No. _____

In the
Supreme Court of the United States

RAFAEL RAMIRO-MEDINA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

Zandra L. Lopez
Federal Defenders of San Diego, Inc.
225 Broadway Street, #900
San Diego, California 92101
619.234.8467
Zandra_Lopez@fd.org

Counsel for Petitioner

QUESTION PRESENTED

If a trial court legally errs in applying the final step of the process under *Batson v. Kentucky*, 476 U.S. 79 (1986), can a federal court of appeals conduct appellate fact-finding and resolve for itself the factual question of whether an attorney had a discriminatory intent in striking a prospective juror?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

INTRODUCTION

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court articulated a three-step process to resolve whether a prosecutor had a discriminatory intent in striking a prospective juror. The third step of the *Batson* inquiry—resolving the prosecutor's intent—is "a pure issue of fact[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (internal quotation marks) (internal quotation marks). If a trial court legally errs in applying *Batson*'s third step, an appellate court must decide the appropriate course: should it conduct the fact-finding itself to resolve the *Batson* challenge or should it remand to the trial court for that court to conduct fact-finding?

In answering that question, the circuits have split. The Court of Appeals for the Ninth Circuit—and only that court—has claimed the discretionary authority to conduct appellate fact-finding and "decide *de novo*" the pure issue of fact of "whether the government's strikes were motivated by purposeful discrimination," if the trial court legally errs in applying *Batson*'s third step. *See United States v. Alvarez-Ulloa*, 784 F.3d 558, 565–66 (9th Cir. 2015). The Ninth Circuit has repeatedly invoked this novel discretionary authority in resolving *Batson* challenges, including in Petitioner's case. *See* Petitioner's Appendix (Pet. App.) at 3-4. By contrast, the six other federal courts of appeal that have faced this situation—the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits—do not conduct appellate fact-finding. Instead, if the trial court errs, these appellate courts remand the case for the trial court to conduct in the first instance the necessary factual finding under the proper substantive standard. This Court should thus grant this petition to resolve this entrenched split.

The Court should also grant review because the Ninth Circuit's fact-finding rule is flatly contrary to this Court's precedent. This Court has "frequently" reminded the lower federal appellate courts that they "are not to decide factual questions *de novo*." *Maine v. Taylor*, 477 U.S. 131, 145 (1986). Thus, if the trial court "'fail[s] to make a [required] finding,'" "'remand'" to the trial court for it to

resolve the fact dispute "'is required[.]'" *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268 (2015) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982)). This Court's prohibition against appellate fact-finding is particularly appropriate in *Batson* cases. The *Batson* inquiry requires a fact-finder to determine the prosecutor's intent in exercising a peremptory strike. The "best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor," *see Thaler v. Haynes*, 559 U.S. 43, 49 (2010), evidence of which will rarely be part of the appellate record. Thus, an appellate court is especially poorly suited to accurately find facts in the *Batson* context. Indeed, this is almost certainly why no other circuit has followed the Ninth Circuit down its appellate fact-finding path.

Moreover, allowing an appellate court to conduct fact-finding in the *Batson* context undercuts the fair administration of the criminal-justice system. The Ninth Circuit's rule makes it more likely that it will inaccurately adjudicate *Batson* claims. As the Sixth Circuit put it: the "factual question[]" of a prosecutor's intent "hinge[s] on [a] ring-side credibility determination[] that no appellate court can fairly make on the basis of a non-sentient record." *United States v. Kimbrel*, 532 F.3d 461, 468 (6th Cir. 2008). And an inaccurate *Batson* determination results in a grievous injury to the criminal-justice system: either a defendant and a prospective juror are denied the equal protection of the law or a prosecutor is unfairly deemed a purveyor of invidious discrimination. It is therefore particularly important that this Court overrule the lower court's appellate fact-finding rule.

Finally, this case presents an ideal vehicle to resolve the question presented. After holding that the district court failed to properly apply *Batson*'s third step, the Ninth Circuit resolved Petitioner's claim by finding "*de novo*" based on the cold record that the prosecutor did not have a discriminatory intent. Pet. App. A at 4. This case therefore squarely raises the question presented.

OPINION BELOW

The memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is attached to this petition as an appendix (hereinafter "Pet. Appx.").

JURISDICTION

The court of appeals entered judgment on August 26, 2021. Pet. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statement of The Case

Petitioner was charged with four counts of transportation of undocumented people, in violation of 8 U.S.C. § 1324. He pled not guilty and proceeded to trial.

During the jury selection process for Petitioner's trial, the trial judge first began by asking the prospective jurors a series of questions regarding their response to the nature of the case and the constitutional rights that were afforded Petitioner. In response to whether there was anything that jurors had seen or experienced with border patrol that would not allow them to be impartial, one juror indicated that he could not be impartial due, in part, to the news stories of separating families at the border. Juror Caudillo, a Hispanic woman, also expressed concern about separating children from their parents at the border. She indicated that based on the court's instructions, however, she did believe that she could be fair and impartial. Specifically, Juror Caudillo responded affirmatively that she would be fair and impartial in deciding "whether or not the government can meet their burden of proof in the charges that they have brought against [Petitioner]" and would not let the separate debate as to the "wisdom of this administration's policies on immigration" affect her impartiality. During the attorney conducted voir dire, there were no specific questions directed at Juror Caudillo, nor did Juror

Caudillo at any point indicate that she would have difficulty considering the evidence presented at trial.

The prosecutor sought to strike Juror Caudillo for cause based on her statement of her knowledge about family separations at the border. The district court noted that it was "satisfied that [Juror Caudillo] is prepared to compartmentalize and set aside these experiences or this knowledge that she referenced," and declined to remove her for cause. The government then used its peremptory strikes on two Hispanic women on the jury, one of whom was Juror Caudillo.

The defense raised a *Baston* challenge as to the two Hispanic women struck by the prosecution. When asked if the government had a response on whether there was a prima facie case, the government responded "No, Your Honor, not on the facts." The trial court denied the *Batson* challenge finding the defense had not made a prima facie case of discrimination at the first step of the *Batson* analysis. After the trial began, the district court revisited the *Batson* issue. The trial court recognized that the record was incomplete and stated it had not previously "offer[ed] the government an opportunity to make a record with respect to its reasoning" for striking the jurors. The court stated it would "require[] the government to offer an explanation as to what it did and why it did it." The prosecution did not provide any explanation as to Juror Caudillo during the supplemental review. It did not state that the reason for the peremptory was the same as the for-cause challenge or whether there were additional reasons for the strike. The government only spoke as to the second Hispanic juror that it struck. As to the second juror, the district court conducted a comparative analysis and ultimately accepted the explanation as race neutral and found it supported the exercise of a peremptory challenge. The court did not conduct any further inquiry as to the basis for striking Juror Caudillo. The trial court simply concluded there were "good-faith reasons" to strike the juror for cause.

The matter proceeded to trial and the jury convicted Petitioner of all charged counts. Petitioner was sentenced to nine months on each count to run concurrent for a total of nine months and two years of supervised release.

On appeal, Petitioner argued that the district court erred by not completing the three-step *Batson* process with respect to Juror Caudillo. Under step one, Petitioner needed to make out a "prima facie" showing that the prosecutor had a discriminatory purpose in striking the juror. *See Johnson v. California*, 545 U.S. 162, 168 (2005). Under step two, the prosecutor needed to state a race neutral reason for the strike. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Petitioner argued that the trial court erred under these first two steps when it speculated that the reason for the peremptory strike of Juror Caudillo was the same reason given by the prosecution for the pre-*Batson* for cause challenge. Petitioner argued that because no actual explanation was provided by the prosecution for the peremptory, the trial court did not properly conduct the first two steps of the *Batson* analysis.

Petitioner went on to argue that at step three, the trial court was required to determine whether the prosecutor's stated reasons were the actual reasons for exercising the peremptory strike or whether they were "pretexts" to hide "purposeful discrimination." *Purkett*, 514 U.S. at 768. But the district court never determined whether the prosecutor's reasons were genuine or pretextual. Instead, the court simply found there was "good-faith reasons to seek her being excused for cause" without reviewing the totality of the circumstances in determining whether the peremptory strike was done with discriminatory intent. *Miller-El*, 537 U.S. at 339.

The court of appeals affirmed. The panel found that although the prosecution did not state the reason for the peremptory strike of Juror Caudillo, it "implicitly adopted" it's prior for cause challenge. Pet. App. at 3. The court of appeals then found that the trial court "arguably misapplied step three of the *Batson* analysis by not expressly determining whether purposeful discrimination

occurred." Pet. App. at 3-4. It found that "'[i]t is not enough that the district court considered the government's [race]-neutral explanation 'plausible.' Instead, it is necessary that the district court make a deliberate decision whether purposeful discrimination occurred.'" *Id.* (citing *United States v. Alanis*, 335 F.3d 965, 969 (9th Cir. 2003)). The panel, however, held that it would "review *de novo* the third step of the *Batson* analysis without remanding for a factual hearing." Pet. App. at 4 (citing *Alvarez-Ulloa,* 784 F.3d at 565). The panel concluded:

> We conclude that [Petitioner] has not established that purposeful racial discrimination occurred. The government had legitimate concerns about whether Juror Caudillo could be impartial, given the nature of the charges against Petitioner. There is no evidence that the government failed to strike non-Hispanic jurors who shared similar concerns. And the seated jury included at least two Hispanic jurors.

Id.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Court ought to grant this petition to resolve the circuit split over the proper appellate course when a trial court legally errs in applying *Batson*'s third step. If a trial court has misapplied *Batson*, six circuits remand the case back to the trial court for it to properly apply the substantive law (as clarified on appeal) and to then make the factual finding of whether the prosecutor exercised a peremptory strike based on purposeful discrimination. By contrast, the Ninth Circuit, and only the Ninth Circuit, has claimed the discretionary authority to conduct appellate fact-finding and to determine in the first instance the factual question of the prosecutor's intent based on its review of the written transcript. Only this Court can resolve this conflict.

Moreover, granting review is particularly warranted: the Ninth Circuit's appellate fact-finding rule is irreconcilable with this Court's precedent; resolving the question presented is vital to the fair administration of the criminal-justice system; and this case presents an ideal vehicle to resolve the question presented.

I. The circuits have split over whether appellate fact-finding is appropriate in a *Batson* case.

As noted above, *Batson* set out a three-step process to adjudicate claims that an attorney struck a juror based on purposeful discrimination. Under step one, a court must determine whether the defendant established a prima facie case of discrimination. *Batson*, 476 U.S. at 94–97. Next, a court must determine whether the prosecutor articulated a race-neutral reason for the strike. *Id.* at 97–98. Third, a court must determine based on the totality of the circumstances whether the prosecutor exercised a peremptory strike with a discriminatory intent, *id.* at 98, a determination that is "'a pure issue of fact,'" *Miller-El*, 537 U.S. at 339 (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991); *accord Batson*, 476 U.S. at 98 n.21. In cases in which a trial court has misapplied the third step of this framework, the appellate court must decide the appropriate course: should it conduct the fact-finding itself to resolve the *Batson* challenge or should it remand the case for the trial court to do so? In answering that question, the circuits have split.

A. Six courts of appeals do not conduct appellate fact-finding when the trial court legally errs in applying *Batson*'s third step.

When a trial court legally errs in applying *Batson*'s third step in some way, six courts of appeal remand, leaving it to the trial court to apply the correct substantive standard (as clarified on appeal) and to make the step-three finding of whether the prosecutor had a discriminatory intent. These courts do not conduct appellate fact-finding.

For example, in *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991), the Fourth Circuit held that the trial court had erred by denying a *Batson* challenge merely because "members of the defendants' racial group were seated on the jury." The defendants asked the Fourth Circuit to "conduct a review of the reasons offered by the government and determine in the first instance whether it exercised its strikes in a discriminatory manner." *Id.* at 103. The Fourth Circuit said no: "We are not well positioned to conduct this important analysis with only a cold record and without

the benefit of findings and supporting reasons of the tier of fact." *Id.* at 104. The court further noted that the relevant individuals were not "present before this court to permit us to judge their credibility or to adequately follow-up with our inquiry to further explore the validity of the various arguments the parties may advance." *Id.* Thus, the court remanded the case to the trial court to conduct the proper *Batson* analysis. *Id.*; *see also Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) (holding that the trial court misapplied Batson and remanding the case for fact-finding, noting that the court had "observed with its own eyes the very acts in dispute") remanding the case for fact-finding, noting that the court had "observed with its own eyes the very acts in dispute").

Similarly, in *United States v. Kimbrel*, 532 F.3d 461, 467—68 (6th Cir. 2008), the Sixth Circuit determined that the trial court misapplied *Batson*. The trial court had sustained a prosecutor's *Batson* objection because the court believed that defense counsel had failed to prove that the strike was not based on race, even though the burden fell on the moving party (here, the prosecutor) to prove that the strike was based on race. *Id.* The government, however, contended that, even if the court erred, the appellate court could "determine for itself whether the government satisfied its ultimate burden of persuasion." *Id.* at 468. The Sixth Circuit refused: "*Batson*'s third step, which asks whether a peremptory strike is motivated by purposeful discrimination and whether proffered neutral justifications are mere pretext, presents factual questions that hinge on ring-side credibility determinations that no appellate court can fairly make on the basis of a non-sentient record." *Id.* Thus, the court remanded to the trial court for it to make the required findings. *Id.*; *see also United States v. McAllister*, 693 F.3d 572, 582 (6th Cir. 2012) (holding that the trial court misapplied *Batson* and remanding for the court to make the necessary findings under the proper standard); *United States v. Torres-Ramos*, 536 F.3d 542, 559—61 (6th Cir. 2008) (same); *United States v. Harris*, 192 F.3d 580, 588 (6th Cir. 1999) (same) (same).

The Second Circuit also does not conduct appellate fact-finding in the *Batson* context. For example, in *United States v. Thomas*, 303 F.3d 138, 146 (2d Cir. 2002), the Second Circuit held that the trial court had erred by not evaluating the prosecutor's credibility in articulating a race-neutral reason for a strike at step three of the process. The court, however, did not then conduct appellate fact-finding to resolve the *Batson* issue itself. Instead, the court held that "'the appropriate course'" was either to grant a new trial or (more "'usually'") to remand to the trial court for it to make a finding "'on the issue of discriminatory intent[.]'" *Id.* (quoting *Barnes v. Anderson*, 202 F.3d 150, 155 (2d Cir. 1999)). Consistent with its "usual[]" practice, the court then remanded the case for the trial court to resolve the question of the prosecutor's intent. *Id.*; *see also United States v. Bontzolakes*, 536 F. App'x 41, 44 (2d Cir. 2013) (holding that the trial court misapplied *Batson* and remanding for the court to make the necessary step-three findings under the proper standard); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (same) (same).

This is consistent with what the Seventh Circuit does. In *United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011), the Seventh Circuit held that the trial court erroneously denied the defendant's *Batson* challenge because the prosecutor's proffered reason was race neutral without determining whether that reason was the actual reason for the strike or whether it was pretext. Faced with this "evidentiary gap," the court did not conduct appellate fact-finding and fill the gap itself. Rather, the court held that a "remand [was] necessary" for the trial court to resolve whether the "asserted reason [was] believable or pretextual." *Id.*; *see also United States v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009) (holding that the trial court misapplied *Batson* and remanding for the court to make the necessary findings under the proper standard); *United States v. Taylor*, 509 F.3d 839, 844–46 (7th Cir. 2007) (same and noting that "it is the district court's job, not ours, to weigh the credibility of the government's reason for the peremptory challenge and decide whether the defendants met their burden of

establishing discrimination") the government's reason for the peremptory challenge and decide whether the defendants met their burden of establishing discrimination").

The Fifth Circuit too does not conduct appellate fact-finding in *Batson* cases. In *United States v. Romero-Reyna*, 867 F.2d 834, 837 (5th Cir. 1989), the Fifth Circuit determined that the trial court had misapplied *Batson* by failing to sufficiently evaluate the prosecutor's proffered reasons for striking minority jurors. The Fifth Circuit, however, did not evaluate the prosecutor's reasons itself. Instead, the court remanded the case for the "district court" to "make the required *Batson* findings[.]" *Id.* at 838.

Finally, in *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989), the Eleventh Circuit held that the trial court had misapplied *Batson* by (among other things) requiring the defendant to prove that the prosecutor had relied on "systematic discriminatory use of peremptory challenges." The Eleventh Circuit did not then conduct appellate fact-finding. Rather, the court remanded the case for the district court to apply the proper substantive standard and to make factual findings under that proper standard. *Id.*

B. The Court of Appeals for the Ninth Circuit, and only that court, permits appellate fact-finding when the trial court legally errs in applying *Batson*'s third step.

The only court of appeals that has claimed the authority to "decide *de novo* whether the government's strikes were motivated by purposeful discrimination" if the trial court improperly applied the "*Batson* framework" is the Ninth Circuit. *See Alvarez-Ulloa*, 784 F.3d at 565–66.

The court first seized this purported authority in *Alanis* in 2003. In that case, the defendant raised a gender-based *Batson* claim before his sexual-abuse-of-a-minor trial when "the prosecutor used all six of her peremptory challenges to strike men from the jury." 335 F.3d at 966. The prosecutor offered up a "gender-neutral explanation for striking each man," including that several had no

children. *Id.* at 967. In response, the trial court merely confirmed that the prosecutor had "offered a plausible explanation" for her strikes and denied the *Batson* challenge on that basis. *Id.*

The Ninth Circuit reversed. The court first determined that the trial court had erred by just determining that the prosecutor had offered a plausible reason for the strikes. *Id.* at 968—69. The inquiry was not whether the prosecutor's reasons were plausible, but whether they were mere pretext to cover up "purposeful discrimination[.]" *Id.* at 969. At this point, the court—without citing any authority—held it could conduct appellate fact-finding in the first instance because it could determine on the "cold record" that the prosecutor had acted with a discriminatory intent. *Id.* at 969 n.5. And that was because three women who remained on the jury also did not have children. *Id.* at 969. The Ninth Circuit took this to mean that the prosecutor must have not been credible when she claimed her reason for striking some male jurors was because they did not have children. *Id.* Thus, without ever seeing or hearing the prosecutor explain her reasons behind the strikes or giving her the chance to respond to the court's comparative-juror analysis, the court determined that she must have been relying on a gender-based criterion to strike jurors.

The Ninth Circuit has shown no indication that it plans to retreat from its novel rule. Since *Alanis*, the Ninth Circuit has repeatedly exercised its self-created discretion to conduct appellate fact-finding to resolve *Batson* cases. The court reviews the record *de novo*, weighs competing pieces of evidence, and makes a factual finding concerning whether the prosecutor struck a juror based on purposeful discrimination. *See United States v. Palacios-Herrera*, 812 F. App'x 467, 468 (9th Cir. 2020) (finding no discriminatory intent); *United States v. Potenciano*, 728 F. App'x 620, 623 (9th Cir. 2018) (same); *United States v. Rodarte*, 734 F. App'x 465, 466 (9th Cir. 2018) (same); *United States v. Mikhel*, 889 F.3d 1003, 1031 (9th Cir. 2018) (same); *United States v. Calderon-Jimenez*, 637 F. App'x 295, 297 (9th Cir. 2016) (same); *United States v. Hitsman*, 624 F. App'x 462, 466 (9th Cir. 2015) (same); *SmithKline*

Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 479 (9th Cir. 2014) (same); *Alvarez-Ulloa*, 784 F.3d at 565–67 (same). The panel below also exercised that authority. After determining that the district court erred, the panel applied "*de novo*" review, evaluated the record evidence, and found that the prosecutor did not have a discriminatory intent. Pet. App. at 4.

* * *

In short, the circuits are intractably split on the question presented. And this split will not resolve itself. This Court's intervention is therefore necessary is provide a uniform rule among the circuits.

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 that permits appellate fact-finding cannot withstand scrutiny. The rule is not only inconsistent with what other circuits have done, it is inconsistent with this Court's precedent on appellate fact-finding and with this Court's *Batson* line of cases.

"'Factfinding,'" this Court has stated, "'is the basic responsibility of district courts, rather than appellate courts[.]'" *Pullman-Standard*, 456 U.S. at 291–92 (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n. (1974)). This flows from the fact that trial courts have "institutional advantages" over appellate courts when it comes to fact-finding. *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991). "The trial judge's major role is the determination of facts, and with experience in fulfilling that role comes expertise." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("*Anderson I*"). This advantage is at its apex when a factual determination turns on a witness's credibility. The trial court has "the unique opportunity . . . to evaluate the credibility of witnesses" because it sees and hears the witnesses testify. *Inwood Laboratories, Inc. v. Ives Laboratories*, 456 U.S. 844, 855 (1982). The trial court "can be aware of variations in demeanor and tone of voice that bear so heavily on the listener's

understanding of and belief in what is said." *Anderson I*, 470 U.S. at 575. These are "matters that cannot be gleaned from a written transcript." *Johnson v. Finn*, 665 F.3d 1063, 1073 (9th Cir. 2011).

Trial courts' fact-finding advantage means that when a trial court fails to make a finding relevant to an appeal, or when it makes a finding applying the wrong legal standard, the appellate court "'should not . . . resolve[] in the first instance'" the factual dispute. *Pullman-Standard*, 456 U.S. at 291–92 (quoting *DeMarco*, 415 U.S. at 450 n.). Indeed, this Court has "frequently" reminded the lower appellate courts that they "are not to decide factual questions *de novo*." *Taylor*, 477 U.S. at 145. "'[A]ppellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.'" *Anderson I*, 470 U.S. at 573 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)). Thus, rather than have the appellate court conduct fact-finding in these circumstances, this Court has held that "'remand" to the trial court for it to conduct fact-finding is "'*required*.'" *Alabama Legislative Black Caucus*, 135 S. Ct. at 1268 (emphasis added); *accord Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). The exception to this rule is when the "record permits only one resolution of the factual issue"; in that case, no appellate fact-finding occurs because the appellate court can decide the uncontested factual issue as a matter of law, *see Pullman-Standard*, 456 U.S. at 292, similar to what happens in the summary-judgment context, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247—50 (1986). "All of this," this Court has observed, "is elementary." *Pullman-Standard*, 456 U.S. at 292.

These "elementary" requirements have particular salience in *Batson* cases. The ultimate *Batson* inquiry—whether the prosecutor had a discriminatory intent in striking a prospective juror—is "'a pure issue of fact.[]'" *Miller-El*, 537 U.S. at 339 (quoting *Hernandez*, 500 U.S. at 365); *accord Batson*, 476 U.S. at 98 n.21. In resolving that fact question, a court must determine whether a prosecutor's stated reasons for the peremptory strike were the actual reasons or whether they were "pretexts" to hide

"purposeful discrimination." *Purkett*, 514 U.S. at 768. The inquiry, then, focuses on the prosecutor's credibility in articulating the reason for the strike:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.

Miller-El, 537 U.S. at 339 (quoting *Hernandez*, 500 U.S. at 365). Thus, an appellate court is not fairly situated to accurately resolve the *Batson* inquiry itself when a trial court legally errs in resolving *Batson*'s third step in some way. In these circumstances, a remand to the trial court is needed and required.

There is no way to reconcile this mountain of authority, and the "elementary" principles upon which they are based, *see Pullman-Standard*, 456 U.S. at 292, with the Ninth Circuit's claim that it can conduct appellate fact-finding in the *Batson* context. Indeed, in *Alanis*, the case in which the Ninth Circuit first exercised this extraordinary authority, the court did not cite *any* case from *any* court to support its view of the appropriateness of appellate fact-finding. *See* 225 F.3d at 969. Since *Alanis*, the court has never attempted to reconcile this authority this Court's precedent or otherwise attempted to justify it. And when Petitioner pointed out to the court in her petition for rehearing en banc that its fact-finding rule was inconsistent with this Court's precedent, the court denied the petition without comment. *See* Pet. App. 7a.

In short, the Ninth Circuit's appellate fact-finding rule is inconsistent with this Court's precedent. No justification for the court's rule has ever been articulated, and none is apparent. That is likely why no other court of appeals has followed the Ninth Circuit's lead. The Court should therefore grant review or summarily reverse and "confirm[] that the Court of Appeals for the Ninth Circuit erred, misapplying settled rules that limit its role and authority." *See Rice v. Collins*, 546 U.S. 333, 335

(2006) (reversing the Ninth Circuit on a Batson issue in a unanimous opinion) (reversing the Ninth Circuit on a *Batson* issue in a unanimous opinion).

III. Resolving the question presented is vital to the fair administration of the criminal-justice system.

Properly adjudicating a *Batson* challenge is especially important given the stakes. If a 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 that 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 appellate fact-finding rule makes it more likely that it will inaccurately adjudicate a *Batson* challenge. That follows from the reality that an appellate court has no way to meaningfully assess a prosecutor's demeanor and thus no way to meaningfully evaluate his or her credibility. *See Kimbrel*, 532 F.3d at 468. The Ninth Circuit's rule, then, undermines the fair administration of the criminal-justice system. It is therefore especially important that the Court grant review in this case and make clear that appellate fact-finding has no place in *Batson* cases.

IV. This case presents an ideal vehicle to resolve the question presented.

By granting review in this case, this Court can resolve the question presented. This case squarely raises the question presented, and it is properly preserved. The court of appeals below first

held that the district court had misapplied step three of the *Batson* analysis by not expressly determining whether purposeful discrimination occurred. Pet. App. at 3. But the court nevertheless refused to remand the case to the district court, as Petitioner requested. Instead, the court held that it would "review" the question of discriminatory intent "*de novo*." Pet. App. at 4. It then addressed the record evidence itself and found that the prosecutor did not have a discriminatory intent. Pet App. at 4.

But the record in this case was slim. During a supplemental review of the *Batson* issue, the trial court recognized, itself, that there was an insufficient record as to why the jurors were being struck by means of peremptory strikes. The trial court, thus, provided the prosecution with an "opportunity to make a record with respect to its reasoning" as to each of the Hispanic jurors. The trial court stated it was "call[ing] upon the government to provide some form of a response in order to make sure we have an ample, fulsome record." But the explanation regarding Juror Caudillo never followed.

Despite the insufficient record, the court of appeals found the prosecutor did not have a discriminatory intent. Pet App. at 3-4. The appellate court thus should have remanded the case for the district court to evaluate all the facts in the record in the first instant. Because the panel failed to remand, this Court should step in and order a remand.

CONCLUSION

This Court should grant this petition for a writ of certiorari or summarily reverse.

Respectfully submitted,

Dated: November 16, 2021

s/ Zandra Lopez

ZANDRA L. LOPEZ
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5097
Telephone: (619) 234-8467
Attorneys for Petitioner