No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICIO LARA-BONILLA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

For claims that a party had a discriminatory intent in using a peremptory strike against a prospective juror under *Batson v. Kentucky*, 476 U.S. 79 (1986), is that party's challenge for cause to a minority juror among the relevant circumstances a trial court should consider?

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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mauricio Lara-Bonilla respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is reproduced in the Appendix to this petition.

JURISDICTION

The court of appeals affirmed Mr. Lara-Bonilla's conviction on July 12, 2019. *See* Appendix. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Due Process Clause[1] provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

I. The prosecutor exercised a peremptory strike against Prospective Juror J.F.

Mr. Lara-Bonilla was charged with illegal reentry, in violation of 8 U.S.C. § 1326, and illegal entry, in violation of 8 U.S.C. § 1325. He proceeded to trial.

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[1] *Batson* is rooted in the Constitution's guarantee of equal protection of the laws. For a federal defendant like Mr. Lara-Bonilla, that guarantee stems from the "equal protection component of the Fifth Amendment's Due Process Clause." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616 (1991).

The trial court presiding over Mr. Lara-Bonilla's trial follows a prescribed jury-selection process. Each prospective juror fills out a short questionnaire. That questionnaire asks for the prospective juror's name; residence; occupation; marital status; occupation of their spouse; number of children (if any); occupation of their adult children; if they have friends or relatives in law enforcement; if they have prior experience with the criminal-justice system; if they have served on a jury before and whether a verdict was reached; and if they can be fair and impartial. Each prospective juror then reads aloud their answers, and the trial court questions the prospective jurors to determine if anyone should be struck for cause.

At Mr. Lara-Bonilla's trial, the trial court questioned thirty-five potential jurors. The penultimate member of the venire to be questioned was J.F, a Latino man. Based on the trial court's questionnaire, J.F. provided the following information about himself:

> I'm [J.F.], I reside in San Diego. I'm an engineer at a defense contractor here in San Diego, Networks in Motion Incorporated. Unmarried but I have a partner of 10 years who became a U.S. citizen about a year ago. No children. No friends or relatives in law enforcement. Have not sat on a jury. No family or close friends that have been in the criminal justice system and, yes, I can be impartial.

Given J.F.'s response about his partner's naturalization, the trial court followed up with additional questions:

> THE COURT: So your partner went through the legal immigration system?
>
> PROSPECTIVE JUROR [J.F.]: Yeah.

> THE COURT: And became a naturalized citizen of the United States. Any strong feelings about immigration law, enforcement of immigration laws?
>
> PROSPECTIVE JUROR [J.F.]: No, just the law is what it is.
>
> THE COURT: Okay.
>
> PROSPECTIVE JUROR [J.F.]: Yep.
>
> THE COURT: Thank you, [J.F.] . . . .

After the trial court questioned the one remaining member of the jury pool, the parties simultaneously exercised their peremptory challenges. The prosecutor struck J.F.

II. The trial court denied Mr. Lara-Bonilla's *Batson* challenge.

In response to the prosecutor's striking of J.F., defense counsel raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986): "Your Honor, with regards to juror number two I believe the government used a peremptory challenge. I would under *Batson*, he's the only Latino male on the panel that we are aware of."

The trial court responded by going through the potential jurors with Spanish-sounding surnames. Other than J.F., the jury pool consisted of two Latinos: V.D., who was dismissed for cause after expressing her discomfort in adjudicating an immigration case, and T.J., whom neither party struck.

Upon conducting this review, the trial court agreed that J.F. "may be the only Hispanic man on the panel." Nevertheless, it denied the *Batson* challenge. The

ensuing petit jury consisted of no Latinos. The trial then took place, and the jury convicted Mr. Lara-Bonilla of both counts.

III. The Ninth Circuit granted the parties' joint motion for a remand to conduct a new *Batson* hearing.

After Mr. Lara-Bonilla subsequently appealed to the Ninth Circuit, the government agreed to move for a remand. The Ninth Circuit, in turn, granted the parties' joint motion and "remand[ed] for the limited purpose of conducting a *Batson* proceeding anew."

IV. At the new hearing, the trial court denied Mr. Lara-Bonilla's *Batson* challenge again.

On remand, the trial court conducted a new *Batson* hearing. It lodged as exhibits the prosecutor's contemporaneous notes from jury selection and the clerk's record of dismissals for cause and peremptory strikes. Those records showed that the prosecutor used her six peremptory strikes against J.F., A.M., E.R., D.R., S.S., and R.P. Of those, only J.F. was Latino. Besides J.F., the jury pool consisted of two other Latinos: T.J., whom the prosecutor did not strike but who ultimately did not serve on the petit jury, and V.D., whom both parties agreed to dismiss for cause.

As the hearing proceeded, defense counsel pointed to the for-cause challenge against V.D. as a relevant circumstance showing discriminatory intent. Although J.F. was the only Latino person the prosecutor used a peremptory challenge against, defense counsel noted that the prosecutor agreed to excuse V.D. for cause. In response, the trial court said "that's a nonstarter." It continued: "[i]f there's

reason to excuse someone for cause, why would I take into consideration, you know, their race, and say, well, you know, it was bad faith on the government to agree with the Court's suggestion that the person's answers constituted cause for removal, which both sides agreed with." The trial court, then, set aside the for-cause challenge to V.D. and only considered other circumstances. Ultimately, it denied Mr. Lara-Bonilla's *Batson* challenge for a second time.

V. The Ninth Circuit affirmed the trial court's decision.

Mr. Lara-Bonilla then appealed his conviction to the Ninth Circuit again. He argued, in part, that the trial court committed legal error under *Batson* by refusing to consider the prosecutor's challenge for cause to V.D. as a relevant circumstance. After holding oral argument, the Ninth Circuit rejected Mr. Lara-Bonilla's argument and affirmed his conviction. *See United States v. Lara-Bonilla*, 773 F. App'x 406, 407 (9th Cir. July 12, 2019) (unpublished).

REASONS FOR GRANTING THE PETITION

Batson made clear that "[i]n deciding whether the defendant has made the requisite showing [of discriminatory intent], the trial court should consider all relevant circumstances." 476 U.S. at 96. The courts of appeals, however, are divided over what constitutes "all relevant circumstances." Specifically, is a party's challenge to a juror for cause a "relevant circumstance?" Four courts of appeals say yes. The Ninth Circuit, however, says no. Only this Court can resolve the conflict.

Moreover, granting review is particularly warranted: the Ninth Circuit's rule—for-cause challenges are not a "relevant circumstance" under *Batson*—is irreconcilable with this Court's precedent; resolving the question presented is vital to the fair administration of the justice system; and this case presents an ideal vehicle to resolve the question presented.

I. The circuits have split over whether a party's challenge to a juror for cause is a relevant circumstance the trial court should consider.

Batson set out a three-step process to adjudicate claims that a party struck a juror based on purposeful discrimination. Under step one, the trial court must determine whether the defendant established a prima facie case of discrimination. *Batson*, 476 U.S. at 94-97. Next, the trial court must determine whether the prosecutor articulated a race-neutral reason for the strike. *Id.* at 97-98. Third, the trial court must determine whether the prosecutor exercised a peremptory strike with a discriminatory intent. *Id.* at 97.

At *Batson*'s third step, "the trial court should consider all relevant circumstances." *Id.* at 96. Since *Batson* was handed down thirty-three years ago, this Court has repeatedly reiterated its relevant-circumstances rule. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (in "evaluating whether racial discrimination occurred," trial court considers "other relevant circumstances that bear upon the issue of racial discrimination."); *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (applying relevant-circumstances rule to reject State's argument that

Court should not consider jury-selection notes); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[I]n 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."); *Edmonson*, 500 U.S. at 631 (adopting *Batson*'s relevant-circumstances rule in the civil context).

Despite the clarity of the relevant-circumstances rule, lower courts have struggled in defining its contours. This confusion especially arises when it comes to a party's use of a for-cause challenge to a minority juror. Does such a for-cause challenge constitute a relevant circumstance bearing on discriminatory intent? Or (as the trial court believed) is a for-cause challenge an irrelevant circumstance since it has an independent, race-neutral motivation?

Four circuits have held that a for-cause challenge falls within the relevant-circumstances rule and is something the trial court should consider. For example, in *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1256-57 (11th Cir. 2009), the Eleventh Circuit addressed a *Batson* challenge in a capital case where "the prosecution had removed all of the African-American jurors from the venire panel[.]" "Combining its strikes for cause and peremptory, the prosecution had struck twenty-four African-American jurors, leaving an all-white jury in a county which was fifty-five percent African-American." *Id.* at 1267. The court considered this "strong" evidence of "intentional discrimination." *Id.*

Similarly, in *Moran v. Clarke*, 443 F.3d 646, 651 (8th Cir. 2006), the Eighth Circuit noted that "Moran directed all of his challenges—both for cause and peremptory—at the four black members of the venire." The court found this to be a relevant circumstance, as "the attempt to strike all black members of the venire and no one else raises an inference of a discriminatory purpose." *Id.*

Moran, in turn, drew on case law from the Second Circuit. Specifically, in *Green v. Travis*, 414 F.3d 288, 299 (2d Cir. 2005), the Second Circuit, applying the relevant-circumstances rule, held that the prosecution's use of all of its for-cause and peremptory challenges to strike African-American and Latino jurors established a prima facie case of discrimination.

Consistent with the foregoing, the Sixth Circuit has likewise placed for-cause challenges within the ambit of the relevant-circumstances rule. When evaluating discriminatory intent, trial courts in that jurisdiction are directed to consider "the race of those who were struck or excused from the jury panel throughout the voir dire (whether for cause or by a peremptory challenge)." *United States v. Jackson*, 983 F.2d 1069, 1993 WL 8152, at *2 (6th Cir. 1993) (per curiam).

In contrast, the Ninth Circuit has an outlier view on the relationship between for-cause challenges and the relevant-circumstances rule. The court rejected Mr. Lara-Bonilla's *Batson* challenge and affirmed his conviction, even though the trial court refused to consider the prosecutor's acquiescence in the for-cause

dismissal of V.D. *See Lara-Bonilla*, 773 F. App'x at 407. In the Ninth Circuit, then, for-cause challenges are deemed to be an irrelevant circumstance under *Batson*.

As a result, the circuits are intractably split on the question presented. This split, however, is not sustainable: either a for-cause challenges is a relevant circumstance under *Batson*, or it is an irrelevant circumstance. Both cannot be true. Only this Court can intervene to provide an answer and bring uniformity to the lower courts.

II. The decision below conflicts with this Court's precedent and was wrongly decided.

Granting review is particularly warranted because the Ninth Circuit's outlier rule cannot withstand scrutiny. The rule is not only inconsistent with what other circuits have done; it is inconsistent with this Court's *Batson* jurisprudence.

Starting with *Batson* itself, the Court specifically enumerated "a 'pattern' of strikes against black jurors included in the particular venire" as an example of discriminatory intent. 476 U.S. at 96-97. Looking to peremptory challenges along with for-cause dismissals is certainly one way to show just such a pattern. *See McGahee*, 560 F.3d at 1265; *Moran*, 443 F.3d at 651-52.

The Ninth Circuit's rule to the contrary is at tension with this Court's expansive view of the relevant-circumstances test. In *Foster*, for example, the state asked the Court "to blind" itself to the existence of jury-selection notes due to uncertainties about the exact author. 136 S. Ct. at 1748. Given the relevant-

circumstances rule, though, this Court "c[ould] not accept the State's invitation[.]" *Id.* Rather, "[a]ny uncertainties concerning the documents [we]re pertinent only as potential limits on the[] [notes'] probative value." *Id. Foster*, then, exhibits this Court's reluctance to sideline evidence as irrelevant for *Batson* purposes.

Meanwhile, the Ninth Circuit had no qualms affirming the trial court's decision to treat the for-cause challenge to V.D. as irrelevant. The court's holding cannot be squared with this Court's precedent and must be reversed.

III. Resolving the question presented is vital to the fair administration of the criminal and civil justice systems.

Properly adjudicating a *Batson* challenge is especially important given the stakes. If a trial court improperly grants a *Batson* challenge, the prosecutor or defense attorney will have been unfairly tarred as a purveyor of racial discrimination—conduct that violates not only the Constitution, but ethical rules too. *See* ABA RULES OF PROF. CONDUCT, Rule 8.4(g) (prohibiting a lawyer from engaging "in conduct the lawyer knows" is "discrimination on the basis of race."). For a prosecutor, it could also trigger an investigation by the Department of Justice's Office of Professional Responsibility. On the other hand, if a court improperly denies a *Batson* challenge, the Constitution's foundational guarantee of equal protection of the laws becomes an empty promise—both for the defendant and for the juror wrongfully struck. *See Batson*, 476 U.S. at 85-87. This will "undermine public confidence in the fairness of our system of justice." *Id.* at 87.

The Ninth Circuit's rule—for-cause challenges are not a relevant circumstance—makes it more likely that it will incorrectly adjudicate a *Batson* challenge. The rule, in turn, undermines the fair administration of the criminal-justice system. And given the extension of *Batson* to the civil context, the rule further threatens the civil-justice system. *See Edmonson*, 500 U.S. at 617-18. It is therefore especially important that the Court grant review in this case and make clear that for-cause challenges constitute a relevant circumstance under *Batson*.

IV. This case is a good vehicle for the Court to resolve the question presented.

By granting review here, this Court can resolve the question presented. Mr. Lara-Bonilla's case squarely raises the question presented, and it is properly preserved. At the second *Batson* hearing, defense counsel brought up that the prosecutor acquiesced in the trial court's excusal of V.D. Specifically, counsel maintained that "it's relevant to the analysis that the government didn't object to her excusing."

The trial court immediately disagreed, noting that the defense likewise did not object to V.D.'s dismissal. The trial court went on to characterize this fact as "a nonstarter." In its view, "[i]f there's reason to excuse someone for cause, why would I take into consideration, you know, their race, and say, well, you know, it was bad faith on the government to agree with the Court's suggestion that this person's answers constituted cause for removal, which both sides agreed with." Ultimately,

the trial court concluded that the prosecutor's actions toward V.D. "ha[ve] nothing to do with race" and completely omitted that fact from its analysis. The trial court—through its own words—thus preserved the issue.

The Ninth Circuit, in turn, passed on the issue when it rejected Mr. Lara-Bonilla's *Batson* challenge and affirmed his conviction. Among his claims of error, Mr. Lara-Bonilla specifically appealed the trial court's refusal to consider the for-cause dismissal of V.D. The Ninth Circuit, however, rejected this argument. *See Lara-Bonilla*, 773 F. App'x at 407.

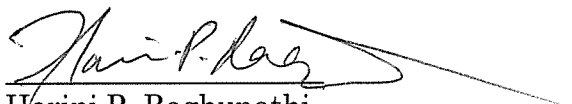
In short, both the trial court and appellate court passed on the question presented here. Mr. Lara-Bonilla's case is therefore a good vehicle.

CONCLUSION

The petition for a writ of certiorari should be granted.

October 10, 2019

Respectfully submitted,



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