more than those in criminal cases. *See City of Miami v. Cornett*, 463 So.2d 399, 402–03 (Fla. Ct. App. 1985); *Williams v. Coppola*, 549 A.2d 1092, 1095–1101 (Conn. Super. Ct. 1986); *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 592–94 (Cal. Ct. App. 1983).

Such an intentional discrimination claim is typically recognized as proper under the Equal Protection Clause—rather than the Due Process Clause—of the Fourteenth Amendment. *See* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing it with Equal Protection*, 64 Hastings L.J. 141 (2012). Indeed, some cases Savala quotes from most extensively actually discuss only the Equal Protection

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[1] Savala also twice quotes from *Casias v. United States*, 315 F.2d 614 (10th Cir. 1963). *See* Appellant's Br. at 20. That *criminal* case had no majority opinion, rejecting a jury challenge by an equally divided court. *See Casias*, 315 F.3d at 621 (per curiam). One concurring opinion did equate the Sixth and Fifth Amendment's rights to an impartial jury. *See id.* at 614 (Breitenstein, J., concurring). But Savala's first quoted language suggesting some holding about civil cases appears nowhere in any of the opinions. *See Casias*, 315 F.3d at 614–21.

Clause's intentional discrimination standard. *See* Appellant's Br. 18; *Smith v. Texas*, 311 U.S. 128, 129 (1946) (considering claim under Equal Protection Clause that Texans were "intentionally and systematically excluded from grand jury service solely on account of their race and color"); *Carter v. Jury Comm'n*, 396 U.S. 320, 330 & n.16 (1970) (agreeing that prospective jurors could challenge "invidious" and "systemic jury discrimination" on account of race by jury commission, relying in part on *Smith*, while rejecting wholesale challenge to neutral statutes).

To be sure, the Eighth Circuit has recognized that the Fifth Amendment's Due Process Clause and the Sixth Amendment both prohibit "systematic and *intentional* exclusion of any substantial portion of the community." *United States v. Olson*, 473 F.3d 686, 688 (8th Cir. 1973) (cleaned up). But it rejected both constitutional claims against a federal statute excluding 18 to 20-year-olds from jury service. *See id.* at 689. And it provides no support for a statistical underrepresentation claim.

Neither does *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946), assist Savala's cause. True, the United States Supreme Court held that a federal district court should have struck the jury panel in a civil case when the clerk of court and jury commissioner admitted to "deliberately and intentionally" excluding daily wage earners from the jury lists. *Thiel*, 328 U.S. 221. But that case wasn't

decided under the Fifth or Seventh amendments relied on by Savala here. Nor was it decided under some other constitutional provision applicable to the States. Instead, it relied on the Court's "power of supervision over the administration of justice in the federal courts." *Id.* at 225. And even if it recognizes some tradition of an impartial civil jury that could carry over to one the inapplicable constitutional provisions cited by Savala, the intentional and deliberate exclusion found to contradict justice there is a far cry from the statistical underrepresentation alleged by Savala.

In fact, "the Supreme Court has never used the Constitution to condemn civil jury selection practices that result in deviation from the fair cross-section standard." William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 Va. L. Rev. 887, 922 (1981); Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. Rev. 411, 439 & n.136 (2008). And to the extent that some think there could be a limited federal constitutional civil cross-section requirement, it would arise from the Seventh Amendment—which doesn't apply to this state proceeding. *See* Luneburg & Nordenberg, 67 Va. L. Rev. at 922–23.

The Seventh and Fifth amendments don't support Savala's constitutional challenge to the jury pool in this civil proceeding in state court.

B. The Sixth Amendment and article I, section 10 of the Iowa Constitution don't apply to civil trials.

Savala also cites as support for his constitutional claim, this Court's decisions in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), *State v. Lilly,* 930 N.W.2d 293 (Iowa 2019), and *State v. Veal*, 930 N.W.2d 319 (Iowa 2019). *See* Appellant's Br. at 21–24. And indeed, the Court held in *Plain* that a criminal defendant had a right to access the same sort of jury pool information Savala seeks here. *See Plain*, 898 N.W.2d at 828. But none of these cases relied on the Fifth or Seventh amendments that Savala now bases his claims on here. *Plain* and *Veal* applied the Sixth Amendment. *See Plain*, 898 N.W.2d at 821 & n.6; *Veal*, 930 N.W.2d at 328 & n.5. While *Lilly* applied article I, section 10, of the Iowa Constitution. *See Lilly*, 930 N.W.2d at 307.

Both of those constitutional provisions are limited by their text to criminal cases. The Sixth Amendment provides in relevant part, "*In all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ..." U.S.

Const. amend. VI (emphasis added). The Iowa Constitution similarly provides, "*In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused* shall have a right to a speedy and public trial by an impartial jury; . . . ." Iowa Const. art. I, § 10 (emphasis added).

Therefore, the Sixth Amendment and article I, section 10 of the Iowa Constitution don't apply to civil cases, like this employment discrimination suit. *See Turner v. Rogers*, 564 U.S. 431, 441 (2011) ("[T]he Sixth Amendment does not govern civil cases."); *State v. Sewell*, 960 N.W.2d 640, 646–650 (Iowa 2021) (discussing longstanding precedent that article I, section 10 only "protects the rights of an 'accused'"). And *Plain*, *Lilly*, *Veal*—and the federal Sixth Amendment cases on which they rely—thus don't provide a basis for Savala's constitutional challenge to his civil jury.

C. This Court should not extend its fair-cross-section jurisprudence from criminal cases to recognize an underrepresentation claim in civil cases.

This Court should not accept Savala's implicit invitation to extend *Plain* and its progeny from its Sixth Amendment roots to civil jury trials. Savala offers no constitutional provision with any possible connection to state civil jury trials on which to engraft this doctrine. And even *Plain*'s textual and historical roots run shallow.

See Lilly, 930 N.W.2d at 314–15 (McDonald, J., dissenting). But creating such a constitutional right out of whole cloth—untethered to any actual constitutional provision—would be extraordinary.

Assuming the Court *could* find some constitutional home unclaimed by Savala for a civil *Plain* challenge, it *shouldn't* do so. The heightened liberty interests involved in a criminal prosecution do not exist in a civil jury trial for damages. There's no community interest in providing "a hedge against the overzealous or mistaken prosecutor." *Plain*, 898 N.W.2d at 821 (cleaned up). Nor are the same policy interests in reducing the disparate rate of convictions of minority defendants that undergirded *Plain* present in civil trials. *See id.* at 825–26 ("Empirical evidence overwhelming shows that having just one person of color on an otherwise all-white jury can reduce disparate rates of convictions between black and white defendants."). And recognizing such challenges for civil cases would complicate and slow down those cases even further and add to the burdens on judicial administration by multiplying the sources of subpoenas and depositions looking into jury practices. *See Lilly*, 930 N.W.2d at 316–17 (McDonald, J., dissenting); *State v. Lilly*, 969 N.W.2d 794, 802 (Iowa 2022) (McDonald, J., concurring).

Perhaps that is why Savala has pointed to no State that has adopted a *Plain*-like underrepresentation challenge for civil jury trials. The cases he cites instead recognize challenges to purposeful

discrimination in the exercise of peremptory challenges. *See* Appellant's Br. at 20; *City of Miami*, 463 So.2d at 402–03; *Williams*, 549 A.2d at 1095–1101; *Holley*, 143 Cal. App. 3d at 592–94. And other States that have considered similar underrepresentation claims have rejected them. *See Garcia v. Tex. Employers' Ins. Ass'n*, 662 S.W.2d 626, 630–31 (Tx. Ct. App. 1981); *Lewis v. Pearson*, 556 S.W.2d 661, 662 (Ark. 1977). Indeed, one of the cases Savala cites even includes dicta rejecting an underrepresentation claim, explaining "there is no constitutional right that the petit jury will result in any particular composition." *Williams*, 549 A.2d at 1096.

Ensuring that *Plain* extends no further than the reach of the Sixth Amendment, doesn't leave civil litigants with unfair trials. Of course, they still have a right to an impartial trial. Parties and all citizens are protected from *intentional* discrimination that excludes jurors under the Equal Protection Clause. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (extending *Batson v. Kentucky*, 476 U.S. 79 (1986), to civil cases because racially discriminatory use of peremptory challenges violates the Equal Protection Clause). Iowa's statutes also vigorously protect against discrimination in the jury process. *See* Iowa Code §§ 607A.4, 607A.21, 607A.22, 607A.30, 607A.33. And if a party has basis to conclude the statutory requirements for drawing or returning the jury have been

violated, the party can properly challenge the pool on that basis too. *See* Iowa R. Civ. P. 1.915(4); Iowa Code ch. 607A.

But Savala made none of these challenges. And there's nothing in the record to suggest that they should have been made. The fair-cross-section challenge that he *did* make to this jury pool has no basis. The district court did not err in overruling it.

CONCLUSION

The district court properly rejected Savala's constitutional challenge to the jury pool. Even now on appeal, he has alleged no proper constitutional violation applicable to a civil proceeding in state court that justifies remand for further factual development. The district court's judgment should be affirmed.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

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/s/ *Samuel P. Langholz*
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 3,432 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Samuel P. Langholz*
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CERTIFICATE OF FILING AND SERVICE

On April 5, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Samuel P. Langholz*
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